A

PRACTICAL TREATISE

OF THE

LAW OF EVIDENCE,

AND

DIGEST OF PROOFS

IN

CIVIL AND CRIMINAL PROCEEDINGS.

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THE SEVENTH AMERICAN, FROM THE THIRD LONDON EDITION,

WITH

REFERENCES TO AMERICAN DECISIONS, AND TO
THE ENGLISH COMMON LAW AND ECCLESIASTICAL REPORTS,

BY

BENJAMIN GERHARD:

TOGETHER WITH THE NOTES TO FORMER EDITIONS OF

THERON METCALF.

VOL. II.—PART I.

PHILADELPHIA:
T. & J. W. JOHNSON, LAW BOOKSELLERS,
SUCCESSORS TO NICKLIN AND JOHNSON,
NO. 5 MINOR STREET.

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1842.

T. K. & P. G. Collins, Printers.

LAW OF EVIDENCE.

VOL. II.

PROOFS ON PARTICULAR ISSUES.

ABATEMENT.

THE proof of the affirmative of the issue on a plea in abatement is, from the very nature of the plea, usually incumbent on the defendant (*a*). This natural order is subject to inversion, either it seems in respect of the form of the issue, according to which the plaintiff takes the burthen of proof upon himself; as where the replication to a plea in abatement for non-joinder in assumpsit, alleges that the defendant undertook *solely* to pay (*b*); or, which more frequently happens, in consideration of the plaintiff having to prove the amount of his damages. In strictness the question as to damages does not arise until the issues have been disposed of, and it might seem to be more convenient to try the issues first, for if the defendant succeed, the inquiry as to damages is unnecessary. The course of practice is otherwise, and so far as any precise rule can be collected it seems to be this, that if the amount of damages be in dispute, the plaintiff is entitled to begin, although the proof of the issue joined may be incumbent on the defendant (*c*); but that if the damages be merely nominal, or can be ascer-

(*a*) See tit. ORDER OF PROOF, *supra*, Vol. I. In *Fowler* v. *Costar*, M. & M. 241, in an action on a bill of exchange, and the non-joinder of a joint contractor pleaded; Lord Tenterden permitted the defendant to begin, observing that where it appeared by the record or statement of counsel, that there was no dispute about the sum to be recovered, the damages being either nominal or mere matter of computation, then if the affirmative was on the defendant, he ought to begin.

(*b*) See *Young* v. *Bairner*, 1 Esp. C. 103.

(*c*) Indebitatus assumpsit for goods sold, plea non-joinder of others as defendants, Lord Denman held that the plaintiff was entitled to begin, but that the defendant might do so if he would admit the amount claimed; *Morris* v. *Lotan*, 1 M. & R. 233. In *Laeon* v. *Higgins*,[1] 3 Starkie's C. 178, the defendant having pleaded her coverture to an action for goods sold, her counsel were permitted by Abbot, L. C. J. to begin, on condition of admitting the amount. In *Roby* v. *Howard*,[2] 2 Starkie's C. 555, non-joinder having been pleaded to a declaration for laying out the plaintiff's money on an insufficient security, the same learned Judge was of opinion that the plaintiff's counsel ought to begin, since it was incumbent on the plaintiff to prove his damages. See also *Stansfield* v. *Levy*,[3] 3 Starkie's C. 8; *Fowler* v. *Costar*, M. & M. 241. In some instances, the question as to beginning appears to have been regarded as one for the discretion of the court, *Burrell* v. *Nicholson*, 1 M. & R. 304. Bayley, J. at the York Summer Assizes 1821, directed that the defendant should begin, and that the question of damages should, if necessary, be tried afterwards. See *Young* v. *Bairner*, 1 Esp. C. 103; *Jackson* v. *Hesketh*,[4] 2 Starkie's C. 518. In the case of *Hutchinson* v. *Fernie*, 3 M. & W. 305, the court intimated that a clear case of erroneous direction in this respect, would be a ground of new trial. In the case of *Stansfield* v. *Levy* above cited, Abbott, L. C. J. held that where the plaintiff is allowed to begin, he may confine himself to proof of damages, and reserve his case in reply to the plea. The plaintiff may, on motion, compel the defendant to give him a particular of the places of residence of the alleged co-partners. *Taylor* v. *Harris*,[5] 4 B. & A. 93. The plaintiff will fail, if it appear that any other than those named in the plea jointly promised. *Godson* v. *Good*,[6] 6 Taunt. 587.

[1]Eng. Com. Law Reps. xiv. 176.[d] [2]*Id.* iii. 472. [3]*Id.* xiv. 146. [4]*Id.* iii. 456. [5]*Id.* vi. 357. [6]*Id.* i. 492.

tained *by mere computation, or are admitted by the defendant on whom the proof of the issue lies, he is entitled to begin (*d*).

Plea of nonjoinder.

A plea in abatement, that the defendant made the promise jointly with another, is supported by evidence that the defendant made the promise jointly with an infant; for the plaintiff ought to plead and prove that the infant has avoided his promise (*e*) (A). Upon a plea that *A.* and *B.*, assignees of *C.*, a bankrupt, ought to have been joined, it is not sufficient for the defendant to prove that they have acted as assignees; he must prove that they were so, either by the production of the assignment, or by proving an admission by the plaintiff to that effect (*f*). A bill delivered by the plaintiff for business done for the insured, the defendant being one, in which he debits the defendant with three-sevenths only of the whole amount, is *primâ facie* evidence (the defendant having pleaded in abatement) that the action was brought to recover his share only (*g*).

If the plaintiff contract with the defendant *alone*, without knowing that he has other partners, proof by the defendant, upon a plea in abatement for non-joinder, that he had secret partners, would not be a sufficient defence in support of the plea (*h*) (B).

(*d*) *Lacon* v. *Higgins*,[1] 3 Starkie's C. 178.

(*e*) But a contract by an infant, for goods sold to trade with, is absolutely *void*. *Thornton* v. *Illingworth*,[2] 2 B. & C. 826. *Gibbs* v. *Merrill*, 3 Taunt. 307. Where one churchwarden sued another for money paid for the affairs of the church, it was held, on a plea in abatement, that it was unnecessary to join the vestrymen who had signed a resolution for the repairs, without any intention of becoming responsible, the two churchwardens having jointly given the orders. *Lanchester* v. *Tricker*,[3] 1 Bing, 201. And where one of two chapelwardens alone orders goods, it is sufficient to sue him alone; for the plaintiff knows no one but the person who gives him the order. *Shaw* v. *Hislop*,[4] 4 D. & R. 241. See also *Eaton* v. *Bell*,[5] 5 B. & A. 34. *Horseley* v. *Bell*, 1 Brown's C. C. 101. Amb. 770. *Sprott* v. *Powell*,[6] 3 Bing. 478. *Brooke* v. *Guest*, 3 Bing. 481. As to the non-joinder of defendants in actions against carriers, see tit. CARRIERS; and *Bretherton* v. *Wood*,[7] 3 B. & B. 54. *Ansell* v. *Waterhouse*,[8] 2 Chitty, 1.

(*f*) *Pasmore* v. *Bousfield*,[9] 1 Starkie's C. 296. *Robinson* v. *Henshaw*, 4 M. & S. 475.

(*g*) 1 Starkie's C. 296.[10]

(*h*) *Doo* v. *Chippenden*, cor. Ld. Kenyon, Ch. J. at Westmr. sittings after Hil. T. 1790, upon a plea in abatement cited in Mr. Abbott's treatise, 92. *Baldney* v. *Ritchie*, 1 Starkie's C.[11] 338. See tit. PARTNERSHIP, *infra*. If a party contract with two, he may sue them only: if after the contract is made he discovers that they had a secret partner who had an interest in the contract, he is at liberty to sue the latter jointly with them, but he is not bound to do so.[12] *De Mautort* v. *Saunders*, 1 B. & A. 398, overruling *Dubois* v. *Ludert*, 5 Taunt. 609. And see *Mullett* v. *Hook*,[13] 1 M. & M. C. 88. And see tit. PARTNERSHIP. On a plea in abatement in an action for work and labour, of the non-joinder of eighteen others, members of a joint company, Abbott, L. C. J. held that declarations by one of the eighteen, before action brought, that he was a shareholder, was evidence of the fact for the defendant, *Clay* v. *Langslow*,[14] 1 M. & M. 45; *tamen quære*.

(A) (Infancy of a plaintiff must be pleaded in abatement. *Schermerhorn* v. *Jenkins*, 7 John. 373; Scott. e. p. 1 Cow. 33, note (*h*).) [See *Burgess* v. *Merrill*, 4 Taunt. 468. *Hartness & al.* v. *Thompson & al.* 5 Johns. 160. *Woodward* v. *Newhall & al.* 1 Pick. 500.]

(B) (Where one of the partners, resident abroad is sued here, he is not allowed to plead in abatement, that his co-partner is not sued with him. *Guion* v. *M'Culloch*, et al. N. Carol. Cases, 78. Where there is an ostensible partnership, a member of the firm who purchased and actually supplied articles for the use of the partnership, may, if sued alone for the price of the goods, plead in abatement that the contract, if made at all, was made with him jointly with the other partners. It is not material whether or not, the plaintiff had knowledge of the partnership at the time of the contract; but if the partner making it, intended it as a partnership transaction, and it came within the scope of his authority as a partner, the contract was with the partnership. *Alexander* v. *M'Ginn*, 3 Watts, 220. Where parties are joined as defendants in assumpsit, who did not join in the promise, advantage may be taken of it under the general issue. *Tom* v. *Goodrich*, 2 John. R. 213. And where the action is general *indebitatus assumpsit*, unless the plaintiff before plea pleaded furnishes the defendant with a bill of particulars, the defendant may avail himself of the *non-joinder* of a co-contractor under the general issue. Per Washington, J., Peters, J. contra *Jordan* v. *Wilkins*, 3 Wash. C. C. R. 110. In an action for a tort, the non-joinder of persons interested with the plaintiff must be pleaded in abatement, and cannot be taken advantage of under the general issue otherwise than in mitigation of damages. *Wheelwright* v. *Depeyster*, 1 John. R. 471; *Brotherton* v. *Hodges*, 6 John. 108; *Bradish* v. *Schenck*, 8 John. R. 151; *Gilbert* v. *Dickinson*, 7 Wend. 449. But in general the non-joinder of a party as a co-plaintiff in any suit growing out of a contract, can be shown under the general issue. *Dob* v. *Halsey*, 16 John. R. 34. See also *Wilson* v. *Wallace*, 8 Serg. & R. 53; *Thompson* v. *Hoskins*, 11 Mass. R. 419; *Hart* v. *Fitzgerald*, 2 Id. 511. *The Portland Bank* v. *Stubbs*, 6 Id. 422.)

[1]Eng. Com. Law Reps. xiv. 176. [2]*Id.* ix. 256. [3]*Id.* viii. 295. [4]*Id.* xvi. 148. [5]*Id.* vii. 13. [6]*Id.* xiii. 61. [7]*Id.* vii. 345. [8]*Id.* xviii. 227. [9]*Id.* ii. 397. [10]*Id.* ii. 416. [11]*Id.* xx. 410. [12]*Id.* xxii. 259. [13]*Id.* xxii. 244. [14]*Id.* viii. 112.

Any acts by the defendant, tending to show that he treated the contract as several, not joint, are evidence for the plaintiff. Where the defendant had written letters to the plaintiff, promising to pay the money in question, and without making mention of any partners, Lord Ellenborough, upon issue to bar on a plea of non-joinder, held that the evidence was conclusive as to separate liability (*i*). One signing an instrument in his own name for others may frequently be sued alone, although the others may also be liable (*k*).

*By the statute 3 & 4 Wm. 4, c. 42, s. 9, to any plea in abatement in any court of law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors. *3

And by section 10, in all cases where after such plea in abatement, the plaintiff shall, without proceeding to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants were liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any defendant who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement (*l*).

Damages. The plaintiff must be prepared to prove his damages (*m*) (A).

Misnomer. Where a peer is named as a commoner, he may plead his misnomer in abatement, since the title is part of his name, and he ought to be tried by his peers only (*n*); but he ought to set forth the writ, &c. upon the plea, because it is but a dilatory plea, and must be tried not by the country but by the record. But a plea that the defendant is a peeress by marriage must be tried by the country, since it involves a question of fact extrinsic of the record (*o*).

Upon a plea of peerage under letters patent, they must be produced under the great seal (*p*). In Knowles's Case, upon an indictment for murder, the defendant pleaded that his grandfather was created Earl of

(*i*) *Murray* v. *Somerville*, 3 Camp. 99. n.

(*k*) See tit. AGENT.—BILL OF EXCHANGE. A promissory note, beginning "I promise to pay," was signed by a member of a firm for himself and his partners, and it was held that he was liable to be sued severally. *Hall* v. *Smith*,[1] 1 B. & C. 407; *March* v. *Ward*, Peake's C. 130; *Clarke* v. *Blackestock*,[2] Holt's C. 474; *Sayer* v. *Chaytor*, 1 Lutw. 696.

(*l*) See *Clay* v. *Langslow*, 1 M. & M. C. 45, *supra*.

(*m*) *Weleker* v. *Le Pelletier*, otherwise the plaintiff will be entitled to nominal damages only.

(*n*) *i. e.* In case of Treason or Felony, 2 Hale, 240. 6 Co. 53. *Countess of Rutland's Case*, 35 H. 6, 46.

(*o*) 6 Co. 53. 2 Hale, 240. See Starkie's Crim. Pl. 295. [4 Hallam's Mid. Ages, (1st Am. ed.) 25, n.]

(*p*) 2 Salk. 209.

(A) (On a plea in *abatement*, if the jury find against the plea, they ought to *assess the damages* on the plaintiff's declaration; if this is omitted a *venire de novo* must be awarded. *Hollingsworth* v. *Duane*, Wallace, 58; S. P. *Mehaffy* v. *Share*, 2 Penns. Reps. 361; *Dodge* v. *Morse*, 3 N. Hamp. R. 232; *Jewett* v. *Davis*, 6 Id. 518; contra where the plea in abatement is triable by record, certificate or inspection. *Marston* v. *Lawrence*, 1 John. C. 398.)

[1]Eng. Com. Law Reps. iii. 159. [2]*Id.* xxii. 45.

Banbury by letters patent under the great seal of England, which he produced in court; the Attorney-general replied, that on, &c. the defendant petitioned the lords in Parliament to be tried by his peers, and that the lords disallowed his claim; the defendant demurred, and the demurrer was allowed, on the ground that the refusal of the lords could not operate as a judgment (*q*).

If the defendant in a criminal proceeding plead a misnomer, the king may reply that he is known by the one name as well as the other (*r*); but in an appeal such a replication was not allowed (*s*) (B).

Upon a plea of *misnomer*, where the defendant avers that he was *baptized* *by the name of *A. B.*, he must give proof of such baptism, although he was not bound so to allege it; and it is not sufficient to show that he has always been called and known by that name (*t*). A defendant in either a criminal or civil proceeding will in general be concluded in a new action, or upon a fresh indictment, as to the name or addition which he has set forth in his former plea (*u*) (A).

*4

Competency.

If in assumpsit the defendant plead in abatement that the promise was made jointly with *E. F.*, the latter will be a competent witness for the plaintiff; for if the plaintiff were to succeed, although the record would prevent the plaintiff from recovering the second time in a joint action, the witness would still be liable to an action at the suit of the defendant for contribution (*x*); for the record would not be evidence against the latter; and if the plaintiff were to fail, the witness, if a partner, would still be liable to be sued by the plaintiff in an action against himself and the former defendant, and would be ultimately liable to pay his own share. The witness, if he be a partner, is at all events liable to pay his own proportion of the debt (*y*). It seems, however, that *E. F.* would not have been a competent witness for the defendant, in order to prove that he was a joint contractor, without a release (*z*), where he would be liable to contribute towards the costs of the action in case the defendant failed. But a release from the defendant would at all events make him competent, for then he would not be liable to contribution; and it would be his interest that the plaintiff should recover against the defendant alone, rather than that he should fail, in which case he might still bring a joint action.

The defendant, upon an indictment for perjury, may prove in bar that the action in which the evidence was given, on which the perjury is

(*q*) *R.* v. *Graham*, 4 St. Tr. 410. See the *Earl of Strathmore* v. the *Countess of Strathmore*, 2 J. & W. 543.

(*r*) 2 Hale, 238. By the statute 7 G. 4, c. 64, s. 19, no indictment or information shall be abated by reason of any plea of misnomer, or want of addition, or of wrong addition, if the court shall be satisfied by affidavit or otherwise of the truth of the plea; and it shall order the indictment or information to be amended, &c.

(*s*) 1 H. 7, 22. 21 Ed. 3, 47. 2 Hale, 238.

(*t*) *Weleker* v. *Le Pelletier*, 1 Camp. 479. See Com. Dig. ABATEMENT, [F.] 17. *Walden* v. *Holman*, 6 Mod. 155; 1 Salk. 6.

(*u*) 2 Hale, 248. See Crim. Pleadings, 2 Ed. 313. A plea of misnomer is no longer allowed in a personal action. 3 & 4 W. 4, c. 42, s. 11; and see the provision, s. 12, as to the use of initials.

(*x*) Lord Ellenborough seems to have been of opinion that in this event the witness would have been in a worse situation than he would have been in had the plaintiff failed, on account of his liability to contribute towards the costs of the former suit.

(*y*) *Hudson* v. *Robinson*. 4 M. & S. 475; and see *Cossham* v. *Goldney*, 2 Starkie's C. 424.

(*z*) *Young* v. *Bairner*, 1 Esp. C. 103; and see the observations of Lord Ellenborough, 4 M & S. 480, and of Bayley, J. Ib. 484; and see *Goodacre* v. *Breame*, Peake's C. 174; and *Birt* v. *Hood*, 1 Esp. C. 20; and see also tit. INTEREST OF WITNESS, and PARTNER.

(B) (Misnomer of parties in a writ or indictment must always be pleaded in abatement or the right to the exception is lost. *Smith* v. *Bowker*, 1 Mass. R. 76. *Scull* v. *Briddle*, 2 Wash. C. C. R. 200. *Porter* v. *Cresson*, 10 Serg. & R. 257.)

(A) (The record of a plea in abatement is evidence against those who pleaded it, that all who are therein alleged to be partners, are so in fact; but it will not admit any contract. *Witmer* v. *Schlatter*, 2 *Rawle*, 359.)

assigned, had abated before the trial of such action, by the death of a co-plaintiff after issue joined, no suggestion having been entered on the record pursuant to the statute 8 & 9 W. 3, c. 11, s. 6 (*a*).

ABUTTALS. *See* TRESPASS.

ACCEPTANCE. *See* BILL OF EXCHANGE.

ACCESS. *See* BASTARDY.

ACCESSORY.

Principal in the first degree.

It will be convenient here to consider the evidence applicable to both *principals* and *accessories* (B). Principals, in cases of felony, are of two degrees. A principal in the first degree is the absolute perpetrator of the crime, and is either actually present when it is perpetrated, or commits it whilst absent by an innocent agent or instrument (*b*). A principal in the second degree is *one who is present, aiding and abetting the fact to be done (*c*). An accessory *before* the fact is he, that being absent at the time of the felony committed, doth yet procure, counsel, or abet another to commit a felony (*d*). A man may therefore be convicted as a principal in the first degree, upon evidence that he committed the fact when absent, without the more immediate intervention of any guilty agent. As where *A.* persuades *B.* to drink poison, by recommending it as a medicine (*e*); or where he sends the poison by a third person, ignorant of its quality (*f*); or incites a madman to destroy another; or a child to set fire to a house (*g*) (A). To prove one to be principal in the second degree, it must be shown *first*, that he was *present* when the offence was committed. But it is not necessary to show that he was actually standing by, within sight or hearing of the fact; it is sufficient if he was near enough to lend his assistance in any manner to the commission of the offence. As where one commits a robery or murder, and another keeps watch or guard at some convenient distance (*h*). So if several set out together or in small parties, upon one common design, whether of murder or felony, or for any other unlawful

*5

Principal in the second degree.

Proof that he was present.

(*a*) *R.* v. *Cohen*, 1 Starkie's C. 511.

(*b*) Hale, 615, 616. 2 Haw. c. 29, s. 11.

(*c*) Hale, P. C. 615. Formerly he who struck alone was principal, and those who were present, aiding and assisting, were accessories, who could not be convicted before the attainder of the principal; 1 Hale, P. C. 437. 40 Ass. 25. 40 E. 3. But it has been long settled, that all present, aiding and abetting, are principals; 1 Hale, P. C. 438. Plow. 97. Whether a person is guilty as a principal in the first or second degree, is a question of law, *R.* v *Royce*, 2 Burr. 2076. If several persons combine to forge an instrument, and each separately executes a part, all are principals, though they are not together when the work is completed. *R.* v. *Bingley and others*, 1 Russ. & R. 446.

(*d*) 1 Hale, P. C. 615. Lord Coke, in his reading on the Statute West. 1, c. 14, says, the word *aid* comprehends all persons counselling, abetting, plotting, assenting, consenting and encouraging to do the act, and who are not present when the act is done; for if present, they are principals; 2 Inst. 182.

(*e*) 4 Co. 44. 2 Inst. 183.

(*f*) 9 Co. 81. Kelynge, 52, 53.

(*g*) *Ann Course's Case*, Foster, 349.

(*h*) Foster, 350. 1 Hale, 537. If two steal in a shop whilst a third remains on the outside to watch and co-operate, he is guilty as a principal. *R.* v. *Gogerly and others*, 1 Russ. & R. 343. In the case of *R.* v. *Davis and Hall*, cited below, though the jury found that the prisoner Hall was near and ready to lend assistance, yet the *evidence* seems to have been insufficient to warrant the finding.

(B) (There can be no accessories in high treason, all concerned in it are principals. Foster, 341. See also Burr's Trial. Nor in offences below felonies. *State* v. *Westfield*, 1 *Bailey*, 132; 4 J. J. Marsh. 182. *Curtain* v. *The State*, 4 *Yerger*, 143.)

(A) (All persons present at the commission of a crime, consenting thereto, aiding, assisting and abetting therein, or in doing any act which is a constituent of the offence, are principals. *U. S.* v. *Wilson*, 1 Baldw. 102. See also *U. S.* v. *Sharp*, 1 Peters, C. C. R. 118. *U. S.* v. *Jones*, 3 Wash. C. C. R. 209.

If one throw a bludgeon to another with intent to furnish that other with a deadly weapon to make an assault, and the assault is made and murder committed, he who threw the bludgeon with such intent is equally guilty with him who struck the blow. *Commonwealth* v. *Drew*, 4 Mass. R. 391.

So if one counsel another to commit suicide, and the other by reason of the advice kills himself, the adviser is guilty of murder as principal, though the *felo de se* be under sentence of death at the time he commits suicide. *Commonwealth* v. *Bowen*, 13 Mass. R. 356.)

purpose, and each takes the part assigned to him, some to commit the fact, they are all, in contemplation of law, *present* when the fact is committed (*i*). So, if several come to commit a burglary, and some enter, and the rest watch, all are principals (*k*). So, where a constable's assistant attempted to apprehend a number of persons in a house, under a warrant for a riot and battery, and fourteen of the rioters issued from the house and killed the constable's assistant, it was held that those within the house, if they abetted and counselled the riot, were, in law, *present*, aiding and assisting, as well as those who issued out and actually committed the assault five roods from the house (*l*). And, *in general*, if a party be sufficiently near to encourage the principal in the first degree with the expectation of immediate help or assistance in the execution of felony, he is in point of law *present*. Lord Dacre and others (*m*) came to steal deer in the park of Mr. Pelham; Rayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park; and it was held that it was murder in them all, and they died for it. So if *A.* and *B.* be present, and consenting to a robbery or burglary, though *A.* only actually commits the robbery, or actually breaks and enters the house,
*6 and *B.* be watching at another place near, or be about a robbery *hard by, which he effects not, both are robbers and burglars (*n*). Where *Hyde* and *A.*, *B.*, *C.* and *D.* rode out to rob, but at Hounslow *D.* parted from the company, and rode away to Colbrook, and *A.*, *B.* and *C.* rode towards Egham, and about three miles from Hounslow, *Hyde*, *A.* and *B.* assaulted a man; but before he was robbed, *C.* seeing another man coming at a distance, before the assault, rode up to him about a bow-shot, or more, from the rest, intending either to rob him, or to prevent his coming to assist; and in his absence, *Hyde*, *A.* and *B.* robbed the first man of divers silk stockings, and then rode back to *C.*, and they all went to London, and there divided the spoil; it was ruled (according to Lord Hale) upon good advice, *first*, that *D.* was not guilty of the robbery, though he rode out with them upon the same design, because he left them at Hounslow, and fell not in with them; it may be he repented of the design, at least he pursued it not. *Secondly*, that *C.*, though he was not actually present at the robbery, nor at the assault, but rode back to secure his company, was guilty as well as *Hyde* and the two others (*o*). It is otherwise where the party is not sufficiently near to render assistance to the principal felons. Where three prisoners were charged with feloniously uttering a forged note, &c., and it appeared that one of the prisoners offered the note in payment at Gosport, the other prisoners being then waiting at Portsmouth for his return: the whole being in consequence of a previously concerted plan, the Judges (after conviction) held, that the two latter prisoners were entitled to their acquittal, since they were not present when the felony was committed (*p*).

In the case of the *King v. Stewart and Dickons* (*q*), it appeared that

(*i*) Foster, 350, 353. 1 Haw. c. 38. 1 Hale, P. C. 439. Kel. 111.
(*k*) Foster, 350. 1 Hale, P. C. 439.
(*l*) 1 Hale, P. C. 462.
(*m*) 1 Hale, 439, 443, 245. Fost. 354.
(*n*) 1 Hale, P. C. 537. 1 And. 116, &c.; differently reported, Fost. 354. See tit. BURGLARY.—RAPE.
(*o*) 1 Hale, 637.
(*p*) *R.* v. *Soares*, and two others, 2 East, P. C. 974; and see *R.* v. *Badcock and others*, 1 Russ. & R. 249; *R.* v. *Kelly*, Ib. 421; *R.* v. *Morris*, Ib. 270. In the case of *R.* v. *Davis & Hall*, 1 Russ. & R. 115, the two prisoners came to town with intent to utter a forged note; they left the inn where they had put up together; Davis went into a shop and uttered the note, and Hall joined him near the place, about fifteen or twenty minutes afterwards. The jury found that Hall was at the time of the uttering sufficiently near and ready to render assistance, and found both guilty; but the Judges afterwards held the conviction of Hall to be improper.
(*q*) *Coram* Garrow, B., Warwick Lent Assiz. 1818, and afterwards before the Judges, MSS. C.

two prisoners had previously agreed to sell forged notes to James Platt, a witness upon the trial, and that the price had been paid. That after the witness had been at the house of the prisoners for the purpose of receiving the notes, Stewart and the witness went to a public house, and that afterwards Dickons came and beckoned them out; Stewart then said to the witness, "You see Ann there, whom you have seen at our house; she will deliver the goods to you; I wish you good luck." Dickons, the woman pointed out by the prisoner Stewart, within three minutes afterwards delivered the forged notes to the witness, and the witness did not know whether the prisoners were or were not in sight when the notes were so delivered, nor which way they went. The jury found the prisoners guilty, and stated (the question being left to them by the learned Judge), that the delivery of the notes by Dickons was in completion of the agreement made by the prisoners, and on their account, and not her own. Execution was respited, in order that the opinion of the Judges might be taken upon the question; and all the Judges recommended that a pardon should be applied for in respect of the particular offence (*r*)

*7 That he was aiding and abetting.

* It must be shown, *secondly*, that he was *aiding and abetting* (*s*); which words seem to include every species of assistance which one present can give, either in act, or by his assent, and by his encouragement or readiness to further the general purpose (*t*). For if any one comes for an unlawful purpose, although he does not act, he is a principal (*u*). It is not necessary to show that one, indicted as a principal, was present during the whole of the transaction; it seems to be sufficient to show him to be present aiding and abetting when the offence was consummated, although he was not present at the inception. Where the servants of *A.* feloniously removed goods in *A.*'s warehouse, and *B.* several hours afterwards assisted them in removing the goods *from* the warehouse, it was held that *B.* was the principal, since it was a continuing transaction (*x*). So, where the servants of Dyer, who was the owner of a boat (and had been employed to convey on shore a quantity of barilla), without the privity of Dyer, separated part of the barilla from the rest, and conveyed it to another part of the boat, and concealed it under some rope, and Dyer afterwards assisted the others in conveying the part so separated from the boat; it was held, upon the same ground, that Dyer was a principal (*y*).

Principals, whether in the first or second degree, are usually charged as being feloniously present, aiding and abetting (*z*); since where a statute creates a new felony, or takes away the benefit of clergy from those guilty of an existing felony, under particular circumstances, the offence partakes of all the incidents to a felony at common law, and all present aiding and abetting are principals, and may be charged as such (*a*). But where the statute by its description includes that party only who does the very act, one who is principal in the second degree only ought to be acquitted either

(*r*) See also *R.* v. *Else*, 1 R. & R. 142.

(*s*) See Lord Coke's exposition of the word *aid*, 2 Inst. 218, and *supra*, 5; see also Foster, 354; and Minshew, Cowel, Skinner, Spelman, and Dufresne, on the meaning of the word *abet;* from which it appears that instigation alone, without force, is the sense of the word.

(*t*) Fost. 350. 2 Haw. c. 47. (*u*) 1 Hale, C. P. 374, 443.

(*x*) *R.* v. *Atwell and others*, East, C. P. 768. But where several broke open a warehouse and stole a quantity of butter, and carried it along the street thirty yards, and then the prisoner joined them, and being apprised of the felony, assisted in vending the goods; it was held that he was but an accessory. *R.* v. *King*, Russ. & R. 332. *R.* v. *M'Makim & Smith*, Ib.

(*y*) *R.* v. *Dyer and Disting*, East, P. C. 767, per Graham, B. and Le Blanc, J.

(*z*) Where aiders and abettors are mentioned expressly in the statute, the general allegation appears to be sufficient; see Crim. Pleadings, second edition, 82, 83, 86.

(*a*) See the Coalheaver's case, Leach, 76. Staundf. 44. 3 Inst. 45. 1 Hale, P. C. 613. Fost. 354. *R.* v. *Midwinter & Sims*, Leach, C. C. L. 3d edit. 78. Burr. 2075.

of the offence generally, or of so much as the particular statute is applicable to.

The allegation, that the prisoner was *aiding* and *abetting*, implies an *assent* to the principal act. This assent must be proved either by some act directly done in furtherance of the commission of the crime, which manifests the assent of the prisoner, as by his keeping watch whilst others in his presence break open a house, or by evidence that he was associated with the rest in the prosecution of one common illegal object, in the execution and furtherance of which the principal crime was committed. If *A.* be present when a murder is committed, and takes no part in it, nor endeavours to prevent it, and neither apprehends the murderer, nor levies hue and cry after him, and the matter be done in private, the circumstances would, it seems, be evidence to a jury, of consent and concurrence on his part (*b*).
*8 But here the privacy * and secrecy with which the fact was accompanied would be a strong circumstance; for if the homicide had been openly committed before witnesses, as it frequently is, where it amounts in *construction of law* to murder, although *A.*'s conduct might be criminal, it would not render him either principal or accessory (*c*). But in case the murder had been committed in prosecution of an unlawful design, proof that *A.* came to assist and carry that design into execution, would be evidence to convict him as a principal in the second degree (*d*); for in such case the person giving the blow is no more than the instrument by which all strike. In such case, however, it would be essential to prove that the murder was committed in the prosecution of some specific unlawful design in which the prisoner had engaged (*e*); for if the death resulted from the particular malice of the individual who inflicted the blow and who took the opportunity to revenge himself, the others, who were assembled for a different purpose, would not be involved in his guilt. Three soldiers went to rob an orchard, two got up a pear-tree, the third watched with a drawn sword, and killed the son of the owner, who had collared him; and it was held, that the latter was guilty of murder, but that the two others were innocent, because they came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. But Holt, C. J. said that it would have been otherwise, "if they had all come thither with a general resolution against all opposers," which would have proved that the murder was committed in prosecution of their original purpose (*f*). So where *A.* beat a constable in execution of his office, and being parted from him desisted, and *B.*, a friend of *A.*, rushed in and killed the constable, *A.* not having been engaged after they were parted, it was held to be murder in *B.*, but that *A.* was innocent, since there was no previous agreement to obstruct the constable in the execution of his office (*g*). A general resolution against all opposers, which can be proved either to have been expressly entered into, or which can be inferred from circumstances, as from the number, arms, or behaviour of the parties at or before the scene of action, is strong evidence in cases of this nature (*h*), and shows, when substantiated, that every one present, in the eye of the law, when the offence is committed, is guilty as a principal (*i*). Where, however, *A.*, *B.* and *C.* set

(*b*) Foster, Disc. 3, s. 5.
(*c*) Dalt. 395. Staundf. 40. Fost. Disc. 3, s. 5.
(*d*) Fost. Disc. 3, s. 6. Kel. 116.
(*e*) Fost. Disc. 3, s. 7.
(*f*) Ibid.
(*g*) Per Holt and Rokeby, Js. Hertford Ass. Fost. Disc. 3, s. 7; see also *Plummer's Case*, Ib.
(*h*) Fost. Disc 3, s. 8.
(*i*) The cases of Lord *Dacre* and *Pudsey*, cited above, were decided on the same principle; the offences of which they stood charged were committed far out of their sight and hearing, yet both were holden to be present. It was sufficient that at the instant the offences were committed by some of the same party, and upon the same pursuit, and under the same engagement and expectation of mutual defence with those who did the fact. Fost. 354.

out with intent to rob on the highway, and *A.* and *B.* upon the same day commit a robbery, *C.* may show in defence that he had previously abandoned the design, and separated himself from the party, and that there was not, when the offence was committed, any engagement or reasonable expectation of mutual support and defence to affect him (*k*). So if several set out to commit a felony, but being alarmed, run different ways, and one to avoid capture, maims his pursuer, the rest are not principals (*l*).

Evidence against an accessory before the fact.

An accessory before the fact may be tried either after the conviction of the principal felon or at the same time with him, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not *been previously convicted (*m*) (A). If the principal has been previously convicted, the conviction may be proved by the record properly authenticated (*n*) (B), which will be *primâ facie* evidence to prove the guilt of the principal (*o*), whether the indictment allege the guilt of the principal expressly (*p*), or, as is the more usual course, recites the record of conviction (*q*). In either case the prisoner may insist on every matter both of fact and of law to controvert the guilt of the principal (*r*), for the accessory is considered as *particeps in lite* (*s*). As against an accessory before the fact, the general allegation must next be proved, that he did feloniously and maliciously incite, move, procure aid, abet, counsel, hire, and command the principal to commit the felony (*t*). Proof sufficient to satisfy this allegation imports evidence of the knowledge and assent of the prisoner to the commission of the felony, that he at least instigated and incited the principal to commit the crime. With respect to the measure of the incitement and force of persuasion used, no rule is laid down; that it was sufficient to effectuate the evil purpose is proved by the result. In principal, it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed although the incitement had never taken place (*u*). *9

In cases where there is a variance between the crime which the accessory has advised and that which the principal has perpetrated, those criteria must be resorted to which are clearly stated by Sir M. Foster; viz. "Did the principal commit the felony he standeth charged with under the influence of the flagitious advice, and was the event in the ordinary course of things a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or on a different subject (*x*)?"

(*k*) Fost. Disc. 3, s. 8.
(*l*) *R.* v. *White and another*, Russell & Ry. 9.
(*m*) By the st. 7 & 8 G. 4, c. 29, s. 54.
(*n*) See tit. RECORD.
(*o*) See tit. JUDGMENTS, for the reason.
(*p*) As in Lord *Sanchar's Case*, 9 Co. 114. See Starkie's Cr. Pl. 2d edit. 140.
(*q*) See Fost. Disc. 3, c. 2, s. 3.
(*r*) See the reason, tit. JUDGMENTS.
(*s*) Fost. 365.
(*t*) See Crim. Pleadings, 130.
(*u*) According to Lord Coke, to *cause*, is to procure or counsel one to forge; to *assent*, is to agree afterwards to the procurement or counsel of another; to *consent*, is to agree at the time of the procurement, or counsel, and he in law is a procurer; 3 Inst. 169. But an assent after the fact committed makes not the party assenting a principal, 1 Hale, 684.
(*x*) Foster, Disc. 371. Thus if *A.* counsel *B.* to burn the house of *C.*, and *B.* knowing the house of *C.* spares it, and burns the house of *D.*, *A.* is not an accessory to this felony.

(A) (An accessory in a capital felony cannot be put on his trial without his consent, if the principal be dead without conviction. See *Commonwealth* v. *Phillips*, 16 Mass. 423. *State* v. *Chittem*, 2 Dev. 49.)
(B) (*S. P. State* v. *Crank*, 2 Bailey, 66. Where the principal and accessory are tried separately, and joined in an indictment, the record of the principal's conviction is *primâ facie* evidence of his guilt upon the trial of the accessory; and, as the burden of proof is on the accessory, he must show clearly that the principal ought not to have been convicted. *Commonwealth* v. *Knapp*, 10 Pick. 484.)

Wife. A wife may be convicted as a principal felon in uttering a forged certificate for receiving prize money, although she acted in pursuance of her husband's direction; and the husband may be convicted as an accessory before the fact (*y*).

Accessory after the fact. Against an accessory *after the fact*, after proof of the principal felony, either by the record of the conviction of the principal felon or by evidence (*z*), it must be proved, that he, knowing the felony to have been committed, received, relieved, comforted or assisted the felon (*a*), or received the stolen goods (*b*). It seems once to have been held, that the
*10 knowledge of the *accessory was to be inferred from the attainder of the principal in the same county (*c*), because every one is bound to take notice of an attainder in the same county; but this notion appears to have exploded (*d*).

Variance. If *A.* be charged as principal in the first degree, and *B.* as aiding and abetting, the indictment will be supported by evidence that *B.* struck the blow, and that *A.* was present aiding and abetting (*e*); and in such case, *B.* may be convicted although *A.* is acquitted (*f*). If *A.* be indicted as accessory to *B.* and *C.*, he may be convicted on evidence that he was accessory to *C.* only (*g*). It has been said, that it was otherwise in case of an appeal (*h*): yet there seems to have been no difference in the two cases as to the rules of evidence. One indicted as a principal cannot be found guilty on evidence showing that he was an accessory before the fact (*i*). Wherever a variance is material as to the principal, it is material and available to the accessory (*k*); and *vice versâ*, where a variance is immaterial to the principal, it is immaterial to the accessory (*l*).

ACCOMPLICE.

Competency. It seems to be an universal rule, that a *particeps criminis* may be examined as a witness in both civil and criminal cases, notwithstanding the immorality or illegality of his conduct, provided he has not been convicted of any crime that incapacitates him (*m*).

In civil actions it was formerly held that a witness could not be admitted to allege his own turpitude, or to disprove an instrument to which he was a party or witness (*n*); but the rule is now exploded (*o*), for it is calculated to conceal the truth. The subscribing witnesses to a will have, in several instances, been allowed to give evidence to impeach the will (*p*); and the same rule applies where the instrument is of a negotiable nature (*q*).

(*y*) *R.* v. *Morris*, 2 Leach, 696; Russ. & R. 270; and see *R.* v. *Hughes*, cor. Thompson, B. Lancr. Lent. Ass. 1813. Russell, 1478. See tit. Husband and Wife.

(*z*) The receiver of stolen property may be tried either as an accessory after the fact, or as a substantive felon, 7 & 8 G. 4, c. 29, s. 54.

(*a*) 1 Hale, C. P. 618.

(*b*) Under the stat. 7 & 8 G. 4, c. 29, s. 54. See Larceny.

(*c*) Staundf. 96. 8 E. 4, f. 3. (*d*) 3 P. Wms. 494.

(*e*) 9 Co. 67. Ibid. 112, b. 4 Co. 42. 3 Inst. 148. 2 Hale, P. C. 292. 1 Plow. 28. *R.* v. *Wallis*, 1 Salk. 334. *R.* v. *Benson*, 3 Mod. 121. 1 Lord Raymond, 21. Doug. 20.

(*f*) *R.* v. *Wallis*, 1 Salk. 334.

(*g*) 9 Co. 119. 2 Hale, P. C. 292. 2 Haw. c. 46, sec. 196.

(*h*) 2 Inst. 183. (*i*) 1 Haw. c. 26, s. 178, 9.

(*k*) 2 Haw. c. 46, s. 194. Summ. 265. 2 Hale, P. C. 292.

(*l*) 2 Haw. c. 46. *R.* v. *Macally*, 9 Co. 65. Cro. J. 279. 2 Hale, P. C. 292.

(*m*) See tit. Infamous Witness.

(*n*) 4 Inst. 279. Str. 1148. Salk. 461, 680. 3 St. Tr. 427. Burr. 1255. 1 T. R. 296. 3 T. R. 21, 27. This was in conformity with the maxim of civil law, "*Nemo allegans turpitudinem suam est audiendus.*" In the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601, Lawrence, J. observed, "persons are continually allowed to allege their own turpitude, as in cases of simony, compounding felony, sale of offices, &c.; and possibly that maxim may in our law be confined to the cases of plaintiffs making demands *ex turpi causâ*, and to cases of defence in which innocent persons may be prejudiced."

(*o*) 5 T. R. 579. 7 T. R. 601. (*p*) *Lowe* v. *Jolliffe*, 1 Bl. R. 365. 7 T. R. 604.

(*q*) 7 T. R. 64.

A clerk having embezzled his master's property laid it out in illegal insurances, and he was held to be a competent witness for the master against the insurer (*r*). So a man who has pretended to convey lands to another is a competent witness to prove that he had no title (*s*). A co-assignor of a ship may prove that he had no interest in the vessel (*t*). Parents may give evidence to bastardize their issue (*u*).

* In the case of *Walton* v. *Shelley* (*x*), it was held that the indorsee of a promissory note was not competent to prove that it was tainted with usury in its creation; but in the latter case of *Jordaine* v. *Lashbrooke*, (*y*) it was denied that the former decision was warranted by the previous cases; and it was held, that a party to a bill of exchange was competent to prove it to have been void in its creation (*z*). So in an action for bribery the person bribed is a competent witness, although by the statute (*a*) the party who discovers the bribery of another is exempted from an action, and the witness intends to avail himself of this exemption by way of defence to an action pending against himself for bribery committed at the same election (*b*). No one, however, can be a witness for another whilst he is a party to the record. But a co-defendant may be rendered competent by entering a *nolle prosequi* (*c*); and if there be no evidence to charge one co-defendant in trespass, he may be acquitted under the direction of the court, and give evidence in the cause. *11

In criminal cases it is perfectly clear that an accomplice is a competent witness, previous to his conviction of a crime which takes away competency, in all cases, whether of treason (*d*), felony (*e*), or mere misdemeanour (*f*); the doctrine is founded on obvious grounds of policy (*g*), and, perhaps, of necessity (A). It is also perfectly settled that no promise of pardon, whether it be absolute or conditional, will render an accomplice incompetent (*h*). In some instances accomplices are strictly entitled to pardon. Such was formerly the case with approvers, upon conviction of their associates (*i*). The practice of admitting an approver to appeal (a matter purely within the discretion of the court) had become obsolete in the time of Sir Matthew Hale (*k*), who observed that more mischief had arisen to good men from these approvements, upon false accusations by desperate villains, than benefit to the public by the discovery and conviction of real offenders. Since their discontinuance, and before their final abolition (*l*),

(*r*) *Clarke* v. *Shee*, Cowp. 197. (*s*) *Title* v. *Grevel*, Lord Raym. 1008.

(*t*) Anon. cited 1 T. R. 301. So a witness may be called to prove that the defendant had been registered as the part-owner of a ship, on the oath of the witness, without his privity or consent, *Rands* v. *Thomas*, 5 M. & S. 224. And where a woman had deposed on oath, at the instance of the defendant, that the prosecutor was the father of her bastard child, it was held that she was a competent witness to prove that the defendant was the father. *P.* v. *Teal*, 11 East, 309.

(*u*) See the cases tit. BASTARDY; but see also *R.* v. *Rock*, 1 Wils. 340.

(*x*) 1 T. R. 296. (*y*) 7 T. R. 601.

(*z*) See *Rich* v. *Topping*, Peake's Cas. 224. Esp. 117. (*a*) 2 G. 2, c. 24.

(*b*) *Bush* v. *Rawlings*, Say. 209. *Howard* v. *Shipley*, 4 East, 180. *Edwards* v. *Evans*, 3 East, 431. *Phillips* v. *Fowler*, Say. 289, 290.

(*c*) *Man* v. *Ward*, 2 Atk. 229. (*d*) *R.* v. *Tonge*, Keb. 17. 1 Hale, P. C. 303. 7 T. R. 709.

(*e*) Leach, C. C. L. 133. *R.* v. *Dr. Dodd*, Leach, C. C. L. 141. *R.* v. *Westbeer*, Ibid. 12.

(*f*) 2 Haw. c. 46. *R.* v. *Cross*, 12 Mod. 520, where the thief was a witness against the receiver. See *R.* v. *Teal*, 11 East, 309, *supra* note (*p*).

(*g*) 1 Hale, 303.

(*h*) *Tonge's Case*, 1 Hale, 304. *Layer's Case*, 10 St. Tr. 259. Lord Hale seems to have been of a different opinion in case of a pardon promised for witnesses against others, 1 Hale, 304; 2 Hale, 280; and in the case of an approver, 1 Hale, 303.

(*i*) Cowp. 339. Leach, C. C. L. 140. But now by the stat. 59 G. 3, c. 46, appeals by approvers, as well as others, are abolished.

(*k*) 2 Hale, 226. (*l*) By the stat. 59 G. 3, c. 46.

(A) (S. P. *Byrd* v. *Commonwealth*, 2 Virg. Cas. 490. *People* v. *Whipple*, 9 Cow. 707. *U. States* v. *Henry*, 4 Wash. C. C. 428.)

the doctrine of approvements had become more a matter of curiosity than use (*m*). Although an approver was sworn to the truth of his appeal (*n*), yet it seems that he was not a competent witness upon the trial. For this proceeding have been substituted the enactments of general statutes, and the reasonable and equitable practice of admitting an accomplice to give evidence under a conditional promise of pardon, in case he make a fair and impartial disclosure (B).

Competency.

*12 * These statutes, in cases of coining, robbery, burglary, housebreaking and horse-stealing (*o*), enact, that if an offender being out of prison shall discover two or more persons who have committed the like offences, he shall be entitled to a pardon of the offences respectively specified in those statutes (*p*).

These statutes, and also others which protect an offending party who discovers another offender, seem to make the latter a competent witness by legislative declaration; for if he were not to be a competent witness, the provisions of the statutes would be almost nugatory and useless; it would be holding out an inducement to offenders to make a discovery, and when made, they would be precluded from the benefit of it (*q*).

In present practice, where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to pardon, the usage, lenity, and practice of the court is to stay the prosecution against them; and they have an equitable title to a recommendation to the king's mercy (*r*).

Under such circumstances, there can be no doubt, as to the competency of the accomplice, upon any principle: the condition is not that he shall convict, nor even that he shall give evidence unfavourable to any prisoner, but that he shall make a fair disclosure of what he knows. The *credit* to be given to such a witness is for the consideration of the jury: the acknowledged turpitude of the witness must necessarily stamp his testimony with suspicion; and it is to be the more carefully watched, since such a witness lies under a strong temptation to substantiate the account which he has already given, in the hopes of pardon, and is likely to suppose that his object will be gained by a conviction, and may be frustrated by an acquittal.

No accomplice can be examined against his consent, for he is not bound to criminate himself. Where he is willing to give evidence, it seems to be

(*m*) If there were a dozen appellees, the approver was bound to fight them all if they waged battle; Haw. b. 2, c. 24, s. 24. 2 Hale, 233, 234. 3 Inst. 130. But as he had the power to make his own selection, there was room for the exercise of much discretion.

(*n*) Staundf. lib. 2, c. 56, p. 145. 1 Hale, 303; but see *Layer's Case*, 10 St. Tr. 259.

(*o*) Robbery, 4 W. & M. c. 8, s. 7. Coining, 6 & 7 W. 3, c. 17, s. 12. Burglary, housebreaking, and private stealing, 10 W. 3, c. 23, s. 5; repealed by the 7 & 8 Geo. 4, c. 27. 5 Ann. c. 31, s. 4. Uttering counterfeit money, 15 Geo. 2, c. 28, s. 28, which extends to *such* offences only. Illegally buying or receiving stolen lead, iron, or other metals, 29 Geo. 2, c. 30; repealed by the st. 7 & 8 Geo. 4, c. 27.

(*p*) See 4 Comm. 330, 331.

(*q*) See Lord Ellenborough's observations in *Heward* v. *Shipley*, 4 East, 180; *Bush* v. *Rawling*, Say. 289; *R.* v. *Rockwood*, 4 St. Tr. 684-6; *R.* v. *Teasdale*, 3 Esp. 68; *Mead* v. *Robinson*, Willes, 422; where it was held, that the legislature, by holding out inducements, and offering an indemnity, intended to make the discoverers legal witnesses. And *Philips* v. *Fowler*, 8 Geo. 2, cited Willes, 425; *R.* v. *Luckup*, 9 Geo. 2, B. R. MSS. cited Willes, 425, in the note; where, in a prosecution for penalties under the stat. 9 Ann. c. 14, s. 9, the loser of money at cards was held to be a good witness to prove the loss. So in *R.* v. *Johnson*, cited ibid. See INTERESTED WITNESS.

(*r*) *R.* v. *Rudd*, Leach, C. C. L. 140, per Lord Mansfield, Cowp. 339. And see *R.* v. *Lee*, 1 Russ, & R. 261.

(B) (An accomplice having made a full disclosure, is entitled, in New York, to a recommendation for pardon. Otherwise in Virginia.)

the more proper course not to include him in the indictment (*s*). The practice is (where the accomplice is in custody), for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential (*t*). The admission of the party as a witness, amounts to a promise * of recommendation to mercy, upon condition of his making a full and fair disclosure of all the circumstances of the crime. *13

An accomplice, as it seems, is a competent witness, and may be examined, if he be willing, although he is indicted alone with others, provided he be not put upon his trial at the same time with the others (*u*); for an indictment against several, is several as to each; so he is if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him (*x*). So an accomplice is a competent witness for his associates, as well as against them, although they be severally indicted for the same offence (*y*), whether he is convicted or not, provided he be not disqualified by a judgment. When indicted with others.

By a breach of the condition the accomplice forfeits his claim to favour, and is liable to be tried and convicted (*z*) upon his confession.

Where there is no evidence, or but slight evidence, against one of the parties upon his trial, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him to admit his testimony (*a*).

With respect to the force and effect of such testimony, it must, from its very nature, be regarded with great jealousy and suspicion. It is hard (Lord Hale observed) (*b*) to take away the life of any person upon the evidence of a *particeps criminis*, unless there be very considerable circumstances which may give the greater credit to what he swears. In strictness of law, indeed, a prisoner may be convicted on the testimony of a single accomplice (*c*); since, where competent evidence is adduced, it is for the jury to determine on the effect of that evidence. In practice it is usual to direct the jury to acquit the prisoner, where the evidence of an accomplice stands uncorroborated in material circumstances; but this it is said is a matter resting entirely in the discretion of the court (*d*) (A). Force of such testimony.

(*s*) 1 Hale, 305. Lord Hale there says, the witness is never indicted, because that weakens and disparages his testimony, but possibly does not wholly take away his testimony. See 2 Hale, 234. It is said that if a defendant accuse himself, he may be a witness against his companion. See *Sir Percy Cresby's Case*, 19 J. 1. Noy's Rep. 154.

(*t*) If, however, an accomplice be taken before the grand jury by means of a surreptitious order, the indictment will still be valid. *R.* v. *Dodd*, Leach, C. C. L. 184. And it seems to be a general rule, that the means by which evidence was obtained will be no objection to the evidence itself. A justice of the peace has no authority to pardon an offender, and to tell him he shall be a witness at all events against others. *R.* v. *Rudd*, Leach, C. C. L. 140; Cowp. 331.

(*u*) *Qu.* and see 1 Hale, 305, *supra* note (*s*). See also *R.* v. *Ellis*, Macnall. 53.

(*x*) *Lee* v. *Gansel*, Cowp. 1.

(*y*) 1 Hale, 280, cites the case of *Billmore*, *Gray* and *Harbin*, and *Gunston* v. *Downs*, 2 R. A. 685, pl. 3. That is, as it seems, where they are severally tried for an offence several in its nature; for in such case it seems to make no difference whether they are severally or jointly indicted.

(*z*) In a late instance, a prisoner who had made a confession, after a representation made to him by a constable in the gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *R.* v. *Burley*, *cor.* Garrow, B. Leicester Lent Assizes 1818. And the conviction was afterwards approved by all the Judges. MSS. C.

(*a*) 1 Sid. 237; Trials per Pais, 148. Style, 401. 12 Ass. 12, 34. 2 Haw. c. 46, s. 98; Sav. 34.

(*b*) 1 Hale, P. C. 305.

(*c*) *R.* v. *Atwood*, Leach, C. C. L. 521. *R.* v. *Durham & Crowder*, Leach, C. C. L. 538. Lord Kenyon's observations in *Jordaine* v. *Lashbrooke*, 7 T. R. 601; 1 Hale, P. C. 303, 304, 305.

(*d*) It seems to be clearly settled, that a prisoner may be convicted on the unconfirmed testimony of an accomplice. But as a rule of *discretion* and in practice, it is said, that he ought not to be convicted unless

(A) (S. P. *United States* v. *Kessler*, 1 Bald. 22.)

the testimony of the accomplice receive *material* confirmation. Regarding the rule as one of discretion and not of strict law, it can scarcely be understood that it is a rule which the Judge may enforce or disregard at his option, but rather that it belongs to the court to decide, under the circumstances of each particular case, whether they supply a material confirmation of the accomplice's testimony. Now, though circumstances may be infinitely varied, the principle on which the rule is founded, and by which it is to be applied, remains the same. The rule is devised for the protection of the accused. Independently of the rule, a jury would not be warranted in convicting upon the testimony of an accomplice, without being satisfied that his testimony was true. But even assuming them to be so satisfied, the rule intervenes to the protection of the accused, and requires that they shall not convict him unless their belief is at least in part founded on *considerable* circumstances (according to Lord Hale) proved *aliunde*, which coincide with his testimony, and add credit to it. For coincidences in testimony and circumstances, when they consist in particulars which were beyond the reach of premeditation, may not only sanction but compel belief in the *particular statement* made by the worst of men. But then the question arises, is any distinction to be made as to the nature of the circumstances in respect of which confirmation is required—is it sufficient that the accomplice be confirmed simply as to the *corpus delicti*, or are some confirmatory circumstances essential as to the *identity of the offender*? The object of requiring confirmatory evidence must either be to create such a degree of confidence in the sincerity of the accomplice as to render him *generally credible* even as to statements in respect of which he is not confirmed, or to exclude the probability of his attempting to deceive in the *particular transaction* which he details. If the latter be the true principle, some confirmation as to the agency of the accused should seem to be essential; for where there are no circumstances independently of the testimony of the accomplice to implicate the accused, the conviction must necessarily rest on the credibility of the witness. From the language of the Judges on the subject, and particularly that of Thomson, L. C. B. (in the case of *R.* v. *Swallow*, cited below), it should seem that confirmation as to the circumstances of the offence without any as to the *identity of the offender* is sufficient, provided of course the jury be induced to give credit to such a witness. The same inference may it seems be drawn from those cases where it has been held, that where several are jointly tried, and there is confirmation only as to some, others may be convicted as to whom there is no confirmation. See *R.* v. *Jones*, 2 Camp. 133, cited below, and *R.* v. *Dawber*,[1] 3 Starkie's C. 34, and the point is stated to have been expressly decided by the Judges in *Birkett's Case*, Russ. & Ry. C. C. L. 252. It must be admitted, that even assuming that it is sufficient to confirm by circumstances the *general credibility* of the accomplice, yet that mere confirmation as to the circumstances of the offence, although it may show the accuracy of the accomplice's recollection, usually affords a very imperfect test of his *sincerity*. The ordinary motive to deceive, by which an accomplice would be influenced, is the hope of saving himself, and, it may be, a friend who participated in the offence, by the conviction of an innocent person; and the temptation is to misrepresent not as to the circumstances of the offence, but merely as to the agents who committed it. As it is his obvious interest to acquire the confidence of the jury, it is plain that the mere accuracy of his details of the *corpus delicti* can seldom generate any reasonable degree of confidence in his general sincerity. On the other hand, whatever be the rule of law on the subject, it seems that such circumstances as tend to implicate the accused, independently of the testimony of the accomplice, are of far greater weight than those which merely confirm him as to the details of the offence, whether the object be to confer general credibility or to exclude the apprehension of deceit in the particular case. If distinct proof were to be given *aliunde*, that the offence had been committed by *two persons* at the least, even this would effectually exclude a suspicion which might otherwise obtain, *viz:* that the witness sought to secure impunity to himself by imputing guilt exclusively his own to another; still a doubt might remain whether to save a guilty friend he did not in his statement substitute an innocent party; and it would be difficult to extract such a degree of confidence from his mere detail of the *res gestæ*, however accurate, as would warrant belief in his mere unconfirmed statement, though such an apprehension might to a great extent, or even entirely, be removed by circumstances which affected the prisoner personally. It would be easy for an accomplice to convict an innocent substitute for a guilty party, were no evidence requisite to connect the latter personally with the offence, but exceedingly difficult to do so were his powers of effecting mischief to be limited to those against whom circumstantial evidence existed, independently of his testimony and beyond the reach of his artifices. It may be said that if personal confirmation were essential, and several prisoners were tried at the same time, as to some of whom there was personal confirmation, but not as to the rest, the jury would be bound to acquit the latter, though they convicted the rest, and that it would be inconsistent that on the testimony of the same witness they should believe him as to part and not as to the rest of his story. The answer, however, is obvious, that if the rule be regarded, as it must be, a technical and artificial one, to be applied in protection of a prisoner even though the jury should think the witness faith-worthy, there would be no inconsistency in convicting *A.* as to whom there was personal confirmation, and acquitting *B.* as to whom there was none; the inconsistency would not be greater than if both *A.* and *B.* were to be acquitted, though the jury believed the witness, because there was no confirmation as to either. Indeed a greater degree of inconsistency might result from the opposite doctrine. For personal confirmation being unnecessary, if *A.* and *B.* were to be tried together, and there were confirmation as to *A.* but none of any kind as to *B.*, the latter might nevertheless be convicted if the witness were confirmed as to *A.* and derived credit from such confirmation: and yet if they were to be tried separately, then, notwithstanding the faith-worthiness of the witness, yet, if there were no confirmation the jury ought to acquit *B.;* so that *B.* might be liable to be convicted or acquitted accordingly as he was tried jointly with *A.* or separately. It is also observable, that if mere confirmation as to the facts immediately connected with the commission of the crime were sufficient, the rule would be of little importance, for it rarely happens that there is not some confirmation as to the *corpus delicti*.

The following are the principal authorities on the subject:—In the case of *Atwood* v. *Robins*, *cor.* Buller, Leach, C. C. L. 521, 3d edit., the accomplice was confirmed as to the circumstances of a highway robbery,

[1]Eng Com. Law Reps. xiv. 153.

*ACCORD.

AN *Accord and Satisfaction*, before the late alterations in the rules of pleading, was evidence in an action upon the case, under the general issue Must be pleaded.

as to the conversation which took place at the time, and as to the number of robbers, but there was no evidence as to the identity of the other two. The jury having found the prisoners guilty, the learned Judge referred the question to the consideration of the twelve Judges, on the doubt whether the evidence of an accomplice, *unconfirmed* by any other evidence that could materially affect the case, was sufficient to warrant a conviction, and the Judges unanimously held, that the conviction was legal, and sentence of death was passed. It is remarkable, that in this case the Judges, at least the learned Judge who tried the prisoners, did not conceive the confirmation as to the *corpus delicti* to be that which could *materially* affect the case. In the subsequent case of *Durham & Crowder*, Leach's C. C. L. 538. 3d. ed. which occurred very soon afterwards, it was held that the prisoners were properly convicted of a burglary on the sole testimony (as far as regarded the prisoners personally) of a pawnbroker, who had for years been a common receiver of stolen goods. The court seem in this case, as well as the former, to have decided on the ground that no confirmation as to the prisoners was necessary, and that the evidence of an accomplice might be left to a jury, though it was entirely unsubstantiated by any other evidence. It was, however, observed, that Fleming the witness, was to be considered as an accessory after the fact, rather than as an accomplice. If the opinion of the Judges in this case is to be considered as founded on the assumption that Fleming was to be regarded as an accomplice, the decision seems to go the full length of wholly dispensing with the necessity for confirmation, even as a discretionary rule, for there was no confirmation whatsoever of the witness as far as appears, not even as to the *corpus delicti:* and though it is reported to have been said in that case, that the practice of rejecting an unsupported accomplice was rather a matter of discretion with the court than a rule of law, yet it is difficult to understand how it can be looked upon as any rule at all, if it may be utterly dispensed with and disregarded. In other instances, some confirmation of the testimony of an accomplice has been admitted to be necessary. In the case of *The King* v. *Despard*, Howell's St. Tr. vol. 28, p. 346, the Attorney-general (Mr. Perceval) says, "It shall not be contended by us that an accomplice does not require to be confirmed by collateral testimony, before a jury should implicitly give him credit." And he adds, "The confirmation that is required for an accomplice, is to show that the story as related by him coincides with other circumstances which are by unexceptionable testimony proved to have existed, and where such circumstances falling in with the testimony of the accomplice cannot so easily be accounted for by any other supposition than that of the truth of the story." In the case of *The King* v. *Jones*, 2 Camp. 132, Lord Ellenborough says, "No one can seriously doubt that a conviction is legal, though it proceed on the evidence of an approver only. Judges in their discretion will advise a jury *not to believe an accomplice unless he is confirmed, or only in as far as he is confirmed;* but if he is believed, his testimony is unquestionably sufficient to establish the fact which he deposed." In the case of *The King* v. *Swallow and others*, York Trials, 1813, p. 16, Mr. Baron Thomson stated to the jury as follows:—"If an accomplice is materially confirmed in his evidence by such testimony as the jury think is unimpeachable, then, notwithstanding the character in which he stands before them, he is to be heard and to be credited by them. And you were rightly also informed, that it was not necessary an accomplice should be confirmed in every circumstance he details in evidence—that would be almost a matter of impossibility; and if every circumstance to which he has spoken could be confirmed by other evidence, there would hardly be occasion to take the accomplice from the bar as a prisoner to make him a witness here: that is certainly too much to be expected, and never is required. It is quite sufficient to see that in some material facts the witness who shall have been an accomplice, is confirmed to the satisfaction of a jury; and that confirmation need not be of circumstances which go to prove that he speaks truth with respect to all the prisoners, and with respect to the share they have each taken in the transaction; for if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the other prisoners as to whom there may be no confirmation."

In the case of *Birkett and Brady*, Russ. & Ry. 251, it is stated that the Judges were of opinion, that an accomplice did not require confirmation as to the *person* he charged, if he was confirmed as to the particulars of his story.

So it has been held, that if an accomplice be confirmed as to one or more of several prisoners, another as to whom there is no confirmation may legally be convicted on his testimony. Thus in *R.* v. *Jones*, 2 Camp. 133, Lord Ellenborough observes, "Within a few years a case was referred to the twelve Judges, where four men were convicted of burglary on the evidence of an accomplice who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion that the conviction was legal, and upon that opinion they all suffered the sentence of the law." The same was ruled by Bayley, J. in the case of *The King* v. *Dauber*,[1] 3 Starkie's C. 34.[2] In the late case of *R.* v. *Wells and others*, 1 Mood & M. C. 326, on an indictment against a principal and accessories, the testimony of an accomplice was confirmed as to the accessories, but not as to the principal, and it was held that both principal and accessories ought to be acquitted.

For further observations on this important subject, the reader is referred to a very able essay, written by a gentleman of the Irish bar, intituled, "Observations on the Confirmation of the Testimony of Accomplices;" the object of which is to show, that in principle some confirmation as to the *personal identity* of the prisoner is necessary to warrant a conviction.

[1]Eng. Com. Law Reps. xiv. 153. [2]*Id.* xxii. 326.

(*p*); but in an action of trespass a special plea was necessary, as it now is generally. An accord must be shown to have been received in full satisfaction of the thing demanded (*q*); and although the plaintiff has agreed to take it in satisfaction, it will not be a bar to the action, unless it operate in satisfaction (*r*). A less sum cannot operate in satisfaction of a greater (*s*); but it is otherwise where an additional security is given for the payment of a less sum by a third person (*t*) (A). So if a debtor assign over all his effects to a trustee, to raise a fund for the payment of a composition to his creditors (*u*), the general rule is, that the court will see that there has been a reasonable satisfaction (*v*).

As accord and satisfaction must be specially pleaded, the evidence must of course depend upon the nature of the plea, and the issue taken.

When the accord has been proved by means of a witness, or by the admission of the other party, the performance of the terms accordingly must also be proved where it is executory in its nature. After evidence of an agreement between the plaintiff and defendant, with other creditors of the defendant, to accept a composition in satisfaction of their respective debts, to be paid within a reasonable time, it would not be sufficient to prove a tender, and a *refusal* on the part of the plaintiff to accept the composition
*17 (*x*). If *a plaintiff in an action against several for a tort accept a sum

(*p*) *Huxham* v. *Smith*, 2 Camp. 19. *Lane* v. *Applegate*,[1] 1 Starkie's C. 97. *Paramore* v. *Johnson*, 1 Lord Raym. 566; 12 Mod. 376. It is always a good plea where the action is founded on a covenant, with subsequent damages, *secus* where debt arises *tempore confectionis scripti*. *Blake's Case*, 6 Co. 44. Accord and satisfaction by one, is a bar for all; Com. Dig. Accord, [A.] 1.

(*q*) See Com. Dig. Accord, [B.] 1.

(*r*) See *Edgcombe* v. *Rodd*, 5 East, 294, as to what amounts to a legal satisfaction; and Com. Dig. Accord, [B.] 1. A judgment without satisfaction is no payment, *Tarleton* v. *Allhusen*,[2] 2 Ad. & Ell. 32. An executory agreement may after breach, be discharged by accord and satisfaction, B. N. P. 152; or by a valid agreement, substituting a new cause of action for the old, *Case* v. *Barker;* T. Ray. 450.

(*s*) *Fitch* v. *Sutton*, 5 East, 230. *Lynn* v. *Bruce*, 2 H. B. 317. *Heathcote* v. *Cruickshanks*, 2 T. R. 24. Vid. *infra*, note (*x*).

(*t*) *Steinman* v. *Magnus*, 11 East, 390.

(*u*) *Heathcote* v. *Cruickshanks*, 2 T. R. 24.

(*v*) *Cumber* v. *Wane*, Str. 426. *Pinnel's Case*, 5 Rep. 117. Co. Lit. 112. b. Vid. *infra*, note (*x*).

(*x*) *Heathcote* v. *Cruickshanks*, 2 T. R. 24. This was on demurrer to a plea. Where there is an agreement to pay money in satisfaction, it is not enough to show that he has always been ready to pay it, or a tender and refusal. Com. Dig. Accord, [B.] 4. *Peyton's Case*, 9 Rep. 79. b. But in *Bradley* v. *Gregory*, 2 Camp. 383, it was held that a creditor who had agreed with other creditors to execute a composition deed, with a release, on receiving a composition, secured partly by the acceptances of a third person, and partly by those of the debtor, could not, after a tender and refusal of the acceptances, sue for the original debt, on the ground that the agreement operated as satisfaction.

See further on this head, *Cumber* v. *Wane*, Str. 426, where it was held that a payment of a promissory note for 5*l.* could be no satisfaction of a debt of 15*l.*; *Fitch* v. *Sutton*, 5 East, 230, above cited; *Kearslake* v. *Morgan*, 5 T. R. 513, where it was held that the defendant might plead that he indorsed a promissory note, of which he was payee, to the plaintiff, in satisfaction of the demand. The giving the security of a third person for *part* of a debt only, as for part of a stipulated composition, will be no bar. (*Walker* v. *Seaborne*, 1 Taunt. 526.) But if, upon the faith of an agreement amongst creditors to take less than their whole demand, a third person becomes surety for the amount, a creditor, after receiving the amount, cannot sue the debtor, because it would be a fraud upon the surety. *Steinman* v. *Magnus*, 2 Camp. 124; 11 East, 390. If creditors agree to give time to their debtor for payment of their respective debts, and to take his promissory notes for their amount, they cannot, unless the agreement has been broken by the debtor, sue him for the amount. *Boothbey* v. *Sowden*, 3 Camp. 175. See *Cranley* v. *Hillary*, 2 M. & S. 122. *Bradley* v. *Gregory*,

(A) (It seems to be perfectly well settled, that an agreement to deliver goods, or a less sum of money in discharge of a greater, must be fully executed, otherwise it is no extinguishment. *Spruneberger* v. *Dentler*, 4 Watts, 126. *Rice* v. *Morris*, 4 Whart. 249. *Levering* v. *Rittenhouse*, 4 Id. 138. *Agnew* v. *Dorr*, 5 Id. 131. *Coit* v. *Houston*, 3 Johns. Ch. 243. See also *Thomas* v. *M'Daniel*, 14 John. R. 185. The plea should show what was given in satisfaction, allege delivery, and expressly aver an acceptance in satisfaction and discharge. *Bank* v. *Littlejohn*, 1 Dev. & Bat. 565. Accord and satisfaction is a good bar to an action of covenant, where the breach of covenant has accrued, but not where the breach has not accrued. *Harpe* v. *Hampton*, 1 Har. & J. 673. *Smith* v. *Brown*, 3 Hawks, 580.)

[1] Eng. Com. Law Reps. ii. 312. [2] *Id.* xxix. 20.

from one to forego the action, he cannot, it seems, proceed against the rest (*y*).

* An accord in respect of which a party may have remedy for a breach, is binding (*z*). *18

An agreement after action brought for an unliquidated demand, by which the plaintiff agrees to take a sum in discharge of the demand, is a good consideration for a promise by the plaintiff to stay the proceedings and pay his own costs (*a*).

ACCOUNT (A).

For the evidence to support a count upon an *account stated*, see Assumpsit.—With respect to the evidence in an *action* of account little

2 Camp. 383. The defendant agreed to accept a sum to be paid on a day fixed, and a *cognovit* for the residue; after the day passed, the money not being paid, he issued execution against the plaintiff for the whole amount; the plaintiff obtained a Judge's order for his discharge from the arrest on certain terms, but which he did not act upon, but brought his action for the taking in execution beyond the amount mentioned in the cognovit, and recovered large damages; the Court, on the ground of the damages being excessive, granted a new trial. Parke, J. held that the action was not maintainable, the Judge's order upon being drawn up being in the nature of an agreement, and one of the terms being that the plaintiff should not bring any action for the imprisonment. *Wentworth* v. *Bullen*,[1] 9 B. & C. 840. In an action against several, the defendants pleaded a former action brought by the plaintiffs for the same cause against one of the defendants, and that he paid a small sum into court, upon which the plaintiffs taxed and received their costs up to that time, and afterwards discontinued the action, and the defendant received his taxed costs; it was held that the issue in the second action, that the plaintiff accepted the said sum and taxed costs in full satisfaction, was not proved by the fact of the plaintiff having received the costs only, and that the defendant by accepting the taxed costs had assented to the discontinuance of the action. *Power* v. *Butcher*,[2] 10 B. & C. 329. It is not sufficient to show that the plaintiff agreed to receive a composition, and on the defendant's assigning particular debts to creditors to execute a general release, and that all the other creditors accepted the composition and executed the release, without proving a tender of the notes to the plaintiff. *Cranley* v. *Hillary*, 2 M. & S. 120, and see *Walker* v. *Seaborne*, 1 Taunt. 526. *Oughton* v. *Trotter*, 2 N. & M. 71. But it would it seems be sufficient to show that the notes were tendered. *Oughton* v. *Trotter*[3], 2 N. & M. 71, and see *Bradley* v. *Gregory*, 2 Camp. 383. *Butler* v. *Rhodes*, 1 Esp. C. 226. Creditors agreed to accept payment by the debtor's covenanting to pay to a trustee of their nomination one-third of his annual income; the creditors nominated no trustee, and the agreement was not acted on, but it was held that the agreement though not properly an accord and satisfaction was a good defence under the general issue, it being a new agreement with the defendant, the consideration of which to the creditor was forbearance by all the other creditors. *Good* v. *Cheesman*,[4] 2 B. & A. 329. And where an agreement with creditors has been partly executed, and terms afterwards dispensed with by a part only of the creditors, it was held that a creditor party to the agreement but not to the dispensation could not sue for his original debt. *Cock* v. *Saunders*, 1 B. & A. 46. The plaintiff and other creditors of the plaintiff agreed to take a composition of 5*s*. in the pound, payable by notes at four and eight months, but there being a dispute between the plaintiffs and defendants as to the balance due, the plaintiffs promised to adjust their account with one of the defendants, and the defendants said they would do as the other creditors did; after some dispute as to the amount, the plaintiffs' attorney offered to pay the composition on the sum claimed by the defendants, which was the sum really due; the plaintiffs' attorney refused and claimed the whole balance, and it was held that the plaintiffs, although no tender had been made, were entitled to no more than the composition upon the balance. *Reay* v. *White*, 1 Cr. & M. 748. But if the debtor wilfully prevent the creditor from receiving the benefit of the composition, the latter is remitted to his right. *Garrard* v. *Woolner*,[5] 8 Bing. 258. So such an agreement may be defeated by evidence of fraud, as if the debtor wilfully withhold from the creditor information respecting his estate. *Vine* v. *Mitchell*, 1 M. & R. 337.

(*y*) *Dufresne* v. *Hutchinson*, 3 Taunt. 117.

(*z*) *Cartwright* v. *Cooke*,[6] 3 B. & Ad. 701. An accord is good with mutual promises to perform, although the thing be not performed at the time of the action. Com. Dig. Accord, [B.] 4.

(*a*) *Wilkinson* v. *Byers*,[7] 1 Ad. & Ell. 106; and *semble*, per Littledale, J., so it would in case of liquidated demand. A treaty is proved between two for the renunciation by the one of a right of action against the other; it is also proved that the latter has repudiated all knowledge of such an agreement; the presumption is that none was concluded, and the former may sue on his original right. *Smith* v. *Dickinson*, 3 B. & P. 630.

(A) (As the action of account render has become nearly obsolete in England, there is no title for it in the text; the subject has, however, been, and even now is, too important in the United States to be overlooked; though in Massachusetts the action has been abolished by the revised statutes and in Pennsylvania it will probably lose its importance from the full grant of chancery powers to the courts in matters of account.

An action of account render will lie in all cases where one man has received money as the agent of ano-

[1] Eng. Com. Law Reps. xvii. 503. [2] *Id.* xxi. 89. [3] *Id.* xxviii. 353. [4] *Id.* xxii. 89. [5] *Id.* xxi. 296. [6] *Id.* xxiii. 165. [7] *Id.* xxviii. 48.

need be said, since the proceeding seems to be obsolete. The evidence depends upon the nature of the plea in bar, which alleges that the de-

ther, and where relief may be had in chancery, per Rogers, J., *Bredin* v. *Kingland*, 4 Watts, 422; *Mumford* v. *Avery*, Kirby, 163. See also *Hawley* v. *Cramer*, 4 Cow. 717; *Irvine* v. *Hanlin*, 10 Serg. & R. 219. But every bailment is not a trust involving an account in equity; per Baldwin, J. *Baker* v. *Biddle*, 1 Baldw. 423; and, to support this action, a contract express or implied must be shown. *King of France* v. *Morris*, cited 3 Yeates, 251. Thus it will not lie to recover mesne profits, *Harker* v. *Whitaker* 5 Watts, 474. Tenants in common of a tract of land cannot maintain a *joint* action of account render to recover the proceeds of the land from one who is liable upon an implied contract to account for them. *M'Creary* v. *Ross*, 7 Watts, 483.

In general, the evidence for the plaintiff must conform to the declaration in respect to the material averments, which will be briefly noticed. If the defendant is charged as bailiff or receiver, the allegation must be proved as laid; and if he is tenant in common, he must be so charged. *Griffith* v. *Willing*, et al. 3 Binn. 317. *Jordan* v. *Wilkins*, 2 Wash. C. C. R. 482. *Sargent* v. *Parsons*, 12 Mass. R. 157. *Wheler* v. *Horne*, Willes, 208. For the action of account did not lie against tenants in common and joint tenants, before it was given by statute 4 & 5 Ann. c. 16, s. 27, and they are only answerable for what they have *actually* received, and are not allowed costs and expenses; guardians and bailiffs are answerable for what they *might* have received, reasonable charges and expenses being deducted; receivers at common law were only obliged to account for what they had *actually* received, but no allowance was made to them except in some special cases in favour of trade and merchandise. 1 Selw. 2, n. 1, 2, 3. 1 Co. Litt. 166, n. 17, 18. 1 Co. Litt. 173. 3 Co. Litt. 343, 347.

But the rule, that no one shall recover more damages than he has declared for, is not applicable to account render. *Gratz* v. *Philips*, 5 Binn. 564.

If the defendant is charged as receiver, the declaration must state by the hands of whom the money was received; Bull. N. P. 125; *Jordan* v. *Wilkins*, *supra; Bishop* v. *Eagle*, 11 Mod. 186; *Walker* v. *Holyday*. 1 Com. R. 272; 3 Co. Litt. 344; 1 Vin. Ab. 146, 175-6; since when the money is alleged to have been received from the plaintiff himself, the defendant may wage his law. *Hodsden* v. *Harridge*, 2 Saund. 65. *Mood* v. *the Mayor of London*, 5 Salk. 683. But if the defendant is charged as receiver by the hands of *A.*, although the burthen of proof lies on the plaintiff, and such a receipt ought to be proved, yet it is sufficient to show, that *A.* directed the defendant to borrow of another to pay the plaintiff; that the defendant borrowed the money accordingly, and that *A.* gave bond to the lender. *Harrington* v. *Deane*, Hob. 36; Bull. N. P. 125. See also *Spalding* v. *Dunlap*, 1 Root. 319; *Thouron* v. *Paul*, 6 Whart. 615.

It has been held, that, as between partners, it is sufficient to charge the defendant, generally, with the receipt of money to their joint benefit, and if the plaintiff prove that a partnership existed, that the defendant was the acting partner, and that he received any part of the sum charged, from any of the persons mentioned in the declaration, he is entitled to a general verdict on the issue of *ne unques receiver*. *James* v. *Browne*, 1 Dall. 339; but see *Jordan* v. *Wilkins*, *supra*. The property of the goods bailed or the money received, must be correctly stated and proved as stated. *Jordan* v. *Wilkins*, *James* v. *Browne*, *supra*. If there are more than one defendant, there must be a joint liability on their part to render an account to the plaintiff. *Whelen* v. *Watmough*, et al., 15 Serg. & R. 158. It has been held, that unless a settlement has been made, and a balance struck, between partners, where there are two, the remedy is by action of account render; but where there are more than two, the only proper mode of proceeding is by a bill in equity. *Beach* v. *Hotchkiss*, 2 Conn. R. 425; but see the remarks of Duncan, J. on this case, in *Whelen* v. *Watmough*, et. al., *supra*.

On a reference to auditors, under a judgment *quod computet*, all articles of account between the parties incurred since the commencement of the suit, are to be included by the auditors; and the whole transaction between them are to be brought down to the time when they made an end of the account. *Couscher* v. *Toulam*, 4 Wash. C. C. R. 442. On the trial of issues certified by the auditors, however, the plaintiff cannot give evidence of moneys received before the time laid in the declaration. *Sweigart* v. *Cowmarter*, 14 Serg. & R. 200.

The *evidence* for the defendant may readily be ascertained by what has been said in respect to the evidence for the plaintiff. A few principles in relation to the proper pleas in this action may render the subject more plain. There is no general issue. 1 Chit. Pl. 127. The defendant may plead in bar his infancy, or that he has fully accounted, or the statute of limitations. 1 Chit. Pl. 429, 430. 1 Selw. 3. 1 Co. Lit. 172-3. 3 Co. Lit. 343. In general, matter pleadable in bar cannot be pleaded before the auditors. *Bredin* v. *Divin*, 2 Watts, 15. If a party is once chargeable and accountable, he cannot plead in bar, but must plead before the auditors, except in the case of the pleas of release *plene computavit* or statute of limitations, and even in these cases, he must plead specially and cannot give them in evidence in the plea of *ne unques receiver*. *Godfrey* v. *Saunders*, 3 Wils. 94. 1 Chit. Pl. 430.

Where goods are consigned to the defendant for sale, under his agreement, to return those unsold, the plea of *plene computavit* cannot be maintained by proof of the rendering an account sales of such of the goods as have been sold, the remainder not having been returned. *Read* v. *Bertrand*, 4 Wash. C. C. R. 556. The plea of *plene computavit*, when added to that of *ne unques*, bailiff, &c., does not admit the liability of the defendant to account. *Whelen* v. *Watmough*, *supra*. Where the defendant is bound to account for a part only of the goods mentioned in the declaration, a general verdict is good. *Sturges* v. *Bush*, 5 Day, 452; for a general verdict for the plaintiff, and a judgment *quod computet*, do not conclude the defendant as to the dates and sums mentioned in the declaration; but the auditors may make the proper charges and allow the proper credits without regard to the verdict. *Newbold* v. *Sims*, 2 Serg. & R. 317. The legislature of Pennsylvania, by the act of the 13th of Oct. 1840, have changed the mode of proceeding in this action.)

fendant never was bailiff or receiver to the plaintiff, or that he has accounted, or that the plaintiff has released him (*b*), &c.

Upon a plea that he was never receiver, the defendant cannot show that he received the money from the plaintiff by way of bailment, to deliver to another person, and that he did deliver it accordingly; for he did receive the money although he was to be accountable only conditionally, and therefore the evidence does not support the plea (*c*). Neither under such a plea can he give a release in evidence (*d*). The burthen of proof on such a plea lies upon the plaintiff (*e*). Where he charges the defendant as receiver by the hands of *A.*, it is sufficient for him to prove that *A.* directed the defendant to borrow of another to pay the plaintiff, and that the defendant borrowed accordingly, and that *A.* gave his bond to the lender (*f*).

ACKNOWLEDGMENT. *See* ADMISSION.—FRAUDS, STATUTE OF.

ACQUITTAL. *See* VOL. I. P. II. tit. JUDICIAL INSTRUMENTS.

ACTION, COMMENCEMENT OF, HOW PROVED. *See* WRIT.—LIMITATIONS.—TIME.

ACTS OF PARLIAMENT. *See* tit. STATUTE.

ADMINISTRATOR. *See* tit. EXECUTOR.

ADMISSIONS.

Nature of admissions.

IT is a matter of obvious and daily remark, how much of the materials of evidence in ordinary practice is derived from the admissions, direct and indirect, of the parties themselves, and how difficult it would frequently be, if not impossible, to establish the truth by means of any other evidence. Evidence of this kind admits of great variety both in its nature and application. In many instances the admission is *directly and expressly* made with a view to establish the fact, and in order to supersede the necessity of any other proof; as where it arises upon the face of the pleadings, or is made by matter of record; or by specialty, by which the party is estopped *from afterwards denying the admitted fact. In other instances, although *19
there be no direct and express admission for such a purpose, yet if a representation be made of any fact, with a view to influence the conduct of another, or to derive an advantage to the party, and which cannot afterwards be denied without a breach of good faith, such an admission will not only be evidence of the fact, but will usually preclude the party who has made it from insisting upon the contrary. In such cases the admission does not operate merely as presumptive evidence of the actual truth of the fact, which must give way to positive proof of the contrary, but precludes, and as it were *estops the party*, on grounds of policy, from repudiating his own representation, and renders the actual truth of the fact immaterial. In other instances again, such evidence rests simply on the presumption that the party would not have admitted a fact contrary to his own interest, unless it had been true: such admissions are frequently of the most forcible nature, as in the case of a confession of guilt by a prisoner (*g*). It is a most general and extensive rule, that all a man's acts and declarations shall be admitted in evidence whenever they afford any presumption against him: for it is to be presumed that he acted or spoke consistently with his knowledge of the truth. All presumptions founded upon a man's conduct may be referred to this head, for a man's acts and conduct are indications which frequently afford presumptions as strong as express declarations; the very silence of a party will frequently supply a strong inference; as,

(*b*) 1 Roll. Ab. 121.
(*c*) 2 Roll. Ab. 683. Selw. N. P. 5.
(*d*) *Willoughby* v. *Smalt*, 2 Brownl. 24.
(*e*) Hob. 36.
(*f*) *Harrington* v. *Deane*, Hob. 36.
(*g*) Vide *infra*, ADMISSIONS IN CRIMINAL CASES.

for instance, where one makes a claim upon another, before witnesses, the justice of which the latter does not deny (*h*) (A).

Admissions made with a view to evidence.

The admissibility and effect of evidence of this description will be considered generally, with respect to the *nature and manner* of the admission itself; and secondly, with respect to the *parties* to be affected by it. In the first place, as to the nature and manner of the admission, it is either made, *first*, expressly with a view to evidence; or, *secondly*, with a view to induce others to act upon the representation; or, *thirdly*, it is an unconnected or casual representation. In general, a party cannot contradict that by evidence which he has admitted on the pleadings; nor can the jury find any fact contrary to such admissions, for they are sworn to try the matter in issue between the parties, so that nothing else is properly before them (*i*).

It is a general rule that what is admitted on record must be taken to be proved, and cannot be disproved (*k*). And also that whatever is pleaded and not denied is to be taken as admitted (*l*). But it seems that where a
*20 party *in pleading admits, because he does not deny, a part alleged by the adversary, it is not to be taken as if proved in evidence, so as to warrant such inferences as might have been made had the fact been proved in evidence (*m*). A plea of the general issue usually admits the title of the plaintiff to sue in the special character of executor or administrator (*n*); in respect of a cause of action arising in the lifetime of the testator or testatrix. In an action by a husband and wife, the plea of the general issue admits the marriage (*o*). In an action on the case for negligent driving of a carriage by the defendant's servant to the injury of the plaintiff's person, the ownership of the carriage and the fact of its having been driven by the defendant's servant is admitted by the plea of not guilty (*p*).

An admission upon a plea does not operate as an admission with respect

(*h*) See as to an admission by a defendant that his trade is a nuisance, *R.* v. *Neville*, Peake's C. 91. Admissions implied from the *acquiescence* of a party, *Neale* v. *Parkin*, 1 Esp. C. 229. *Doe* v. *Pye*, 1 Esp. C. 364. An admission that a debt was not due to an insolvent who had omitted to insert it in his schedule, *Nicholls* v. *Downes*, 1 M. & R. 13.

(*i*) B. N. P. 298. So the payment of money into court admits the character in which the plaintiff sues, and his right to recover at least to the amount of the money so paid. 4 T. R. 579. 2 T. R. 275. See tit. PAYMENT INTO COURT.

(*k*) B. N. P. 298. And see *Evans* v. *Ogilvie*, 2 Y. & J. 79.

(*l*) *Wimbush* v. *Tailbois*, Plowd. 48. 2 Lutw. 1215. B. N. P. 298. In such case the jury cannot find to the contrary. 2 Lutw. 1215. But no more is admitted than is stated. *Williams* v. *Sills*, 2 Camp. 509. *Watson* v. *King*, 4 Camp. 272. *Infra*. tit. COVENANT. *Dunston* v. *Tresider*, 5 T. R. 2. *Infra*, tit. TRESPASS. The plea of non-assumpsit does not admit any immaterial allegation in the inducement. *Bennion* v. *Davison*, 3 M. & W. 642. Nor any title but such as is stated in the declaration. Where the declaration states letters of administration which on the face of them are void, the plea of the general issue does not admit a title sufficient to enable the plaintiff to recover. *Adams* v. *Savage*, 6 Mod. 134. A new assignment of unnecessary violence to a plea by the defendant of an entry to abate a nuisance, admits the nuisance. *Pickering* v. *Rudd*,[1] 1 Starkie's C. 56.

(*m*) Per Alderson, B. in *Edmonds* v. *Groves*, 2 M. and W. 642, *supra*. But note, that it was unnecessary in that case to decide the point. The defendant pleaded, by way of set-off, that the plaintiff made his promissory note payable to *A. C.*, and that the administrator of *A. C.* indorsed it to the defendant. Replication that the supposed cause of action did not accrue to the defendant within six years. The making of the note and the indorsement were held to be admitted by the replication, and also that the defendant might avail himself of a memorandum of the payment of interest written on the note by *A. C.* to bar the Statute of Limitations. *Gall* v. *Apern*,[2] 1 Ad. & Ell. 102.

(*n*) See tit. EXECUTOR.

(*o*) See tit. HUSBAND AND WIFE.

(*p*) *Emery* v. *Clarke*, 2 Mo. & Ry. 260. *Taverner* v. *Little*,[3] 5 Bing. N. C. 678. *Wolfe* v. *Beard*, Q. B. cited 2 Mo. & R. 261.

(A) (A man's own allegations in the record of a suit are the highest evidence against him; their effect cannot be destroyed or weakened by any contradicting evidence. *Delacroix* v. *Prevost's heirs*, 6 Martin, 280. *Latapie* v. *Gravier*, 8 *Id.* 317.)

[1]Eng. Com. Law Reps. ii. 293. [2]*Id.* xxviii. 46. [3]*Id.* xxxv. 269.

to the proof of an issue upon any other plea (*q*); and although the form of protestations is still adhered to in pleading, for the purpose of precluding the inference (*r*) that the party pleading one matter meant to admit another, they seem to be but of little use at the present day.

By letting judgment go by default the defendant admits a cause of action, and therefore he cannot afterwards insist on fraud on the part of the plaintiff (*s*). Where a plea to a count in indebitatus assumpsit is pleaded as to a precise sum, that sum, although laid under a *videlicet*, is admitted to be due, and must be covered in order to warrant a verdict for the defendant (*t*). So where a party has solemnly admitted a fact under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it recites (*u*). Thus, if one deed be recited in another, which latter *is proved to be executed by the party, the recital will be *21
evidence of the execution of the recital deed (*x*). In the case of *Shelley* v. *Wright* (*y*) it was held that the obligor of a bond was estopped from averring against the obligee, that he had not received certain sums of money for the obligee, recited in the condition of the bond to have been so received by him. So a recital of a lease in a deed of release is evidence of the execution of such a lease (*z*). So the date of a lease is evidence that it was executed the same day (*a*). But the whole of a recital is to be taken; and therefore if a patent be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender (*b*). Where a covenant to lay out a sum in an annuity recited that the covenantor had given a bond for the payment of the money, the recital was held to be evidence of the bond (*c*). The subscription of a paper by one as a witness is not of itself proof of acquiescence in the contents (*d*).

So in an action against a master for not inserting the true consideration

(*q*) Vol. I. p. 337. Nor can a notice of set-off or particular of it be used as evidence on the other side. Ib. And see *Miller* v. *Johnson*, 2 Esp. C. 602. *Stracy* v. *Blake*, 1 M. & W. 168. The statements in a plea held bad on demurrer are not evidence for the plaintiff on the general issue. *Montgomery* v. *Richardson*,[1] 5 C. & P. 247. Neither a plea nor demurrer to a bill in equity is evidence by way of admission against the defendant in another transaction. After a demurrer to a bill in equity overruled, the party may still go on and answer; and consequently the demurrer is not to be taken as an absolute admission of the facts charged. And on the same principle a plea in equity cannot be so, for it amounts merely to a statement of circumstances to prove that, supposing the facts charged to be true, the defendant is not bound to answer. *Tomkins* v. *Ashby*,[2] 1 M. & M. 32. A plea in a discontinued action is not evidence against the defendant in another action. *Allen* v. *Hartley*, Doug. 20. A demurrer admits those facts only which are well pleaded.

(*r*) See Co. Litt. 124, b. Doct. Pl. 295. 2 Will. Saund. 103, n. 1. *Montgomery* v. *Richardson*,[1] 5 C. & P. 247. *Firmin* v. *Crucifix*,[1] Ib. 98.

(*s*) *East India Company* v. *Glover*, 1 Stra. 612.

(*t*) *Cousins* v. *Paddon*, 2 C. M. & R. 547. But the plea is for this purpose divisible. Ib. And see *Green* v. *Marsh*, 4 Dow, P. C. 669.

(*u*) B. N. P. 298. See Vol. I. Ind. tit. Estoppel. In other cases, although the parties may be estopped, the jury are not. *Goddard's Case*, 2 Co. 4, b.; B. N. P. 298.

(*x*) See tit. Recital.—Deed; and 1 Salk. 186. The recital of an ancient charter in a modern one is evidence. Per Abbott, J. *Gervis* v. *Great Western Canal Company*, 5 M. & S. 78.

(*y*) Willes, 9. See also *Cossens* v. *Cossens*, Willes' R. 25. And see *Bowman* v. *Taylor*, 4 N. & M. 264. *Rees* v. *Loyd*, Wight. 123.

(*z*) Per Holt, J. *Ford* v. *Gregy*, 1 Salk. 186. Com. Dig. Estoppel, [B.] 5. *Crease* v. *Barrett*, 1 C. M. & R. 919.

(*a*) 1 Salk. 485. In trespass against a sheriff, a bill of sale, reciting the writ, the taking, and the sale of the goods, is evidence against him of these facts. *Woodward* v. *Larking*, 3 Esp. C. 286.

(*b*) 2 Vent. 171. 1 Com. Dig. Evidence, [B.] 5. A recital in a bond that the parties had agreed to execute a bond in the sum of 500*l.*, does not confine the bond to that sum if actually executed in the penal sum of 1,000*l.* *Ingleby* v. *Swift*,[3] 3 M. & S. 488. 10 Bing. 84.

(*c*) 2 P. Wms. 432. *Marchioness of Annandale* v. *Harris.*

(*d*) 1 Esp. C. 57. Where a party executed a deed (for raising money on an annuity) reciting a will, and that the trustees had not sold, and that he was in possession by their permission; held that such admission was evidence to show that he was not the legal owner of the estate. *Doe* v. *Coulthred*, 2 Nev. & P. 165.

[1]Eng. Com. Law Reps. xxiv. 302. [2]*Id.* xxii. 239. [3]*Id.* xxv. 36.

in an indenture of apprenticeship, the recital in that part of the indenture executed by the defendant, that *A. B.* put himself apprentice, &c., is evidence of the fact against the defendant (*e*). So a grant to a corporation by a particular name is evidence as against the grantor, that the corporation was at that time known by that name (*f*). But a recital will not operate as an estoppel, or as evidence against one who was neither a party to the deed, nor claims under a party (*g*). Although he may claim title under a deed containing such recital (*h*). Where a counsel in a cause admits a fact, even by inference, it is to be taken as proved (*i*).

Admissions which have been acted upon.

Secondly, there is a strong line of distinction between admissions or conduct upon which a party has induced others to act, or by means of which he has acquired some advantage to himself, and those admissions which have been made without any reference to the matter litigated, and which are not immediately connected with it: in the former case the party is usually concluded absolutely by such an admission; as where he makes an

*22 *admission for the purpose of trial (*k*). Where a man has cohabited with a woman, and treated her in the face of the world as his wife, he cannot afterwards object to a creditor who supplied her with goods, that she is not his wife (*l*). So where a man has held himself out to the world in a particular character, he cannot afterwards divest himself of it, in order to claim that to which under the assumed character he is not entitled (*m*). A man who acquiesces several years in a commission of bankrupt, and solicits the votes of creditors in the choice of assignees, cannot afterwards dispute the commission (*n*). So a petitioning creditor cannot dispute the debt in an action at the suit of the assignees (*o*). So a defendant is estopped, by the recognizance of bail entered into for him by the name by which he is sued, from pleading a misnomer, although he is no party to the recognizance (*p*); for in these and other such cases the party, by taking the benefit of the act, has conclusively adopted it. So a tenant cannot dispute his landlord's title, nor can a copyhold tenant dispute the title of the lord of the manor (*q*). A tenant is concluded by the statement which he makes to his landlord, as to the time of entry (*r*). Respondents obtaining a respite of an appeal cannot afterwards object the want of notice of appeal (*s*). Where one being asked his name previous to the suing out of process, represents it to be *John*, he cannot in an action of trespass against the sheriff, insist that his name is *William* (*t*). So where a man has made a deliberate administration *in rem.*, by giving his promissory note, or by entering into a bond, or other obligation, for the amount of goods sold, he

(*e*) *Burleigh* v. *Stibbs*, 1 T. R. 465. (*f*) *Mayor of Carlisle* v. *Blamire*, 8 East, 493.

(*g*) 1 Salk. 186. Com. Dig. Evidence, [B.] 5. Ibid. Estoppel, [A.] 2. But it may be secondary evidence where the original is lost. 1 Salk. 286. Com. Dig. Evidence, [B.] 5. But it operates against those who claim under the party. *Fitzgerald* v. *Eustace*, Bac. Ab. Ev. 647. 2 P. Wms. 432.

(*h*) A deed conveying an estate to *B.*, but to which *B.* is no party, recites the bankruptcy of *A.*; *B.* conveys the estate by a deed which contains no such recital; the former deed is not evidence against *B.* of the bankruptcy of *A.* in a suit as to other lands. *Doe* v. *Shelton*,[1] 3 Ad. & Ell. 265.

(*i*) *Stracy* v. *Blake*, 1 M. & W. 168. As to admissions by an attorney, see tit. Attorney.

(*k*) Such an admission must either be proved to have been signed by the attorney on the record, or by the authority of the party himself. See Vol. I. and Ind. tit. Admissions.

(*l*) *Watson* v. *Threlkeld*, 2 Esp. 637. *Robinson* v. *Nahon*, 1 Camp. 245. *Munro* v. *De Chemant*, 4 Camp. 215.

(*m*) *Watson* v. *Threlkeld*, 2 Esp. 637. *Robinson* v. *Nahon*, 1 Camp. 245.

(*n*) *Like* v. *Howe* and *Rogers*, 6 Esp. C. 20. *Flower* v. *Heebee*, 2 Ves. 236. (See also *Clarke* v. *Clarke*, 6 Esp. C. 61.)

(*o*) *Harmer* v. *Davis*, 1 Moore, 300. (*p*) *Meredith* v. *Hodges*, 2 N. R. 453.

(*q*) *Doe* d. *Nepean* v. *Budden*,[2] 5 B. & A. 626. See tit. Use and Occupation, and tit. Ejectment.

(*r*) *Doe* d. *Eyre* v. *Lambley*, 2 Esp. C. 635.

(*s*) *R.* v. *Justices of Carmarthenshire*,[3] 4 B. & Ad. 563.

(*t*) *Price* v. *Harwood*, 3 Camp. 108; and see *Bass* v. *Clive*, 4 M. & S. 13.

[1]Eng. Com. Law Reps. xxx. 90. [2]*Id.* vii. 214. [3]*Id.* xxiv. 118.

is conclusively bound by it in the absence of fraud, or perhaps, of mistake; for the very intent and purpose of the acknowledgment is, that it shall operate as conclusive evidence against the party (*u*). Where, however, a receipt has been given for money, it is not so conclusive but that the party may show that it was given under a mistake (*x*), and that he did not receive the sum or thing in question (A). So a parish certificate is evidence, for all the rest of the world, against the parish which granted it, and conclusive as to the parish to which it was directed (*y*). Where a plaintiff signed himself *M. D.* it was held that he was to be taken for a physician, and that he could not maintain an action for fees (*z*). So it has been said that proof of the bankrupt's submission to a commission is evidence against him of his being such (*a*), as, if he obtain his discharge as a bankrupt under a Judge's order (*b*). But the *mere surrender of the bankrupt is not sufficient, because it is compulsory (*c*). The fact that a party has proved a debt under a commission of bankrupt is not even *primâ facie* evidence, in an action by the assignees of the bankrupt against that party, of the requisites to support the commission (*d*); for a creditor has not the means of knowing what was the evidence upon which the party was declared a bankrupt; and by proving the debt he at most gives credit to the petitioning creditor, and the commissioners, that the former has not sued out a commission, nor the latter declared the party bankrupt, without proper grounds (*e*); and it is not reasonable that he should be put to the dilemma of being barred by a certificate, or of being taken to have admitted that every act necessary to support the commission really existed. Such admissions (*f*), though they be conclusive, are not *estoppels* in the *23

(*u*) See *Nash* v. *Turner*, 1 Esp. C. 117. *Solomonson* v. *Turner*,[1] 1 Starkie's C. 51. Vid. *infra*, Assumpsit.
(*x*) *Stratton* v. *Rastall*, 2 T. R. 366. *Benson* v. *Bennett*, 1 Camp. 394. *Bristow* v. *Eastman*, 1 Esp. C. 172.
(*y*) 4 T. R. 256. *R.* v. *Headcorn*, Burr. S. C. 253.
(*z*) *Lipscomb* v. *Holmes*, 2 Camp. 441. See *Chorley* v. *Bolcott*, 4 T. R. 317.
(*a*) *Haviland* v. *Cook*, 5 T. R. 655.
(*b*) *Goldie* v. *Gunstone*, 4 Camp. 381. *Mercer* v. *Wise*, 3 Esp. 219. *Watson* v. *Wace*,[2] 5 B. & C. 153. *Secus*, if he make the admission merely in a transaction with third persons. *Heane* v. *Rogers*,[3] 9 B. & C. 577. See 11 Ves. 409.
(*c*) Per Ld. Ellenborough, 4 Camp. 382. Neither is he precluded by a petition to the Chancellor to enlarge the time of surrendering. *Mercer* v. *Wise*, 3 Esp. C. 219. Nor by an application to a commissioner to appoint an official assignee. *Munk* v. *Clarke*,[4] 2 Bing. N. C. 299.
(*d*) *Rankin* v. *Horner*, 16 East, 191. *Stewart* v. *Richman*, 1 Esp. C. 108. It had before been held, that the proving a debt under a commission of a bankrupt *estopped* the party from afterwards disputing it. Per Lord Mansfield, *Walker* v. *Newell*, cited 3 T. R. 322.
(*e*) *Rankin* v. *Horner and another*, 16 East, 191. But see *Maltby* v. *Christie*, 1 Esp. C. 340. *Walker* v. *Burnell*, Dougl. 303; 3 T. R. 321.
(*f*) See further Vol. II. tit. Presumption. An executrix who uses the testator's goods as her own, and afterwards as her husband's, cannot object to their being taken in execution for the husband's debt. *Quick* v. *Staines*, 1 B. & P. 293. See tit. Sheriff. A petitioning creditor cannot dispute the debt in an action by the assignees. *Harmer* v. *Davis*, 1 Moore, 300. A distress on one as tenant is evidence of the tenancy. *Lord Falmouth* v. *Swann*,[5] 8 B. & C. 459. Where *A. B.* executed a warrant of attorney in the name of *C. B.*, held that judgment was properly entered up, and *fi. fa.* issued and executed against him, by that name. *Reeves* v. *Slater*,[6] 7 B. & C. 873. The obligor of a bond represented to a purchaser that it was a valid instrument, and would be paid when due; he cannot afterwards set up as a defence that it was void, as having been given for a gaming debt. *Davison* v. *Franklin*,[7] 1 B. & Ad. 142. One of a committee of a

(A) (A receipt for money by a stranger to a suit, cannot be given in evidence on the trial of the cause. *Craig* v. *Craig*, 5 Rawle, 91. *Townsend* v. *Kerns*, 2 Watts, 180. But to this rule there is the exception of a payment to a public officer Per Gibson, Ch. J. in *M'Call* v. *Neely*, 3 Watts, 73. See also *Cluggage* v. *Swan*, 4 Binn. 150. Payment may be proved by parol, though there be a receipt for it in writing, without producing or accounting for it. *Southwick* v. *Hayden*, 7 Cow. 334. Though a receipt in writing and even under seal be absolute in its terms, it is not conclusive, and it may be rebutted by parol evidence. *Johnson* v. *Weed*, 9 John. R. 310. *Thompson* v. *Fausset*, 1 Peters, C. C. R. 182. *Watson* v. *Blaine*, 12 Serg. & R. 131. *Tucker* v. *Maxwell*, 11 Mass. R. 143.)

[1]Eng. Com. Law Reps. ii. 291. [2]*Id.* xii. 77. [3]*Id.* xvii. 449. [4]*Id.* xxix. 345. [5]*Id.* xv. 264. [6]*Id.* xiv. 91. [7]*Id.* xx. 363.

strict and technical sense, which, to be conclusive, must be pleaded; but are conclusive upon the evidence, on the principles of good sense and sound policy (*g*).

Collateral admissions.

Thirdly. Where the admission or declaration is quite foreign to the question pending, although admissible, yet it is not in general *conclusive* evidence (A), and though a party may, by falsifying his former declaration or oath, show that he has acted illegally and immorally, yet as he is not guilty of any breach of good faith in the existing transaction, and has not induced others to act upon his admission or declaration, nor derived any benefit from it against his adversary, he is not bound by it; the evidence in such cases is merely presumptive, and liable to be rebutted. Where the admission consists in a loose and careless declaration, if it be evidence at all, it is of little weight (*h*). Proof that *B.* has dealt with *A.* as the
*24 farmer *of the post-horse duties is evidence in an action by *A.* against *B.*, to prove that he is so (*i*). Upon an indictment under the 27th of Eliz. for remaining in this kingdom forty days after taking orders from the See of Rome, proof that the defendant had officiated here as a Romish priest was held to be evidence of his having taken orders (*k*).

In an action for non-residence, proof that the defendant has acted as the parson, is evidence against him that he is such (*l*). In an action for not setting out tithes, proof that the defendant has paid tithes to the plaintiff is evidence of his title to receive them (*m*). An acknowledgment by the defendant that his trade is a nuisance, is admissible, although not conclusive evidence against him, upon an indictment for setting up his trade at another place (*n*). Proof that *A. B.*, as the proprietor of a newspaper, had given security for the payment of the duties on advertisements, and had from time to time applied to the Stamp-office concerning duties on the paper, was held to be evidence that he was the publisher (*o*). A description by the party as to his situation is evidence against himself that he holds that situation (*p*). And therefore, on an information against a military officer for false musters, the returns themselves in which he described himself to be such officer were held to be evidence of the fact (*q*).

An advertisement by an auctioneer of the sale of the property of *A. B.* a bankrupt, is evidence in an action by him against the assignees that *A. B.* was a bankrupt (*r*). In an action for slandering the plaintiff in his pro-

company empowered by Act of Parliament to carry on certain works, is not estopped by having joined in making calls on subscribers, or by payment of calls, from disputing their validity, if illegal; for such calls being against law, no person could be misled. *Stratford and Moreton Railway Company* v. *Stratton*,[1] 2 B. & Ad. 518. A relator who did not concur in the election of the defendant, although he appeared afterwards to have acted and attended corporate meetings with him, may still sustain the application for a *quo warranto*. *R.* v. *Benney*,[2] 1 B. & Ad. 684; and see *R.* v. *Clarke*, 1 East, 38. *Secus* where he had concurred in the election of others at the time when the same objection to the title of the elected, and of which he sought to avail himself on the motion, was made and overruled. *R.* v. *Parkyn*,[2] 1 B. & Ad. 690; and see *R.* v. *Symonds*, 4 T. R. 233. *R.* v. *Mortlock*, 3 T. R. 300.

(*g*) See the observations of Abbott, L. C. J., 5 B. & C. 155.

(*h*) Burr. 2057; 2 Wils. 399; and Lord Ellenborough's observations, 1 M. & S. 636.

(*i*) *Radford* v. *M'Intosh*, 3 T. R. 682. And see *Peacock* v. *Harris*, 10 East, 104. *Lister* v. *Priestley*, Wightw. 67.

(*k*) *R.* v. *Kerne*, 2 St. Tri. 694. *R.* v. *Brommich*, 2 St. Tr. 966.

(*l*) *Bevan* v. *Williams*, 3 T. R. 635.

(*m*) Per Lord Kenyon, 3 T. R. 635; 4 T. R. 367, per Buller, J.

(*n*) *R.* v. *Neville*, Peake's C. 91.

(*o*) *R.* v. *Topham*, 4 T. R. 126.

(*p*) *R.* v. *Gardner*, 2 Camp. 513.

(*q*) Ibid.

(*r*) *Maltby* v. *Christie*, 1 Esp. C. 340. *Booth* v. *Coward*, 1 B. & A. 677. *Inglis* v. *Spence*, 1 Cr. M. & R. 432. So where the defendant, with a view to a commission, made affidavit that the party had become bankrupt. *Ledbetter* v. *Salt*,[3] 4 Bing. 623.

(A) (Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general and almost universal rule, inadmissible. *Robb* v. *Hackley*, 23 Wend. 50.)

[1]Eng. Com Law Reps. xxii. 130. [2]*Id.* xx. 472. [3]*Id.* xv. 91.

fession as an attorney, the words importing that the plaintiff was an attorney are evidence of the fact (*s*).

Where a lessee covenanted that the lease should be avoided by his bankruptcy, proof of his submission to a commission was held to be evidence of bankruptcy without proof of any act of bankruptcy (*t*).

The oath of a party taken before the commissioners of the income-tax is evidence upon an information under the game-laws (*u*), but not conclusive. So the omission of a debt by an insolvent in his schedule is evidence against him, although it does not stop him from suing (*x*). So in a suit between the lord of a manor and the devisee of a copyhold, the recital of the devise in *the admittance is evidence of the devise against the lord, *25
although it would not have been so against the heir (*y*).

In an action for bribing of one who had a vote at an election, the very offer to bribe is evidence against the defendant that the party solicited had a right to vote (*z*) (A).

In the case of *Morris* v. *Miller* (*a*) it was held, that, in an action for criminal conversation, an admission by the defendant that he had committed adultery with the wife of the plaintiff was not sufficient, without proof of a marriage in fact. But when this doctrine was urged in a subsequent case (*b*) the Court observed, as to the case of criminal conversation, "To be sure, a defendant's saying in jest, or in loose rambling talk, that he had lain with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if it were proved that the defendant had seriously and solemnly recognized that he knew the woman he had lain with was the plaintiff's wife, we think it would be evidence proper to be left to a jury, without proving a marriage."

Answers in Chancery, as has been seen, operate as admissions upon oath (*c*). It seems, however, that an admission by the defendant, even to an answer in Chancery, is merely secondary evidence as to the execution of a

(*s*) *Berryman* v. *Wise*, 4 T. R. 366. *Pearce* v. *Whale*,[1] 5 B. & C. 39; and see Vol. II. tit. LIBEL. In a *qui tam* action against a collector of taxes, it is not necessary to give in evidence his warrant. Proof that he has acted as collector is sufficient. *Lister* v. *Priestley*, Wightw. 67. Accounting with one as farmer of the tolls of a turnpike, who has assumed that character by consent of those concerned, estops the party from disputing the validity of his title, when suing by account stated for those tolls. *Peacock* v. *Harris*, 10 East, 104. In an action against overseers, acts done by them in that capacity are evidence of their being overseers. *Merrill's Lessee* v. *Whitechurch*, Salisbury assiz. 1817. But they were not concluded by the acts of former overseers, without regular proof of their appointment. Or by the act of a co-defendant previous to the commencement of his overseership.

(*t*) *Doe* v. *Hodgson*, *cor.* Abbot, L. C. J. Sitting after Easter T. 1823.

(*u*) *R.* v. *Clarke*, 8 T. R. 120. So a return under the stat. 1 & 2 G. 4, c. 87, of corn in the possession of a party, as sold and delivered to *B.*, does not preclude him from showing that it was delivered to *D.* on account of *B.*, but that *B.* was not to have possession before payment. *Woodley* v. *Brown*,[2] 2 Bing. 528.

(*x*) 3 Camp. 13.

(*y*) Lord Raym. 735.

(*z*) *Coombe* v. *Pitt*, Burr. 1586; and *Rigg* v. *Curgenven*, 2 Wils. 395. In both those cases the bribee was admitted to vote, which was held to be the strongest evidence of his right to vote; but Lord Mansfield and the rest of the Court (Burr. 1590), held expressly, that a man who had given money to another for his vote should not be admitted to say that he had no vote.

(*a*) Burr. 2057. *Qu.* whether this is the same with the case cited 2 Wils. 399, under the names of *Dr. Smith* v. *Miller*?

(*b*) 2 Wils. 399.

(*c*) *Supra*, Vol. I. tit. JUDICIAL INSTRUMENTS.

(A) (A promissory note void in law may be used as evidence of an acknowledgment of a debt to take the case out of the statute of limitations. *Utica Ins. Co.* v. *Kip*, 3 Wend. 369. But see *Law* v. *Merrills*, 6 Wend. 277. In prosecutions for bigamy, the mere confession of the defendant is not sufficient evidence of the first marriage. *The People* v. *Humphrey*, 7 John. R. 314. Aliter except in prosecutions for bigamy, and *crim. con.* actions. *Fenton* v. *Reed*, 4 John. R. 52.

[1]Eng. Com. Law Reps. xi. 138. [2]*Id.* ix. 509.

deed, and therefore does not supersede the necessity of proving it by the subscribing witness, because a fact may be known to the subscribing witness which is not known to the obliger, and he is entitled to avail himself of all the knowledge of the subscribing witness relating to the transaction (*d*). But this objection does not apply where the party enters into an admission with a view to the trial of the cause. And it has been held that a declaration by the lessee of a plaintiff in ejectment, that he has assigned a lease, is evidence of the fact (*e*).

So in some other cases, where the subject of admission is usually authenticated and proved in a formal and solemn manner, and the existence of the fact includes legal considerations not likely to be understood by the party, better evidence than his simple oral admission is frequently required; as, where a prisoner upon an indictment for bigamy has admitted the former marriage (*f*); for this, it has been held (*g*), does not supersede the necessity of formal proof of the first marriage.

A mere voluntary affidavit is evidence against the party who makes it as a confession (*h*). So, as has been seen in some cases, a bill in equity is
*26 evidence * against the complainant (*i*). So a paper written by a defendant, though signed by a third person, is evidence against him (*k*.)

Indirect admissions.

In general an admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence. As, for instance, where the existence of the debt, or of the particular right, has been inserted in his presence and he has not contradicted it. So an acquiescence and endurance, when acts are done by another, which, if wrongfully done, are encroachments, and call for resistance and opposition, are evidence, as a tacit admission that such acts could not legally be resisted (*l*).

(*d*) Per Le Blanc, J., *Call* v. *Dunning*, 4 East, 53; *Abbott* v. *Plumb*, Dougl. 205. But it has been held, that a declaration by the lessor of the plaintiff in ejectment that he has assigned a lease is evidence of the fact. *Doe* v. *Watson*,[1] 2 Starkie's C. 230.

(*e*) *Doe* v. *Watson*, 2 Starkie's C. 230. But a party's admission of having executed a bond does not supersede the ordinary proof. *Abbott* v. *Plumbe*, Doug. 205.

(*f*) See tit. Polygamy. So where the plaintiff in assumpsit had admitted his discharge under an insolvent act, which was set up as a defence. See 3 Camp. 136. So an admission by the plaintiff at a tavern that he had been discharged as an insolvent was held to be inconclusive, as comprising matter of law as well as of fact. *Summerset* v. *Adamson*,[2] 1 Bing. 73.

(*g*) By Le Blanc, J, York Assizes.

(*h*) Style, 446. *Sacheverel* v. *Sacheverel*, Bac. Ab. Ev. 628. An answer to a bill in Chancery filed against the defendant by a stranger, may be read to show the admission of a particular fact, though it is not evidence of a judicial proceeding. *Grant* v. *Jackson*, bart. *and others*, Peake's C. 203. An answer in Chancery, stating that the defendant "believes that *H. M.* was possessed of the leasehold premises mentioned in the bill," is evidence against him in an action of ejectment brought by the executor of *H. M.* to show that the testator had a chattel interest in the property. *Doe* d. *Digby* v. *Steele*, 3 Camp. 115. The holder of a bill overdue gives in a blank schedule under an insolvent act. This is not such an acknowledgment that the bill has been satisfied as will discharge the defendant, the acceptor. *Hart* v. *Newman*, 3 Camp. C. 13. See *R.* v. *Feversham*, 8 T. R. 352. A letter by a party, in which he speaks of a ship as his own ship, does not conclude him from showing that he used these expressions as agent to a third person. *Culloch* v. *Boyd*,[3] Holt's C. 487. In assumpsit for a copyhold fine, the defendant is not estopped by the rent reserved by him on the premises from showing the real value. *Lord Verulam* v. *Howard*,[4] 7 Bing. 327, and 6 M. & P. 148, and see *Halton* v. *Hussell*, 2 Str. 1042.

(*i*) Vide *ante*, Vol. I. Ind. tit. Judicial Instruments.

(*k*) *Alexander* v. *Brown*,[5] 1 Carr. 288.

(*l*) See the observations of Abbott, Ld. Ch. J. in *Steel* v. *Prickett*,[6] 2 Starkie's C. 471. If *A.* having title to premises in the possession of *B.*, suffer *B.* to make alterations inconsistent with such title, it is evidence to go to a jury of recognition of *A.* of the right of *B.* *Doe* d. *Winckley* v. *Pye*, esq. Principal of Barnard's Inn, 1 Esp. C. 364. And see *Doe* v. *Allen*, 3 Taunt. 78. Covenant by a lessee that the lease shall become void if he became bankrupt, proof of his submission to the commission is evidence, without proving an act of bankruptcy. *Doe* v. *Hodgson*, West. Sitt. after Easter Term, 1823, *cor.* Abbott, L. C. J. The drawer of a dishonoured bill objects to pay the amount, on the ground of his having received no consideration, but says nothing concerning the indorsement; his silence in this respect is not an admission of the handwriting of the first indorser. *Duncan* v. *Scott*, 1 Camp. C. 100. Although what has been said in the presence of a party, is admissible in evidence for the purpose of introducing or explaining anything said by him, or even of

[1]Eng. Com. Law Reps. iii. 328. [2]*Id.* viii. 255. [3]*Id.* iii. 165. [4]*Id.* xx. 149. [5]*Id.* xi. 288. [6]*Id.* iii. 433.

Where notice to quit is served personally upon a tenant, and he makes no objection to the time specified in the notice, it is *primâ facie* evidence of admission and acquiescence (*m*); but if the party cannot, or does not, read the notice when served, no such inference can be made (*n*).

Evidence of this class declines by gradual shades, from the most express and solemn admissions down to expressions and acts which afford but remote and weak presumptions as to the particular fact in question; for it has already been seen, that the conduct of the party himself who knows the truth of the fact, or who may be presumed to know it, is always evidence against himself (A).

An admission made for the purpose, as it is usually termed, of buying peace, is not allowed to be taken advantage of for the purposes of evidence, * since the offer may have resulted, not from a consciousness of the truth of the claim, but a desire to avoid litigation (*o*). And, therefore, where it appears to be probable that such was the motive, the evidence is not admissible (*p*) (B). But the offer of a sum of money by way of compensation is admissible, unless it be accompanied with a notification that it is made without prejudice, or is confidential (*q*). *27

So an admission made conditionally, where the condition has not been

raising an inference from his silence, the rule does not apply to assertions or declarations made by a third person in the presence and hearing of a party on an inquiry before a magistrate on a penal charge, even although the party might if he had chosen cross examined that third person or commented on his statement; for in such proceedings a regularity and order of proceeding is adopted which prevent a party from interposing when and how he pleases; and, consequently, the same inferences cannot be drawn from his conduct or his silence as in ordinary cases. *Melen* v. *Andrews*,[1] 1 Mood. & M. 336.

(*m*) See EJECTMENT BY LANDLORD.

(*n*) *Thomas* d. *Jones* v. *Thomas*, 2 Camp. 559. *Doe* v. *Forster*, 13 East, 405. *Doe* v. *Briggs*, 2 Taunt. 109.

(*o*) 3 Esp. C. 113. B. N. B. 236. 1 Esp. C. 143.

(*p*) And therefore it is said, that if *A.* sue *B.* for 100*l.*, and *B.* offer to pay 20*l.*, it shall not be received as evidence, for that neither admits nor ascertains any debt, and is no more than saying he would give 20*l.* to get rid of the action; but that if an account consist of ten articles, and *B.* admit that such a one is due, it will be good evidence for so much. Peake's Ev. 19, citing Bull. N. P. 236. In the case of *Waldridge* v. *Kennison*, 1 Esp. C. 143, Lord Kenyon is stated to have held, that an admission or confession made pending and under the faith of a treaty, and into which the party might have been led by the confidence of an expected compromise, could not be given in evidence to his prejudice; but that, under such circumstances, the admission of a fact, such as the handwriting of the party, which was not connected with the merits, might be received in evidence. The rule does not extend to an offer to refer, for that is not a concession for the purpose of peace, *Thomas* v. *Austen*,[2] 2 D. & R. 359; nor to a treaty which is concluded. *Frogwell* v. *Llewellyn*, 8 Price, 122.

(*q*) *Wallace* v. *Small*,[3] M. & M. 446. *Hill* v. *Elliott*,[4] 5 C. & P. 436. *Watts* v. *Lawson*, Ib. 447. The rule is applicable only to treaties for the purpose of ending suits which are not eventually brought to a conclusion; but does not apply to agreements perfected and executed, although the subject-matter and objects of such agreements may be a compromise of previously existing differences between the parties. *Froysell* v. *Lewelyn*, 9 Pri. 122. The defendant was sued for work done on premises in the occupation of his tenant; and upon an interview between the plaintiff and his attorney, the defendant and his tenant, it was agreed that the tenant out of the rent should pay the debt (which he accordingly did), and that the defendant should pay two-thirds of the costs; this not being done, the plaintiff proceeded in the action. At the trial he failed in proving the defendant's liability for the work, but relied on the arrangement so made as an admission of the debt. Held (per Littledale and Holroyd, JJ., *diss.* Bayley, J.) that, if even it were admissible in evidence, as being upon a negotiation for a compromise, it did not show an original right of action, although it might have been evidence to support a new ground of action in that agreement. *Lofts* v. *Hudson*,[5] 2 M. & Ry. 481.

(A) (If, after the dishonour of a note, the indorser promise to pay it, such promise is presumptive evidence of the demand and notice. *Breed* v. *Hillhouse*, 7 Conn. R. 523.)

(B) (*Peck* v. *Botsford*, 7 Conn. R. 172. *Williams* v. *Thorp*, 8 Cow. 201. *Spence* v. *Spence*, 4 Watts, 165. *Baird* v. *Rice*, 1 Call, 18. *Williams* v. *Price*, 5 Munf. 507. *Miller* v. *Halsey*, 2 Green. An offer to pay money by way of compromise is inadmissible in evidence, but the confession of particular facts, independent of an offer to pay, may be given in evidence against the party making it, although then treating for a compromise. *Marsh* v. *Gold*, 2 Pick. 285. *Gerrish* v. *Sweetser*, 4 Id. 374. *Delogny* v. *Rentoul*, 2 Martin, 175. See also *Hartford B. Co.* v. *Granger*, 4 Conn. R. 148. *Fuller* v. *Hampton*, 5 Id. 417.)

[1]Eng. Com. Law Reps. xxii. 329. [2]*Id.* xvi. 94. [3]*Id.* xxii. 355. [4]*Id.* xxiv. 399. [5]*Id.* xvii. 318.

Conditional admissions.

performed, or with reference to particular circumstances, or to the particular state of the pleadings, &c., is not admissible in evidence under different circumstances. It was once held, that admissions made upon a reference which turned out to be ineffectual, were not afterwards admissible; but Lord Kenyon said, in a subsequent case, that this was going too far, and that he should receive all such admissions as the party would be compelled to make by a bill of discovery (*r*), and the arbitrator may be called as a witness to prove them.

An agreement to admit a fact on the trial applies to every trial which the Court may direct (*s*).

Compulsory admissions.

Admissions by a bankrupt upon an examination before commissioners are evidence against him, although he might have demurred to the questions (*t*), because they might subject him to penalties. And so it seems are

*28 *all answers made by a witness in examination in a court of justice, although he might have objected to answering the questions (*u*). So is evidence given by the party in court, although he had no opportunity of entering into an explanation of the circumstances under which the fact took place (*x*). So is evidence given under compulsory authority before a committee of the House of Commons (*y*). But a compelled admission is not evidence of an account stated (*z*). But it will be seen that admissions or confessions extorted by any kind of duress or threats are not evidence in criminal cases.

By a party to the record.

The admission of a *party* on the record is evidence, although he be but a trustee for another, and although it appear from the admission itself that he is such (*a*) (A). And, therefore, an admission by the obligee of an

(*r*) *Slack* v. *Buchanan*, Peake's C. 5. *Gregory* v. *Howard*, 3 Esp. C. 113. *Doe* v. *Evans*,[1] 3 C.& P. 219. *Turton* v. *Benton*, 1 P. Wms. 496. *Harman* v. *Vanhatton*, 2 Vern. 717. *Westlake* v. *Collard*, B. N. P. 236.

(*s*) *Elton* v. *Larkins*, 1 Mo. & R. 196. Although the attorney of the party retract it before the new trial. *Doe* v. *Bird*,[2] 7 P. & C. 6. So a special case settled on one trial, has been admitted as evidence on a second. *Van Wart* v. *Wolley*,[3] R. & M. 5.

(*t*) *Smith* v. *Beadnall*, 1 Camp. 30. *Stochfleth* v. *De Tastet*, 4 Camp. 10. *Gilling* v. *Summerset*, cor. Abbott, Ld. C. J. West. Sitt. after Mich. 1823. *Robson* v. *Alexander*, 1 B. & P. 448. Although part only of what he swore was taken down. *Milward* v. *Forbes*, 4 Esp. C. 172. It has been held that a bankrupt is compellable to answer questions by commissioners, on examination, which may subject him to penalties for gaming or trading as a smuggler, or being a clergyman. *Ex parte Meynolt*, Atk. 200. *Ex parte Barr*, Cooke, 200. And that one who has money of the bankrupt's in his hands, must account for it, though he may subject himself to penalties. *Ex parte Symes*, 11 Ves. 521. Where the examination of the defendant is *primâ facie* admissible for the plaintiff, the opposite party cannot interpose evidence to qualify or show that it was inadmissible, but it ought afterwards to be given as part of the defendant's case.

(*u*) *Infra*, 28.

(*x*) *Collett* v. *Lord Keith*, 4 Esp. C. 212.

(*y*) *R.* v. *Merceron*,[4] 2 Starkie's C. 366.

(*z*) *Tucker* v. *Barrow*, 7 B. & C. 62.

(*a*) *Bauerman* v. *Radenius*, 7 T. R. 663. This was an action by the plaintiffs, who were the shippers of goods on behalf of Van Dycke & Co., against the defendants, for the damaging of goods in the course of the carriage; and the question was, whether a letter from the nominal plaintiffs, from which it appeared that Van Dycke & Co. were the real plaintiffs, and had indemnified them, could be read, in order to prove an admission that the defendants were wholly free from blame. The evidence was rejected upon the trial, but the Court of K. B. were afterwards of opinion that the evidence ought to have been admitted, on the ground that the plaintiff in a cause must be considered as having an interest in the action; and Lawrence, J. observed, that he had looked into the books, and could not find one case in which it had been held that an admission by the plaintiff on record was not evidence. See *Gibson* v. *Winter*,[5] 5 B. & Ad. 96; Salk. 260. *Payne* v. *Rogers*, Dougl. 407, where the tenant, a nominal plaintiff, having given a release to the defendant, the Court ordered it to be given up on an application by the landlord. See *Craib* v. *D'Aeth*,[6] 7 T. R. 670, in note. In Buller's N. P. 237, it is laid down, that the answers of a trustee can in no case be admitted as evidence against a *cestui que* trust.

(A) (*Smith* v. *Sims*, 1 Esp. C. 330. Insolvent received a bill of exchange for £500, as agent of the trustees of his estate; the defendant without knowledge of the insolvency advanced £50 on it, which was admitted by the plaintiffs to be due to him; defendant, then offered insolvent's letters to prove further advances, but they were not received in evidence, because the insolvent was not a *party* to the action, and might have been produced as a witness. Though as a general rule, the declarations and acts of the party on record, whether he had or had not, an interest in the subject at the time of making and performing them, are ad-

[1]Eng. Com. Law Reps. xiv. 278. [2]*Id.* xxxii. 415. [3]*Id.* xxi. 366. [4]*Id.* iii. 385. [5]*Id.* xxvii. 47. [6]*Id.* xxii. 246.

assigned bond, in whose name the action must necessarily be brought, is evidence to bar the action (*b*.) And in an action by the consignor of goods, on behalf of the consignee against the captain, it was held that a letter written by the plaintiff was evidence against him (*c*).

And an admission by one who sues as the assignee of a bankrupt, made before his appointment of assignee, is inadmissible against him in that character (*d*).

But the admission by a guardian, although he be the plaintiff on record, is not evidence against the infant (*e*); nor can the answer of the guardian in Chancery be read against the infant (*f*)

In settlement cases, all declarations by rated parishioners are evidence *against the parish, for they are parties to the cause (*g*). And it is not ne- *29
cessary to show previously that the party has refused to be examined (*h*). But an admission by a corporator is not evidence in actions against the corporation (*i*), unless it be made in an official capacity.

So the admissions of the party really interested, although he be no party to the suit, are evidence against him; for the law, with a view to evidence, regards the real parties. Thus, in an action upon a bond conditioned for the payment of money to *L. D.*, it was held, that the declaration of *L. D.* that the defendant owed nothing, was evidence for the latter (*k*) (A). So in an action on a bill of exchange, for the benefit of another (*l*). So the declaration by the under-sheriff, in matters relating to the execution of the office, is evidence against the sheriff, since he is the responsible person (*m*). So it is where the party interested indemnifies a party to the record (*n*). So in actions upon policies (*o*), the declarations of the parties really inte- By party in interest.

(*b*) *Craib* v. *D'Aeth*, 7 T. R. 670, in the note. (*c*) 7 T. R. 668. See note (*a*).

(*d*) *Fenwick* v. *Thornton*, M. & M. 51.

(*e*) *Eggleston* v. *Speke*, 3 Mod. 258. *Cowling* v. *Ely*,[1] 2 Starkie's C. 366. See *James* v. *Hatfield*, 1 Str. 548. So an admission by a *prochein ami* is not evidence against an infant. *Webb* v. *Smith*,[2] 1 Ry. & M. 106. It was held by Lord Eldon, in *Davies* v. *Ridge*, 3 Esp. C. 101, that in an action against two trustees, an admission by one that he had trust property in his hands was not evidence of the fact against the other.

(*f*) *Eggleston* v. *Speke*, 3 Mod. 258. For by the opinion of the Court of K. B., on being consulted by the Judges of C. P., upon a trial at bar, the answer of the guardian is but to bring the infant into court. See Carth. 79; 2 Vent. 72; Lord Raym. 312; Prec. Ch. 229; 1 P. Wms. 344; 3 Bac. Ab. 148; 3 Bro. P. C. 1.

(*g*) *R.* v. *Whitley Lower*, 1 M. & S. 636; 11 East, 578. *R.* v. *Woburn*, 10 East, 395, 402. And therefore a rated inhabitant could not be examined by the adverse party. But now see the stat. 54 Geo. 3, c. 170.

(*h*) 1 M. & S. 636.

(*i*) *Mayor of London* v. *Long*, 1 Camp. 22. *Mayor of London* v. *Jolliffe*, 2 Keb. 295. *Lord Dorset* v. *Carter*, 2 Keb. 300. *R.* v. *City of London*, 1 Vent. 351; 2 Lev. 231; 1 Vent. 254; 2 Vern. 351. Vide etiam *Duke Aldridge*, 11 East, 584, n.; 7 T. R. 665. *Infra* tit. PARTIES.

(*k*) *Hanson* v. *Parker*, 1 Wils. 257.

(*l*) *Welstead* v. *Levy*, 1 Mo. & R. 138. So as to the declaration of a party from whom the plaintiff received a bill or note where evidence, *Beauchamp* v. *Parry*,[3] 1 B. & Ad. 89.

(*m*) *Yabsley* v. *Doble*, Lord Raym. 190.

(*n*) *Dowden* v. *Fowle*, 4 Camp. 38. The action was brought against the sheriff for a false return, and was defended by the assignees of the execution debtor; and it was held that the declaration of one of them (being petition creditor), that the debt did not amount to 100*l*., was admissible in evidence. See also *Young* v. *Smith*, 6 Esp. C. 121.

(*o*) In *Bell* v. *Ansley*, 16 East, 143, Lord Ellenborough observed, though an action on a policy may be

missible in evidence against him; and though this rule may have no exception, where such declarations and acts affect the party personally, or others who derive their property through him, or who have committed their interest to his care; yet where a suit was brought against an executor on his probate bond, it was held that his declarations and acts, made and performed *before* he was executor, were inadmissible against him, as the judgment would affect the interests of the creditors and heirs of the testator, in relation to whom the executor was a stranger. *Plant* v. *M'Ewen*, 4 Conn. R. 544. So an infant's answer by his guardian shall never be admitted as evidence against him on a trial at law, as he is protected by the law, from tenderness for his inability to defend his rights. And the answer of a trustee can in no case be received in evidence against the *cestui que trust*, Bull. N. P. 233.)

(A) (But one having assigned his interest in a chose in action cannot impair that interest by any confessions made by him to the prejudice of the assignee. *Frear* v. *Evertson*, 20 John. R. 142. *Sprague* v. *Kneeland*, 12 Wend. 161. *Kimball* v. *Huntington*, 10 Wend. 675. See, also, *Pocock* v. *Billing*, 2 Bingh. 269.)

[1]Eng. Com. Law Reps. iii. 385. [2]*Id.* xxi. 392. [3]*Id.* xx. 351.

rested are admissible. So, in an action by the master for freight, is the declaration of the ship-owner (*p*), where the action is brought for his benefit. So where the party in the action is indemnified by another; as when the sheriff is indemnified by a third person, the declarations of that person are evidence against the sheriff (*q*). Where a defendant in trover for a deed admitted that he detained it on the request of another, it was held that the declarations of the latter were properly received (*r*).

By third persons.

An admission or declaration by a third person is, upon principles already adverted to, in general inadmissible. It ceases to be so, where the party making such admission or declaration can be considered as identical in interest and authority with the other, or to be his mere instrument or agent; since, if a man authorize another to make a declaration, it is the same thing in reason and in law as if he had made it himself.

By an agent.

Where a party refers to another for an answer on a particular subject, the answer is, in general, evidence against him, since he makes the referee his accredited agent for the purpose of giving the answer. The defendant in an action for goods sold and delivered, said, "If *Coomes* will say that he *did deliver the goods, I will pay for them." Upon the trial it was proved that *Coomes*, on application to him, did say that he had delivered the goods, and the evidence was held to be admissible (*s*). So where an executor referred a creditor of the testator to *J. S.* for information concerning the effects of the testator, it was held that an admission of assets by *J. S.* was conclusive upon the subject (*t*). So, in general, what an agent says, who is employed by another to make a proposal for him, is also evidence against the latter (*u*). So an admission by an agent, in the course of transacting the business which he is appointed to perform by the principal, is, in general, evidence against the principal (*x*). But in such case it is necessary to prove the authority, either expressly or impliedly, as by showing what the usual mode of dealing has been (*y*); for an agent

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brought in the name of the person who effected it, though he be not the person actually interested, yet the persons interested are so far looked upon as parties to the suit, that the declarations of any of them are received as admissible evidence against the plaintiff, and what would be a defence against them would, in many instances, be a defence against the plaintiff.

(*p*) *Smith* v. *Lyon*, 3 Camp. 465.

(*q*) *Duke* v. *Aldridge*, *cor.* Lord Mansfield, cited in *Bauerman* v. *Radenius*, 7 T. R. 665. *Supra*, notes (*m*) and (*n*).

(*r*) *Harrison* v. *Vallance*,[1] 1 Bing. 45, and see *Robson* v. *Andrade*,[2] 1 Starkie's C. 372. But yet the mere fact that a party has acted as the agent of another, is not in general sufficient to let in evidence of the declarations of the principal, unless he has indemnified the agent. Thus a declaration by a party under whom a defendant in replevin makes cognizance, is not evidence for the plaintiff. *Hart* v. *Horne*, 2 Camp. 92.

(*s*) *Daniel* v. *Pitt*, 2 Camp. 366, 6 Esp. 74, S. C. in note, *cor.* Ld. Ellenborough. And see *Stevens* v. *Thacker*, Peake's C. 187. *Garnett* v. *Ball*,[3] 3 Starkie's C. 160, 1 M. & W. 438. 441. The plaintiff's horse having been injured through alleged negligence on the part of the defendant, in not fencing a shaft, the defendant agreed to pay if a miner jury would say that the shaft was his; held that their so finding was admissible but not conclusive evidence for the plaintiff. *Sybray* v. *White*, 1 M. & M. 435.

(*t*) *Williams* v. *Innes*, 1 Camp. 364. If a party declare that he will be bound by the oath of a third person, and that person makes the oath accordingly, it is binding. Per Bayley, J., Trin. T. 1825; and see *Lloyd* v. *Willan*, 1 Esp. C. 178; Godbolt, 291; 21 Hen. 6, fo. 31, pl. 17. *A.* takes a forged note from *B.*; on its being returned, *B.* says he received the note from *C.*, to whom he refers *A.* for information. *C.*'s statement is evidence against *B.*; *Brock* v. *Kent*, 1 Camp. C. 366, n. The holder of a bill agrees not to sue the drawee, provided the latter will make an affidavit that the acceptance is a forgery. If the affidavit be made, though false, the holder is concluded, *Stevens and another* v. *Thacher*, Peake's C. 187. See *Brayne* v. *Beal*, 3 Lev. 240, 241. The defendant, in reply to inquiries respecting the account, referred to a party who he said was possessed of his sentiments, and referred the inquirer to him thereon; held to be a sufficient acknowledgment of him as an agent to make his declaration as to the account binding. *Hood* v. *Reeve*,[4] 3 C. and P. 532. And see tit. AGENT.

(*u*) *Gainsford* v. *Grammar*, 1 Camp. 9; and where the agent was the attorney employed by the party, an authority for making the proposal was presumed. Ibid.

(*x*) For the cases relating to this point, and the various distinctions upon the subject, see tit. AGENT.

(*y*) Ibid. And see 7 T. R. 688.

[1]Eng. Com. Law Reps. viii. 239. [2]*Id.* ii. 432. [3]*Id.* xiv. 174. [4]*Id.* xiv. 432.

cannot bind his principal, either by act or declaration, beyond the scope of his authority (*z*) (A).

But it seems to be a general rule, that what an agent does or says within the scope of his authority, is binding upon the principal whose instrument he is; so that not only an agreement made by an agent is binding upon the principal, but so are all the declarations of the agent at the time, which in any manner affect or qualify the nature of the agreement (*a*); but what the agent says at another time, and of his own authority, is not evidence against the principal.

The act or admission of an under-sheriff accompanying official acts, is, in general, obligatory upon his principal, the sheriff, because he is notoriously the agent of the sheriff for transacting all that appertains to the office, and he indemnifies the sheriff, and consequently by his admission charges himself (*b*) (B); but the authority of a bailiff, who is not the general officer of the *sheriff, must be proved in every particular case, and then his *31
declarations in the course of his agency are evidence (*c*). In *Biggs* v. *Lawrence* (*d*), it was held at *Nisi Prius* (*e*), that where *A.* had ordered goods of *B.*, to be delivered to *C.*, an acknowledgment in the hand-writing of *C.*, of the delivery, was evidence against *A.* (*f*). But the same point was frequently ruled differently by Lord Kenyon (*g*); and the case was afterwards decided upon another ground, viz. the illegality of the contract. And the admission of the under-sheriff is not admissible unless it accompany an official act, or unless he charge himself, being in fact the real party in the cause (*h*).

A community of interest or design will frequently make the declaration of one the declaration of all. Thus in the case where partners, or others, possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject-matter, is evidence against the rest (*i*). The admission of one of several makers of

Community of interest.

(*z*) *Fenn* v. *Harrison*, 3 T. R. 757. *A.* being the agent of two companies, *B.* & *C.*, makes an admission as the agent of *B.*: this is not evidence against *C.*; *Guthrie* v. *Fisher*,[1] 3 Starkie's C. 151; and see tit. LIMITATIONS; and *Atkins* v. *Tredgold*,[2] 2 B. & C. 23.

(*a*) See AGENT. And see *Palethorpe* v. *Furnish*, 3 Esp. C. 511; *Helyar* v. *Hawke*, 5 Esp. C. 74; *Peto* v. *Hague*, 1 Esp. C. 135; *Alexander* v. *Gibson*, 2 Camp. 555. Action against *A.* and *B.* as owners of a ship; an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he describes them as owners, is evidence of ownership. *Marshall* v. *Cliff*, 4 Camp. 133.

(*b*) *Yabsley* v. *Doble*, Lord Raym. 190.

(*c*) *North* v. *Miles*, 1 Camp. 389. *Bowsher* v. *Cally*, 1 Camp. 391. See tit. SHERIFF.

(*d*) 3 T. R. 454. (*e*) By Buller, J.

(*f*) The case is wrongly abstracted in the marginal note, 3 T. R. 454; the agent was not employed to *buy* goods. *Qu.* whether the receipt was given at the time of the delivery? In the case of *Fairlie* v. *Hastings*, 10 Ves. jun. 123, this point was treated by the Master of the Rolls as a very material one. It is difficult to conceive how any authority to a person to receive goods for another can make the mere admission of the latter evidence against the owner. No such authority is necessarily to be implied, nor will the fact that it was made against the interest of the party receiving, make his receipt or declaration evidence, where his testimony may be had; neither, as it seems, will the circumstance that the receipt was given at the time of delivery, make any material difference in principle, for such evidence would be admitted not to *explain* the nature of a particular fact known to have occurred, but to prove the *existence* of the act itself.

(*g*) See 7 T. R. 668: Dougl. 751. (*h*) *Snowball* v. *Goodrick*,[3] 4 B. & Ad. 541.

(*i*) 11 East, 589, per Le Blanc, J. Where a suit is pending against a great number of persons who have

(A) (The mere declarations of an agent or his acts as such, are not admissible to prove his agency, *White* v. *Turner*, 10 John. R. 225. "The general rule is this: when it is proved that one is the agent of another, whatever the agent does or says, or writes, at the making of a contract, as agent, is admissible in evidence against the principal, but what the agent says or writes afterwards, is not admissible." Per Rogers, J. *Hough* v. *Doyle*, 4 Rawle, 294. See, also, *Thallhimer* v. *Brinckerhoff*, 4 Wend. 394. *Hurd* v. *West*, 7 Cow. 752. *Peytain* v. *Maurin*, 2 Lou. R. 482. *Fairfield County Turnpike Company* v. *Thorp*, 13 Conn. R. 173. *Baring* v. *Clark*, 19 Pick. 220.)

(B) (*Tyler* v. *Ulmer*, 12 Mass. R. 163.)

[1]Eng. Com. Law Reps. xiv. 173. [2]*Id.* ix. 12. [3]*Id.* xxiv. 112.

a joint and several promissory note, that it has not been paid, is evidence against all (*k*). Such an admission, however, ought to be clear and unequivocal.

Partner. A declaration by one partner, concerning a subject of joint interest, is evidence against another, although the former be no party to the suit (A). Thus in an action against some of the members of a firm, the answer of another person, proved to be a partner, was admitted in evidence as an admission against all (*l*).

An admission by one partner, after the dissolution of the co-partnership, is evidence to charge the other partner (*m*); but a declaration made by one of two partners during an existing co-partnership is not evidence to bind his partner as to a transaction which occurred previous to the partnership (*n*), unless a joint responsibility be proved as a foundation for such evidence (*o*). So a declaration made by one partner that he contracted on his own sole account, is evidence against all the partners, to the exclusion of their joint action (*p*). Entries in a book kept by the clerk of an incor-

*32 porated *company were held to be inadmissible against a member of the corporation in an action on a contract with him, although the act of incorporation directs the clerk to keep such a book; for the ground on which partnership books are admissible in evidence against partners is, that they are books kept by themselves, or by their authority; but the clerk of the company, once appointed, was not subject to the control of any individual member (*q*).

In an action of covenant against two, it was held that the voluntary affidavit of one, upon a subject in which he was jointly interested with the other, was evidence against the other (*r*).

But an admission by one of several trustees, who are not personally liable, will not bind the rest (*s*).

a common interest in the decision, a declaration made by one of those persons concerning a material fact within his knowledge, is evidence against him and all the other parties to the suit. See tit. ABATEMENT; *Lucas and others* v. *De la Cour*, 1 M. & S. 249.

(*k*) *Whitcomb* v. *Whiting*, Doug. 652

(*l*) *Wood* v. *Braddick*, 1 Taunt. 104. *Grant* v. *Jackson*, Peake's C. 203. *Nicholas* v. *Dowding*,[1] Starkie's C. 81; and see *Kemble* v. *Farren*,[2] 3 C. & P. 523. See tit. LIMITATIONS.—PARTNERS.

(*m*) *Wood* v. *Braddick*, 1 Taunt. 104.

(*n*) *Catt* v. *Howard*, Guildhall Sittings after Hil. T. 1820, *cor.* Abbott, L. C. J.[3] 3 Starkie's C. 3. *Pritchard* v. *Draper*, 1 Russ. & M. 191.

(*o*) Ibid.

(*p*) *Lucas* v. *De la Cour*, 1 M. & S. 249.

(*q*) *Hill* v. *The Manchester and Salford Waterworks Comp.*[4] 5 B. & A. 866.

(*r*) *Vicary's Case*, Bac. Ab. Ev. 623. But an admission by one part-owner of a ship does not bind another part-owner. *Jaggers* v. *Binnings*, 1 Starkie's C. 64. And it has been held, in an action against two partners on a deed purporting to have been executed by one for *self and partner*, that an admission by the other that he had given authority to his partner to execute on his behalf, is not sufficient without producing the authority. *Steglitz* v. *Eggington*,[5] Holt's C. 141.

(*s*) *Davis* v. *Kioge*, 3 Esp. C. by Lord Eldon. But in an action against a corporation, a declaration by a mere member not relating to any official situation is not admissible. *Mayor of London*, &c. v. *Long*, 1 Camp. 22.

(A) (The declarations of one of several partners, cannot be given in evidence to prove a partnership; they are only admissible against him who made them. *M'Pherson* v. *Rathbone*, 7 Wend. 216. *Whitle* v. *Ferris*, 10 John. R. 66. *Sweeting* v. *Ferner*, 10 Id. 216. *Corps* v. *Robinson*, 2 Wash. C. C. R. 388. *Robbins* v. *Willard*, 6 Pick. 464—contra *Taylor* v. *Henderson*, 17 Serg. & R. 453. *Woods* v. *Courten*, 1 Dall. 141. So in an action against partners, on a promissory note made by one of them, in the name of the firm, the confessions of that partner are not admissible to prove the note a partnership transaction. *Tuttle* v. *Cooper*, 5 Pick. 414. And the confessions of a partner, after the dissolution of the co-partnership cannot be shown, to charge his co-partner. *Gleason* v. *Clark*, 9 Cow. 57. *Walden* v. *Sherburne*, 15 John. R. 409. *Walker* v. *Dubery*, 1 Marsh. 189. *Simonton* v. *Boucher*, 2 Wash. C. C. R. 473—contra *Simpson* v. *Geddes*, 2 Bay. 533. But it is different when such an acknowledgment is offered, merely to take a partnership debt, out of the statute of limitations. *Smith* v. *Ludlow*, 6 John. R. 267. *Willis* v. *Hile*, 2 Dev. & Bat. 231.)

[1]Eng. Com. Law Reps. ii. 305. [2]*Id.* xiv. 490. [3]*Id.* xiv. 143. [4]*Id.* xxvii. 219. [5]*Id.* iii. 54.

But, notwithstanding a community of interest, the declaration of the wife will not, in general, bind the husband. Even in an action by the husband and wife, in the right of the wife as executrix, her declaration will not be evidence (*t*). So where wages had been earned by the wife, it was held that her admission of the receipt of 20*l.* was not evidence against the husband (*u*). So an admission by the wife, of a trespass, cannot bind the husband (*x*). So the answer of the wife in equity cannot be read against the husband (*y*); for the wife is not, in general, considered to be invested with power to act for her husband, and consequently to bind him by her declarations. But where the authority of the wife to act as agent to her husband can be presumed (*z*), her declarations are like those of any other agent; accordingly, the admission of the wife as to an agreement for suckling a child, was held to be evidence (*a*) against him (A). So where an action was brought by the direction of the wife, in the name of her husband, to recover a sum of money which had been taken from her on suspicion that it was the produce of stolen property, it was held that what she had said (in the absence of the husband) respecting the money, when examined on a *charge of being concerned in the robbery, was evidence for the defendant (*b*). So in an action against the husband for goods sold to his wife (*c*) during the time when he occasionally visited her, it was held, that a letter subsequently written by the wife, acknowledging the debt, was evidence. *33 By a wife.

The rule, that where there is a community of interest and design, the declaration of one of the parties is evidence against the rest, is not confined to cases of civil contract. It is indeed true, that in general the declaration or admission of one trepasser, or other wrong-doer, is not evidence to affect any other person, for it is merely *res inter alios acta;* but where it has once been established, that several persons have entered into the same criminal design, with a view to its accomplishment, the acts or declarations of any one of them in furtherance of the general object are no longer to be considered as *res inter alios* with respect to the rest, they are identified with By a conspirator.

(*t*) *Alban and others* v. *Pritchett*, 6 T. R. 680. In an action by the husband and wife for assaulting the wife, the defendant justified the turning the wife out to obtain possession of the plaintiff's house; it was held by Parke, B. that a declaration by the wife as to the terms of the agreement under which the husband held as tenant were inadmissible. *Newton* v. *Harland*, York Summer Ass. 1837. The joint answer of a husband and wife cannot be read in evidence against the wife. *Hodson* v. *Merest*, 9 Price, 556. In an action by the husband and wife to recover a loan by the wife, *dum sola*, a declaration by her during coverture was held to be inadmissible. *Kelly* v. *Small*, 2 Esp. C. 716. But in an action against the defendant as administrator of his wife, for money lent to her before marriage, her admission of the debt during coverture was held to be admissible. *Humphreys* v. *Boyce*, 1 Mo. & M. 240.

(*u*) *Hall* v. *Hill*, Str. 35: P. Will. 175. Bac. Ab. Ev. 622. (*x*) 7 T. R. 112.

(*y*) 3 P. Wms. 238; Salk. 350; Vern. 60, 109, 110.

(*z*) Held that the jury might infer authority from two instances of her appearing to conduct his business relative to the transaction in question at his country house. *Palmer* v. *Sells*,[1] 3 N. & M. 422.

(*a*) Str. 527. See also *Emerson* v. *Blonden*, 1 Esp. C. 141, and *infra* tit. AGENT; and *Anderson* v. *Sanderson*,[2] 2 Starkie's C. 204, where the admission of the wife as to a sum due for articles supplied to the shop, of which she had the sole management, was received. S. P. *Clifford* v. *Barton*,[3] 1 Bing. 199.

(*b*) *Carey* v. *Adkins*, 4 Camp. 92.

(*c*) *Palethorp* v. *Furnish*, 2 Esp. C. 211; 5 Esp. C. 145. *Gregory* v. *Parker*, 1 Camp. 594.

(A) (The declarations made by a wife within the scope of her customary authority, will bind her husband, more especially where they are in the nature of facts, and the presumptions to which they may give rise, are not drawn from the credit of the party, but the fact that such admissions were actually made. *Steele* v. *Thompson*, 3 Penns. R. 29. But the admission of a trespass by the wife cannot bind the husband. *Hawkins* v. *Hatton*, 2 Nott & M'Cord, 74. An acknowledgment by a *feme covert*, is not sufficient to establish an account against her husband, though it be for articles furnished to her before the marriage. *Sheppard's Exr.* v. *Starke*, 3 Munf. 29.) [See also *Spencer* v. *Tisue*, Addison's Rep. 319. *Hughes* v. *Stokes*, 1 Hayw. 372. *Fenner* v. *Lewis*, 10 Johns. 38.]

[1]Eng. Com. Law Reps. xxviii. 404. [2]*Id.* iii. 314. [3]*Id.* viii. 294.

each other in the prosecution of the scheme; they are partners for a bad purpose, and as much mutually responsible as to such purpose, as partners in trade are for more honest pursuits; they may be considered as mutual agents for each other (A). Where an unity of design and purpose has once been established in evidence, it may fairly and reasonably be presumed that the declarations and admissions of any one, with a view to the prosecution and accomplishment of that purpose, convey the intentions and meaning of all (*d*). And this seems to be the general rule, in case of trials for conspiracies, and other crimes of a like nature (*e*).

Against a representative.

An admission by the party represented is usually admissible in evidence against the representative (*f*) (B).

An admission by the owner is sometimes evidence against one who claims title through him (*g*).

*34 * An admission by the debtor is evidence against the sheriff, in an action for a false return or escape (*h*); but this, it seems, is by reason of the sheriff's misconduct.

(*d*) See Lord Ellenborough's observations, 11 East, 584, *infra*, tit. TRESPASS.

(*e*) See tit. CONSPIRACY.—BANKRUPT.

(*f*) See EXECUTOR.—BANKRUPT.—An admission made by a bankrupt before his bankruptcy, is evidence to charge his estate with a debt. P. C. 5 T. R. 513. *Secus*, as to subsequent admissions. So admissions made by an insolvent subsequent to his insolvency, are not admissible against the trustees of his estate. *Smith* v. *Simmes*, 1 Esp. C. 330. In an action against trustees for creditors, a declaration of the debtor is evidence of the plaintiff's debt. *Robson* v. *Andrale*,[1] 1 Starkie's C. 372. Note.—The declaration seems to have been made at the time the trust was created. So in an action against the sheriff for escapes, &c. See tit. SHERIFF. *Kempland* v. *Macauley*, Peake's C. 65; and see *Dyke* v. *Aldridge*, 7 T. R. 665; 11 East, 584, n. In an action against the sheriff for a false return of *nulla bona*, where the defence relied upon is an act of bankruptcy overreaching the levy, the plaintiff may give in evidence an admission made by one of the petitioning creditors as to any fact respecting his debt. *Young* v. *Smith*, 6 Esp. C. 121. To prove a bill of sale, fraudulent declarations made by the vendor *at the time of executing it*, are evidence. *Phillips* v. *Eamer*, 1 Esp. C. 357. *Secus*, of declarations made at any other time. Where the defence to an action against an acceptor is, that after the bill was due the amount was settled in account between himself and the then holder, under whose endorsement the plaintiff claims, the declarations of such holder are not evidence, as he might be called and examined. *Duckham* v. *Wallis*, 5 Esp. C. 251; and see tit. BILLS OF EXCHANGE. *A.* indorsed a bill to *B.* as a security for a running account; *B.*, after the bill became due, indorsed to *C.*; an entry or declaration by *B.* respecting the state of his account with *A.* is not evidence for the latter, unless made contemporaneously with the first indorsement. *Collenridge* v. *Farquharson*,[2] 1 Starkie's C. 259; *Cutler* v. *Newlin*, cor. Holroyd, J., Winch. Spring Ass. 1819; Manning's Ind. Evidence, 253; and see *Bacon* v. *Chesney*,[3] 1 Starkie's C. 192. An admission in an answer by a former owner of property, does not bind a subsequent owner. See tit. ANSWER IN EQUITY. *Gully* v. *Bishop of Exeter*,[4] 5 Bingh. note (*u*). Appx. to St. Tr. 29 Hargrave's edit. and 6 St. Tr. 425.

(*g*) See *Ivatt* v. *Finch*, 1 Taunt. 141; also *supra* Vol. I. and Index, tit. HEARSAY EVIDENCE. An admission by a proprietor or an occupier possessing an interest, is frequently evidence as to the nature and extent of the interest, especially if it be connected with any act relating to the enjoyment. An admission by a former occupier of a tenement in respect of which common is claimed, is, it is said, evidence to negative the existence of the right, though the tenant be alive. *Walker* v. *Bradstock*, 1 Esp. C. 458; and see *Doe* d. *Human* v. *Pettet*,[5] 5 B. & A. 223; *Baggaley* v. *Jones*, 1 Camp. 367. Vol. I. and *Woolway* v. *Rowe*,[6] 1 Ad. & Ell. 114. But an admission made by one who takes a bankrupt's goods in execution, that he knew that an act of bankruptcy had been committed, is not evidence against one who takes the goods by assignment from the sheriff, the admission being subsequent to the assignment. *Deady* v. *Harrison*,[7] 1 Starkie's C. 60. And as to a declaration by the holder of a negotiable security, vide *infra*, BILL OF EXCHANGE. *Competency.* To prove a forfeiture by under-letting, declarations of persons found in possession were admitted in evidence against the lessee. *Doe* d. *Hindley* v. *Rickardy*, 5 Esp. C. 4, *cor.* Lord Alvanley, *sed quære.*

(*h*) *Infra*, tit. SHERIFF. See tit. RES INTER ALIOS.

(A) (The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all, and authorizes the admission of evidence of acts of one to affect the other parties. *Rogers* v. *Hall*, 4 Watts, 359. See also *M'Kee* v. *Gilchrist*, 3 Watts, 230. *Gray* v. *Nations*, 1 Pike Ark. Rep. 557. *Snyder* v. *Lafranboise*, 1 Breese, 269.)

(B) (The widow of a person, who had sold a slave in his lifetime, was held incompetent to prove, after his decease, declarations made by him previous to such sale that the reputed slave was an Indian woman. *Robin* v. *King*, 2 Leigh, 140. See also *Hester* v. *Hester*, 4 Dev. 228. *Nichol* v. *Ridley*, 5 Yerg. 63. The declarations of a father that his conveyance to a child was fraudulent made subsequent to the conveyance, are not admissible against the child. *Arnold* v. *Bell*, 1 Hay, 396. *Gray* v. *Harrison*, 2 Hay, 292.)

[1]Eng. Com. Law Reps. ii. 432. [2]*Id.* ii. 381. [3]*Id.* ii. 352. [4]*Id.* xv. 68. [5]*Id.* vii. 75. [6]*Id.* xxviii. 52. [7]*Id.* ii. 295.

An admission by the principal is not evidence against his surety on a contract (*i*).

It is a general rule with respect to admissions, as it is in all other cases, that where an entry or declaration is entire, and one part is capable of being explained and qualified by another, the whole is to be taken as evidence (*k*) (1). What credit is to be given to the whole, or part, is a question for the consideration and discretion of the jury; and therefore where a party has admitted the claim made by another, but at the same time has made a counter-claim, his statement of a counter-claim is evidence to be left to the jury, as to the existence of such counter-claim (*l*) (A). The whole is to be read.

By the General Rules of Hilary Term, 2 Will. 4, it is ordered that the expense of a witness, called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing and production of such copy, to admit such copy, *and unless such adverse party shall have refused or neglected to make such admission. Admission under rule of 2 Will. 4. *35

And it is further ordered, that the expense of a witness called only to prove the handwritting to or the execution of any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a judge, a reasonable time before the trial (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the judge, upon attendance before him, shall indorse upon such summons that he does not think it reasonable to require such admission.

And by a General Rule of Hilary Term, 4 Will. 4, it is ordered that 4 Will. 4.

(*i*) *Infra*, tit. SURETY. *Hart* v. *Horne*, 2 Camp. 92. See *Perchard* v. *Tindall*, 1 Esp. C. 394. *Infra*, tit. REPLEVIN.

(*k*) *Randle* v. *Blackburn*,[1] 5 Taunt. 245. *Smith* v. *Young*, 1 Camp. 439. *Jacob* v. *Lindsay*, 1 East, 462. *Barrymore* v. *Taylor*, 1 Esp. C. 325. *Green* v. *Dunn*, 3 Camp. 215. So in an answer in Chancery, if a party charge and discharge himself contemporaneously. *Smith* v. *Lumbe*, 7 Ves. 588. Where the only evidence against a party charged with murder, was his own confession, which admitted that he was present at the time, but took no part in the transaction; it was held that the whole was evidence for the prisoner, but that the jury might disbelieve any part. *R.* v. *Clewes*,[2] 4 C. & P. 221. *Rose* v. *Savory*, 2 Bing. N. C. 145. A prosecutor gives in evidence the statement of the prisoner, which is exculpatory; it is not therefore to be taken as true, but it is for the jury to say if they think it consistent with the other evidence. *Rex* v. *Steptoe*,[3] 4 C. & P. 397. The prosecutor offers evidence of what was said by the prisoner before the justice; it is evidence as well for as against him, it is for the jury to say under the circumstances whether they believe it or not. *Smith* v. *Blandy*,[4] 1 Ry. & M. C. 275. *R.* v. *Higgins*,[5] 3 C. & P. 609; *Cray* v. *Halls*, ib. Eq. C. Ab. 10; *Thomson* v. *Lumbe*, 7 Ves. 583; *Ridgway* v. *Dawson*, 7 Ves. 404. Giving credit *in a particular*, for a demand of the opposite party, is not an admission of the debt. *Miller* v. *Johnson*, 2 Esp. C. 602. Under a rule of the Court to admit a notarial copy of the condemnation of a vessel in evidence, such copy only establishes the fact of the condemnation, and is not evidence of the particular defects upon which the condemnation purports to be grounded. *Wright* v. *Barnard*, 2 Esp. C. 700. The plaintiff cannot give in evidence the examination of the defendant taken before Commissioners of Bankrupt on one day, without also reading those taken on another day, 5 Sim. 39. Nor can he give the cross-examination of a defendant in evidence, without reading his examination in chief, ib. It is otherwise where the answer of a witness in equity is put in to show his incompetency, B. N. P. 238. And *see* 2 Vent. 171; Com. Dig. EVIDENCE, [B.] 5.

(*l*) *Randle* v. *Blackburn*,[4] 5 Taunt. 245. *Thompson* v. *Austen*,[6] 2 D. & R. 361, and see note (*k*) and Vol. I.

(1) [But what a party to a cause had said at one time, cannot be given in evidence by himself to explain what he has said at a former time, which the other party has given in evidence. *Blight* v. *Ashley & al.* 1 Peters' R. 15.] {*Stewart* v. *The Inhabitants, &c. of Sherman*, 5 Conn. 244.} [*Newman* v. *Bradley*, 1 Dallas, 240. *Farrel* v. *M'Clea*, ibid, 392. *Carver* v. *Tracy*, 3 Johns. 427. *Fenner* v. *Lewis*, 10 Johns. 38. *Wailing* v. *Toll*, 9 Johns. 141.]

(A) (Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is as a general rule inadmissible; but it seems that there are some exceptions to this rule. *Robb* v. *Hackley*, 23 Wend. 50.)

[1]Eng. Com. Law Reps. i, 92. [2]*Id.* xix. 354. [3]*Id.* xix. 440. [4]*Id.* xxi. 432. [5]*Id.* xiv. 476. [6]*Id.* xvi. 358.

either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed, marked A., or to the like effect, of his intention to adduce in evidence certain written or printed documents, and unless the adverse party shall consent (*m*), by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to show cause before a Judge (*n*) why he should not consent to such admission, or in case of refusal be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause (*o*).

Provided that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party
*36 shall *have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection; and in the absence of a special order the same shall be costs in the cause.

Confessions in criminal cases.

A confession, where it is voluntary, is one of the strongest proofs of guilt; for it cannot be supposed that a person really innocent would *voluntarily* subject himself to infamy and punishment (A). Many of the rules applicable to admissions in civil cases are applicable to those in criminal proceedings, but there are some which are peculiar to the latter (*p*).

(*m*) In the notice of intention to produce documents in the form prescribed by the rule, one of them was described as a counterpart of a lease from *E. T.* to the defendant, dated 26 December, 1829. The order was, Take order by consent for admitting all but the three wills, &c. The plaintiff produced on the trial an instrument in the form of a lease from, and executed by *E. T.*, and also executed by the defendant, indorsed "counterpart," and having a 1*l.* 10*s.* stamp, which was sufficient for a counterpart but not for a lease; and it was held that the effect of the admission was, that a document had been executed of a character corresponding with that in the notice, and that the defendant could not object that the instrument was in effect a lease and not a counterpart; and it was held that proof was unnecessary of the identity of the document produced at the trial with that inspected at the Judge's chambers. *Doe* v. *Smith*,[1] 8 Ad. & Ell. 255.

(*n*) The application must be made to a Judge at chambers; the court have no authority under this rule. *Smith* v. *Bird*, 3 Dowl. 641: Jervis's New Rules, 111.

(*o*) Notice having been given, and admission refused, and a Judge's order having been made, certified by his indorsement, that the documents were produced to his satisfaction, the party is entitled to costs, although a new trial is granted, previously to which the documents are admitted. *Lewis* v. *Howell*,[2] 6 Ad. & Ell. 769. The certificate in such case is to be granted by the Judge presiding at the first trial, *Ib.*

(*p*) As to the effect of confessions in cases of treason, see TREASON.

(A) (Naked confessions of a prisoner, unattended with circumstantial evidence, are not held sufficient in North Carolina to convict him of a capital crime. *State* v. *Long*, 1 Hay. 455. But see *State* v. *Guild*, 5 Halst. 163. *The People* v. *M'Fall*, 1 Wheel. Cr. C. 108.)

[1]Eng. Com. Law Reps. xxxv. 387. [2]*Id.* xxiii. 206.

A confession can never be received in evidence, where the defendant has been influenced by *any* threat or promise (*q*) (B). To say that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the consequent declaration by the prisoner; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration, if *any* degree of influence has been exerted (*r*). And where a confession has once been induced by such means, all subsequent admissions of the same or of the like facts, must be rejected, if they have resulted from the same influence (*s*). It is, however, a question for the court, and not for the jury, to decide, whether under the particuler circumstances the confession be admissible (*t*). The general principle on which the decisions on the subject seem to have proceeded, seems to be this, that if under the circumstances there be reasonable ground for *presuming* that the disclosure was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received (*u*). Voluntary.

(*q*) *Warrickshall's Case*, Leach's C. C. L. 3d edit. 298; Cowp. 334; 2 Haw. c. 46, s. 36. Two men were charged with the murder of one who (as it afterwards appeared) was still living, and yet one of them upon a promise of pardon, confessed himself to be guilty of the crime. Note to *Warrickshall's Case*, Leach's C. C. L. 301, 3d edit. And an instance is mentioned in the State Trials, where not only the party himself, but his brother, were executed on a supposed confession, although all the parties were innocent.

(*r*) A promise made by the surgeon who was called in upon a case of administering poison, after telling the prisoner that she was suspected and had better tell all she knew, was held to render the statement of the prisoner inadmissible. *R.* v. *Kingston*,[1] 4 C. & P. 387. So after a threat by the captain of a ship to the prisoner, a mariner on board, upon the stolen property being found, that if he did not tell him who was his partner he would commit him to prison as soon as he got to *N.* *R.* v. *Parratt*, 5 C. & P. 570.

(*s*) By the Judges, in the case of *Sarah Nute*, Mich. T. 1800. (*t*) Ib.

(*u*) Upon the trial of *Hall*, for burglary, proof was offered that the prisoner had desired *Last* to apply to the justice to admit him as a witness for the Crown; but the evidence of such request was rejected, on the ground that it had been made under the hope of being admitted king's evidence, and could not be considered as voluntary. By Adair, Serj. Leach's C. C. L. 636; this case goes to a very great length. Where hopes had been held out to a prisoner to confess, and when brought before a magistrate he refused to confess, except upon conditions, Buller, J. admitted the general rule, with some qualifications, observing, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favour on that account: and that it ought most clearly to appear that the prisoner understood such warning, before his subsequent confession could be given in evidence; East's P. C. 658. And in a similar case, before Bayley, J. where the prisoner had been told by the constable's assistant that it would be better for him to confess, but the magistrate cautioned him frequently to say nothing against himself, the confession was held to be admissible. *R.* v. *Lingate*, Derby Lent Ass. 1815, and afterwards before the Judges. Where the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, the confession was admitted. *R.* v. *Hardwicke*, *cor.* Wood, B., Nottingham Lent Assizes, 1811, and afterwards before the Judges. Where the prisoner was admonished by a *stranger*, in the presence of a constable, that he had better tell the truth, his subsequent confession to the constable was admitted. *R.* v. *Row*, Append. to Burn's Just. tit. Evidence, 23 edit. p. 102.) Though the prosecutor, in the presence of a magistrate, desire the prisoner to speak the truth, and suggest that he had better speak out, yet if the magistrate or his clerk immediately check the prosecutor, desiring the prisoner not to regard him, the confession is still admissible. *R.* v. *Edwards*, E. T. 1802. And where the constable told the prisoner that he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, and the magistrate said he could not say that it would, on which the prisoner declined to confess; but on his way to prison he confessed to another constable, and confessed again in prison to another magistrate, the Judges held unanimously, that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. *R.* v. *Rosier*, on a case reserved for the Judges, East. Term. 1821.

So if the expressions be not calculated to raise any hope of some benefit or advantage of a mere temporal nature, it seems that they will not exclude a confession. Upon the trial of *Hodgson*, a girl at York, for arson, evidence was offered of declarations made by the prisoner to Mrs. Richardson, her mistress, after the latter

(B) (*Moore* v. *Commonwealth*, 2 Leigh. 701. The case of *Bowerhan, et. al.* 4 Rogers' Rec. 136. But a confession, though made under the representations of the infamy of a concealment, if without threats or promises, may be received. *State* v. *Crank*, 2 Bailey, 66. But see *The People* v. *Ward*, 15 Wend. 231. *Oakley* v. *Schoonmaker*, Id. 226. So even if a confession be induced by promises or threats, yet if, in consequence of it, facts which are evidence of the crime, are made known, those facts are admissible in proof. *Commonwealth* v. *Knapp*, 9 Pick. 496. *State* v. *Crank*, *supra*.)

[1] Eng. Com. Law Reps. xix. 434.

*Where a prisoner had been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted upon his own confession, even although it had previously been *falsely* represented to him by a constable that his accomplices were in custody (*x*) (A). Where a witness answers questions upon his examination upon a trial, tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes (*y*). Where a fact has been ascertained in consequence of an admission improperly obtained, it may still be proved, for *the fact* cannot have been affected by the influence used (*z*); therefore, upon an indictment for receiving stolen goods, where, in consequence of the confession, which had been unduly obtained,
*38 the stoled property had been *found concealed between the sackings of the prisoner's bed, it was held by the twelve Judges, that the fact of finding the stolen property in the prisoner's custody was clearly evidence (*a*). But in such case nothing is to be left to the jury but the fact of the prisoner's having directed the witness where to find the goods, and his finding them, but not to the acknowledgment (*b*). No evidence can be received of any act done by the prisoner in consequence towards discovering the property, unless the goods be actually discovered thereby (*c*).

Prisoner's examination.

Any voluntary admission or confession by a defendant is evidence against him at common law (*d*), whether it be made to a private person or to a magistrate (*e*). The statutes of Philip and Mary, which directed

had told her it would be better if she would confess if she were guilty, for she would never be easy in her mind till she had confessed. Holroyd, J. after consulting Bayley, J. was of opinion that the evidence was receivable, but it was afterwards excluded on other grounds. A police officer having a boy in his custody on a charge of arson, without a warrant, told him that after the prevarications he had made, there was no doubt of his guilt, and asked who was concerned with him. The prisoner had been apprehended about noon, and had no food till he made a confession, in answer to the officer's inquiries, between five and six in the afternoon; and seven of the Judges were of opinion that the evidence was receivable, no threat or promise having been used; but three were of the contrary opinion. *R.* v. *Thornton*, 1 R. & M. 27. Where the constable who had charge of the prisoner left the room, and shortly after the constable to whom the prisoner made the statement entered, the Judge refused to receive the statement without calling the other constable to negative any promise or threat, as otherwise it might lead to collusion by constables; but it appearing that the prisoner was not under charge at the time, but detained only as an unwilling witness, the Court received the statement without previously calling the other constable. *R.* v. *Swatkins*,[1] 4 C. & P. 550. Where a promise or threat has been held out, it will usually exclude the statement made to the same person. *R.* v. *Dunn*,[2] 4 C. & P. 543. But where the prisoner made a confession to a magistrate after the persuasions of a clergyman, but not with any view of temporal benefit, and after cautions that it would probably be given in evidence against him, it was held that such confession was properly admitted. *Gilham's Case*, 1 Ry. & M. C. 186. And where a justice had held out promises of interference to induce a confession, but afterwards had informed the prisoner that there was no hope of pardon, and the prisoner subsequently sent for the coroner, and made a full disclosure notwithstanding he was cautioned that it would be used against him, held that it was admissible.

(*x*) *R.* v. *Burley*, *supra*, tit. ACCOMPLICE.

(*y*) *Supra*, 27; and see *Stockfleth* v. *De Tasteth*, 4 Camp. 10. In the case of *R.* v. *Merceron*, *cor.* Abbott, J.[3] 2 Starkie's C. 366, a statement by the defendant, upon examination before a committee of the House of Commons, was received in evidence, although it was objected that the defendant could not refuse to answer the question without incurring a contempt of the House.

(*z*) *R.* v. *Warrickshall*, Leach's C. C. L. 298, 3d edit. *Harvey's Case*, East's P. C. 658. *Mozey's Case*, Leach's C. C. L. 301. *Lockhart's Case*, Ibid. 430. *Butcher's Case*, Ibid.; 2 Haw. c. 46, s. 38.

(*a*) *Warrickshall's Case*, Leach's C. C. L. 298, 3d edit. So, if after a promise the prisoner bring money, and gives it up to the prosecutor *as part of that* which had been stolen from him. *R.* v. *Griffin*, 1 Russ. & Ry. 151. But where the prosecutor said he wanted his money, and that if the prisoner gave him that, he might go to the devil if he pleased, and the prisoner took money out of his pocket, and said it was all he had left, it was held that the confession ought not to have been received. *R.* v. *Jones*, 1 Russ. & Ry. 152.

(*b*) Per Le Blanc, J. *R.* v. *Grant and Craig*; *R.* v. *Marian Hodge*, Wells Summ. Ass. *cor.* Grose, J. East's P. C. 658.

(*c*) *R.* v. *Jenkins*, 1 Russ. & R. C. C. L. 492.

(*d*) 2 Haw. c. 46, s. 23; Dy. 214; 6 St. Tr. 58. *R.* v. *Tong*, Kel. 18, 19. *R.* v. *Wheeler*, Leach's C. C. L. 349, 3d edit. *R.* v. *Payne*, 5 Mod. 105.

(*e*) 2 Haw. c. 46, s. 33. *R.* v. *Dore*, And. 301. *Marshall's Case*, 2 St. Tr. 1002; Leach's C. C. L, 298, 3d edit.

(A) (See *Commonwealth* v. *Knapp*, 10 Pick. 477.)

[1]Eng. Com. Law Reps. xix. 520. [2]*Id.* xix. 518. [3]*Id.* iii. 385.

the prisoner's examination to be taken (*f*), made no difference as to the admissibility of evidence (*g*). The same observation is applicable to the stat. 7 Geo. 4, c. 64, s. 3. But no parol evidence of a confession can be given, where the confession has been taken down in writing, for the general rule applies, that it is not the best evidence (*h*). The statute directs that the examination of the prisoner shall be reduced to writing; the court will therefore presume that the magistrate has acted in conformity with the statute (*i*), consequently no parol evidence can be given of a prisoner's declaration before a magistrate, without previous proof that it was not taken down in writing (*k*). But a written examination before a magistrate will not exclude evidence of a previous parol declaration, which has not been reduced to writing (*l*).

The prisoner is not to be examined upon oath (*m*), for this would be a *species of duress, and a violation of the maxim, that no one is bound to criminate himself. And where the examination purported on the face of the magistrate's return to have been taken upon oath, the Judge rejected parol evidence to show that no oath had in fact been taken (*n*). *39

Proof of examination.

In *Lambe's Case* (*o*) it was held, by a majority of the twelve Judges, that a confession made by the prisoner before a magistrate might be read in evidence, upon proof, that when it was read over to the prisoner he said it was *all true* enough, although he declined to sign it, and although it had not been signed by the magistrate; for even a parol confession was evidence at common law before the statutes of Philip & Mary (*p*) (A).

(*f*) An examination of a prisoner, though elicited by the magistrate's questions, is admissible against him where no threat or promise was used by the magistrate. *R.* v. *Ellis*, 1 Ry. & M. C. 437. Where the prisoner's statement was reduced into writing before the witnesses against him had been examined, it was admitted by Garrow, B. with great doubts of its legality. *R.* v. *Fagg*, 4 C. & P. 566; but see *R.* v. *Bell*,[1] 5 C. & P. 162.

(*g*) *R.* v. *Lamb*, Leach's C. C. L. 625, 3d edit. per Grose, J.

(*h*) 1 Hale, 284; Summ. 263.

(*i*) *R.* v. *Jacobs and others*, Leach's C. C. L. 349, 3d edit. *R.* v. *Hickman*, Ib. 349. *R.* v. *Fisher*, Ib. *R.* v. *Hall*, Ib. 240. *R.* v. *Fearshire*, Ib.; B. N. P. 298; 2 Haw. c. 46, s. 43.

(*k*) *R.* v. *Hall*, cited in *R.* v. *Lambe*, Leach's C. C. L. 635, by all the Judges, except Gould, J. *Phillips* v. *Winburn*,[2] 4 C. & P. 273. *R.* v. *Hollingshead*,[3] Ib. 242.

(*l*) *R.* v. *M'Carty*, Sp. Comm. Dublin, 797. Maenally on Ev. 45. Action by bankers to recover money paid on a check purporting to be drawn by the defendant, but alleged to be a forgery, minutes of the defendant's examination on a charge made against a party as having forged the check, are receivable, although he afterwards signed a regular deposition. *Williams* v. *Woodward*,[4] 4 C. & P. 346.

(*m*) B. N. P. 242; Kel. 2. It generally happens that a party who is examined upon oath before the magistrate, is examined as a *witness* against others, and under the expectation that he will not be prosecuted. It has been said that a prisoner ought not to be *questioned* by a magistrate; and in the case of *R.* v. *Wilson*,[5] Holt's C. 597, *cor.* Richards, C. B., the prisoner's statement was, on this ground, rejected as inadmissible; but by the statute of Philip & Mary formerly, and now by the stat. 7 G. 4, c. 64, s. 3, the magistrate is to take the *examination* of the prisoner; and at the Carlisle Sp. Ass. 1824, Holroyd, J. admitted the prisoner's examination to be used as evidence against him, notwithstanding this objection. Where a statement by a defendant, made before a committee of the House of Commons, was objected to on the ground that the statement had been made under a compulsory process, the objection was overruled. *R.* v. *Merceron*,[6] 2 Starkie's C. 366. Before a statement made by a prisoner to the magistrate he was sworn by mistake, but as soon as it was discovered, the deposition was destroyed, and the party cautioned; his subsequent statement is receivable. *R.* v. *Webb*,[7] 4 C. & P. 564. A party is examined on oath upon a charge made against another, he not being himself charged or suspected of any offence, upon his being afterwards charged and indicted, his former deposition is admissible. *R.* v. *Haworth*, York Spring Assizes, 1830, Parke, J.

(*n*) *R.* v. *Smith and another*, *cor.* Le Blanc,[8] J. 1 Starkie's C. 242. In the case of *R.* v *Wilson*,[9] 1 Holt, C. 597, *cor.* Richards, L. C. B. it was held, that an examination of a prisoner, which consisted in answers to questions put by the magistrate, could not be received in evidence, although no threats had been held out.

(*o*) Leach's C. C. L. 625: and see 2 Haw. c. 46, s. 31.

(*p*) In the case of the *King* v. *Pelicote*, *cor.* Wood, Baron, York Summer Assizes, 1819,[10] 2 Starkie's C.

(A) (When an examination has been reduced to writing, parol evidence of it cannot be received. *M'Kenna's Case*, 5 Rogers's Rec. 4; but parol evidence is admissible in proof of an examination not reduced to writing. *State* v. *Irwin*, 1 Hayw. 112. *Collins's Case*, 4 Rogers's Rec. 139. So an examination reduced to writing but not signed is admissible in evidence. *Pennsylvania* v. *Stoops*, Addis. 383. *The People* v. *Johnson*, 1 Wheel. C. C. 193. *It seems* that depositions taken *in pencil*, instead of being properly written out, would not be considered as taken in compliance with the statute. *The People* v. *White*, 22 Wend. R. 167.)

[1]Eng. Com. Law Reps. xxiv. 256. [2]*Id.* xix. 380. [3]*Id.* xix. 365. [4]*Id.* xix. 412. [5]*Id.* iii. 192. [6]*Id.* iii. 365. [7]*Id.* xix. 528. [8]*Id.* ii. 374. [9]*Id.* iii. 192. [10]*Id.* iii. 442.

By the statute 7 Geo. 4, c. 64, s. 3, the examinations must be returned by the justices to the next general gaol delivery, to be held within the limits of their commission. The identity of the examination (*q*) is usually proved by the magistrate, coroner, or his clerk, who took it down (*r*), and it should be shown that it contains the *substance* of what the prisoner said (*s*). It should also appear that the confession was made freely (*t*); but it is not
*40 *absolutely incumbent on the magistrate to warn the prisoner not to confess (*u*). The whole of the confession must be read (*x*).

Force and effect.

A prisoner may be convicted upon his own confession, without other evidence (*y*).

It is a general rule, founded upon principles already adverted to (*z*), that the admission or confession of one defendant is not evidence against any but himself (*a*) (A); except, indeed, such a privity and community in the same original design be proved, as to render that which has been said or done by one, in furtherance of the common object, fair and reasonable evidence of the general design and project itself. It was ruled in *Tong's Case* (*b*), upon the soundest principles, that the confession of one shall not be evidence against another. Where several are tried at the same time, and the confession of one implicates another, the evidence cannot on that account be rejected; the usual course is for the court to inform the jury that the confession is evidence against that party only by whom it is made (*c*).

433, where a prisoner, after his examination had been read over, refused to sign it, and did not say (as in *Lamb's Case*) that it was true, the learned Judge rejected the evidence. But in the later case of *R.* v. *Dewhurst*, s. c. 2 Russ. C. & 4, 645, Lancaster Spring Assizes, 1825, where the magistrate himself had taken down the examination, which was read over to the prisoner, who made no objection to it, but did not sign it, Bayley, J. held that the magistrate might at all events refresh his memory by the writing, and give evidence of the statement; but ultimately the examination itself was read. Minutes of a prisoner's examination, which have not been signed by him, or read over to him, may be used as minutes to refresh the memory of the witness, *Layer's Case*, 24 Howell's St. Tr. 214; 6 Hargreave's St. Tr. 229. Where the examination of a prisoner taken in writing is inadmissible from some irregularity, parol evidence of what he said upon the examination is admissible. *R.* v. *Reed*,[1] 1 Mood. & M. C. 403.

(*q*) It has been said that the examinations ought not to be taken before the grand jury, Gilb. Ev. by Loft, 216; but the rule seems to apply to depositions only; and, in practice, the examinations are frequently (by leave of the court,) taken before the grand jury.

(*r*) Parke, B. was of opinion, that it is sufficient to prove the magistrate's signature; but Lord Denman held, that this was not sufficient when the prisoner made his mark only, without writing his name.

(*s*) 1 Hale, 284. The safest course is to take down the very words. The statute requires the justices to take the examination, and to put the same, or so much thereof as is material, into writing. A prisoner said, "Give me a glass of gin, and I'll tell you all about it," and two glasses of gin were given by an officer to the prisoner, who then made a confession, and the officer afterwards wrote down from recollection what the prisoner had said, and the officer read over what had been so written before the committing magistrate, and the magistrate told the prisoner that a confession might do him harm, upon which the prisoner said that what had been read was the truth, and signed the paper. Best, J. refused to admit the evidence. *R.* v. *Sexton*, 2 Russ. C. & M. 645, Norwich, Summ. Ass. 1822.

(*t*) 1 Hale's P. C. 284.

(*u*) *R.* v. *Magill*, Macnally, 38.

(*x*) *R.* v. *Payne*, 5 Mod. 165; 2 Haw. c. 46, s. 42.

(*y*) *Stone's Case*, Dy. 214. *Francis's Case*, 6 St. Tr. 58. *Fisher's Case*, Leach's C. C. L. 3d edit. 394. *Wheeler's Case*, Ib. Even though there be no positive proof that the offence was committed. *R.* v. *Eldridge*, Russ. & R. C. C. L. 440. *R.* v. *Falkner*, Ib. 481. *R.* v. *White*, Ib. 508. *R.* v. *Tippett*, Ib. 509.

(*z*) Vol. I. See Index, tit. Admissions.

(*a*) 2 Haw. c. 46. The contrary was unjustly ruled in *Throgmorton's Case*, 1 St. Tr. 70. *Earl of Essex's Case*, Ib. 197; and *Sir Walter Raleigh's Case*, 1 Jac. 1.

(*b*) Kel. 18.

(*c*) *R.* v. *Hearne and others*,[2] 4 C. & P. 215. See the observations of Wood, B. in *Bullen* v. *Mitchell*, 2 Price, 299. It is, however, morally impossible that the hearing of such a confession should not operate to the prejudice of the parties implicated; in some instances the inconvenience might be obviated by separate trials.

(A) (On an indictment against *A.* for concealing a horse thief, knowing him to be such, it is not competent for the prosecutor to give evidence of what the alleged horse thief confessed in the presence of *A.* to establish the fact that a horse was stolen. The voluntary confessions of a man are evidence against himself but not against other persons. *Morrison* v. *The State of Ohio*, 5 Ohio Rep. 439. *Lowe* v. *Boteler*, 4 Har. & McHen. 349.

[1]Eng. Com. Law Reps. xxii. 341. [2]*Id.* xix. 550.

In some instances, the confession of one, taken in the presence and hearing of another prisoner, may be very material evidence to explain the expressions and conduct of the latter upon that occasion; for any *declarations* of his, by which he assented to what was confessed by another, to his own prejudice, would be admissible evidence against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations (*d*).

ADMISSION TO A COPYHOLD. *See* COPYHOLD.—EJECTMENT.

ADULTERY. *See* CRIMINAL CONVERSATION.

AFFIDAVIT.

An affidavit sworn before a Judge is receivable in the court of which he is a Judge, though not entitled of that court, but not in any other court unless entitled of that court (*e*).

AFFIRMANCE OF CONTRACT. *See* Index, tit. WAVER.

AGENT (*f*) (A).

IF *A.* authorize *B.* to do an act, it is in law the act of *A.*, and may be so alleged in pleading, except in cases of felony; for then, if *A.* be absent when the fact is committed, he is but an accessory before the fact (*g*). Accordingly *on an allegation (in a civil action) that the master and servant drove ungovernable horses in Lincoln's-Inn-Fields, both were found guilty, although the servant alone was present (*h*). So an allegation that the defendant negligently drove his cart, is supported by proof that it was driven by his servant (*i*). Before the act of *B.* can be given in evidence as the act of *A.*, it must be proved that *B.* was the agent of *A.* (B). This proof may either be,—1st, direct, or it may result, 2dly, from the relative situation of *A.* and *B.*; or 3dly, from their habit and course of dealing, or other special circumstances; or, 4thly, from *A.*'s recognition of *B.*'s act, or his acquiescence in it. 1st. May be *direct* (*k*). As where the agent is called *41

(*d*) But a confession by one of several prisoners before a magistrate, which implicates all, cannot be read in evidence merely for the purpose of drawing an inference from their *silence* as to the parts which affect them. *R.* v. *Appleby and others*,[1] 3 Starkie's C. 30, *cor.* Holroyd, J. who said that it had been so held by several of the judges on a case from Chester, and that he was of that opinion.

(*e*) Reg. G., H. T. 2 W. 4. The addition of every person making an affidavit must be inserted therein, Ib. When sworn before the attorney on record or his agent, Ib.

(*f*) For other evidence on this head, see tit. ADMISSIONS.—ACCESSORIES.

(*g*) See ACCESSORY.

(*h*) *Michael* v. *Allestree*, 2. Lev. 172.

(*i*) *Brucker* v. *Fromont*, 6 T. R. 659; and see *Tuberville* v. *Stamp*, Ld. Raym. 264.

(*k*) A letter authorizing an agent to draw to a certain amount, coupled with a power of attorney to enter into and *complete* contracts, make *purchases*, &c., is a sufficient authority to such agent to raise money for the purposes of his employers; and a party advancing monies to such agent is not bound to call for those instruments, and inquire what money has been already advanced on the letter. *Withington* v. *Herring*,[2] 5 Bing. 442. See *Attwood* v. *Munnings*,[3] 7 B. & C. 278. A direction to an agent to enter upon premises (in mortgage) and sell the stock, &c., which was declared to be for the benefit of the plaintiff, and amounting to an authority to pay over the amount to him, being in consideration of his postponing the sale of the estate, is an irrevocable authority, and the plaintiff may sue the agent for money had and received. *Metcalf* v. *Clough*, 2 M. & Ry. 178. The steward of a manor cannot appoint a deputy without special authority. *Barker* v. *Kett*, 3 Salk. 124. The office is grantable in reversion; Ib. Where the agent had in his own

(A) (No one is obliged to accept a consignment of goods, but if it be received, the consignee, like every other agent or factor, is liable for a breach of the positive orders of his principal. *Walker et al.* v. *Smith*, 4 Dall. 389, 1 Wash. C. C. R. 202.)

(B) (The acts of agents do not derive their validity from professing on the face of them, to have been done in the exercise of their agency, but upon the facts that the acts were done in the exercise and within the limits, of the power delegated. *Mech. B'k of Alexandria* v. *The B'k of Columbia*, 5 Wheat. 326. In ascertaining these facts as connected with the execution of any written instrument, parol testimony is admissible. Ibid.)

[1]Eng. Com. Law Reps. xiv. 152. [2]*Id.* xv. 493. [3]*Id.* xiv. 42.

Direct evidence of agency.

as a witness and proves that he was authorized to do the act, or transact the particular business. The fact of agency may be proved by collateral evidence without calling the agent (*l*). If the authority was in writing, it must be produced, in order that it may be seen whether it has been pursued (*m*). If he acted under a power of attorney, the instrument must be produced and proved (*n*). And parol evidence of the authority is inadmissible, where the authority from its nature must have been in writing (*o*). This, however, does not appear to be necessary, where the authority can be clearly inferred from the course of dealing, or from the recognition of the agent's acts by the principal. And therefore in the case of *The King* v. *Bigg* (*p*), which was an indictment for a felonious erasure of an indorsement upon a bank-note, although it was contended, on behalf of the prisoner, that it was necessary to prove the appointment of *Adams* as the agent of the Bank of England, being a corporate body, under their seal (*q*), it was held to be sufficient to show that *Adams* had been used to sign bills and notes, which from time to time had been duly paid, and answered by the Bank. It was found by the special verdict that *Adams* had been intrusted and employed by the Governor *and Company, but not by any instrument under their seal. A majority of the Judges were of opinion that the evidence was sufficient, and the prisoner was transported.

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From the relative situation of the parties.

Secondly. From relative situation.—Where the authority results from the relative situation of the parties, it is sufficient to prove such relative situation (*r*). Thus, to affect the sheriff with the act of the under-sheriff it is unnecessary to show more than that the latter is the under-sheriff (*s*). But a bailiff is not the general officer of the sheriff, and therefore the particular authority must be proved (*t*). Proof of the sale of a book by a servant in a bookseller's shop is *primâ facie* evidence of a sale by the master (*u*). The answer of a clerk at a banking house, transacting the business of his principals, is evidence against the latter (*x*). Where the

name always sold the goods and received the amount, held that having an authority to sell, he had an implied one to receive the price; and that the principals could not avow the act of their agent as to one part, and repudiate it as to the other. *Capel* v. *Thornton*,[1] 3 C. & P. 353.

(*l*) *Owen* v. *Barrow*, 1 N. R. 101; *infra*, tit. Usury. Where goods were fraudulently obtained by *D.*, the agent of *W.*, the purchaser, and also of the defendants, without any intention of being paid for, and were immediately sold to the defendants; held, in trover, that the handwriting of *D.* to various contracts as the agent of *W.* might be proved, and as steps in proving the fraud, without calling him as a witness, although the jury found that the defendants were not privy to the fraud. *Irving* v. *Motley*,[2] 7 Bing. 543.

(*m*) *Johnson* v. *Mason*, 1 Esp. C. 89. *Coore* v. *Calloway*, Ib. 115. (*n*) Ibid.

(*o*) Ibid; but see 3 P. Wms. 427, *R.* v. *Bigg*. (*p*) 3 P. Wms. 427.

(*q*) It was alleged in the indictment, that one *Joshua Adams* was intrusted and employed by the Governor and Company of the Bank of England to sign bank-notes for the said company; and it was found by the special verdict that he was so intrusted and employed by the Governor, &c. *but not under their common seal.*

(*r*) See 7 T. R. 113. The plaintiffs, correspondents in England of a foreign merchant, had in May 1827, a Bank of England note remitted in part-payment of the account due to them, which had been stolen in February 1826, and when presented at the Bank, was detained; it was held in trover, that the plaintiffs must be taken to be the agents of the foreign merchant, and could only recover upon his title, and therefore were bound to show that it had been received without any grounds of suspicion that the note had been improperly obtained. *De la Chaumette* v. *Bank of England*,[3] 9 B. & C. 208. A deed signed by the chief clerk and solicitor of a company is binding on them, unless it be shown that he exceeded his authority; and it makes no difference whether the object of producing it were to enforce it or bind the company in any other way by its contents. *Doe* d. *Macleod* v. *East London Waterworks Company*,[4] 1 Mood. & M. C. 149. Agents, authorized to draw bills for a company, drew them in their own names, and not as agents, although for the purposes of the company; held that the members of the company were not liable on the bills, but, *semble*, they were liable as partners for the money lent. *Ducarrey* v. *Gill*,[5] 1 Mo. & M. 451, and 4 C. & P. 121. (*s*) Ibid. (*t*) Ibid.

(*u*) *R.* v. *Almon*, Burr. 2686. See tit. Libel.

(*x*) *Price* v. *Marsh*, 1 Carr. C. 60. The employment of a ship is evidence of an authority from the owner to the master, in respect of every lawful contract made by him relative to such employment of the ship. Abbott's L. S. 112, 122; 1 Vent. 190, 238. An assignment of a lease under a *fi. fa.* by *A. B.* as under-sheriff,

[1]Eng. Com. Law Reps. xiv. 343. [2]*Id.* xx. 233. [3]*Id.* xvii. 356. [4]*Id.* xvii. 271. [5]*Id.* xix. 302.

captain of a vessel orders goods for the use of the ship, the owners are responsible (*y*). So it is the common course upon trials at Nisi Prius, to read the admissions of the attorney on record of either of the parties; and a plaintiff is bound by the act, not only of his attorney, but of his agent in town (*z*), in the course of the cause (A).

A letter written to the plaintiffs, respecting the pulling down an adjoining house belonging to a corporation by their surveyor, and who had the management of their buildings, may be presumed to have been written by him in that capacity, and therefore is evidence against them (*a*).

Thirdly. From habit, course of dealing, &c.—In mercantile transactions, the fact of the usual and general employment of a particular agent in the transaction of business is the most usual evidence of authority (*b*). Thus, *the general authority of brokers to sell, so as to bind their principals in respect of the purchase, is to be collected from their general dealings, and not merely from their private instructions as to the particular parcel of goods; and if a general authority can be inferred from the usual course and habit of dealing, the principal will be bound by the contract although it be contrary to the particular instructions (*c*). Where an agent had been employed for a length of time to pay for work of a particular description, and workmen were always referred to him, his acknowledgment of a debt was held to be binding upon his principal (*d*). A master who in a single instance authorizes his servant to take up goods on credit, is afterwards liable (*e*). So where the defendant's wife usually gave orders for goods, her acknowledgment of a debt being due within six years, was held to be evidence against her husband (*f*). So where the wife had taken lodgings for herself and her husband, and afterwards gave notice of quitting, upon an action brought for use and occupation, it was held that the acknowledgment of the wife was evidence against her husband; and Lord Kenyon said, that where a wife acts for her husband in any business or department by his authority, and with his assent, he thereby adopts her acts, and must be bound by any acknowledgment, or any admission made by her respect-

From habit and course of dealing.

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is evidence that he is under-sheriff. *Doe* d. *James* v. *Brown*,[1] 5 B. & A. 243. The drawing of bills by the consignor of goods on the consignee or factor, against the consignment, does not authorize the latter to plead the goods. *Gill* v. *Kymer*,[2] 5 Moore, 518. *Duclos* v. *Hyland*, cited Ib. See *Guichard* v. *Morgan*,[3] 4 Moore, 36; *Paterson* v. *Gandesequi*, 15 East, 62; *Daubigny* v. *Duval*, 5 T. R. 604; *Fielding* v. *Kymer*,[2] 2 B. & B. 639. By the stat. 4 G. 4, c. 83, a person may take a deposit or pledge of goods to the extent of the consignee's interest.

(*y*) 1 T. R. 108; and so is the captain also; *aliter*, if they be ordered before his appointment, although not delivered till after. *Farmer* v. *Davis*, Ibid. And see the last note.

(*z*) *Griffiths* v. *Williams*, 1 T. R. 710, 711. See *Hays* v. *Perkins*, 3 East, 568.

(*a*) *Peyton* v. *Governors of St. Thomas's Hospital*,[4] 3 C. & P. 363. The answer of a clerk at a banking-house, transacting the business of his principals, is evidence against them. *Price* v. *Marsh*, 1 Carr. C. 60.

(*b*) See *R.* v. *Biggs*, 3 P. Wms. 427, and *supra*, note (*x*).

(*c*) *Whitehead* v. *Tuckett*, 15 East, 400.

(*d*) *Burt* v. *Palmer*, 5 Esp. C. 145. The plaintiff, after repeated applications for payment to the defendant, receiving no answer, applied to an attorney, supposed to act for the defendant, for payment, who answered the letter, and paid part, and to a subsequent letter replied, promising payment of the remainder; held, that as it appeared that he was the agent at one time, this was evidence to go to the jury that he continued to be so. *Roberts* v. *Gresley*,[5] 3 C. & P. 380.

(*e*) The defendant sent a waterman to the plaintiff for iron, on trust, and paid for it afterwards; he sent the same waterman a second time with ready money, who received the goods but did not pay for them. The C. J. ruled that the sending him on trust the first time, and paying the money, gave him credit, so as to charge the defendant on the second contract. *Hazard* v. *Tradwell*, Str. 506; and see *Rusby* v. *Scarlett*, 5 Esp. C. 76; 1 Show, 95. See tit. GOODS SOLD AND DELIVERED.

(*f*) *Palethorp* v. *Furnish*, 2 Esp. Cas. 211. See tit. ADMISSIONS, 29, 30.

(A) (A son who rides his father's horse with his permission, is authorized to make such disposition of him as may be necessary for his preservation. *White* v. *Edgman*, 1 Tenn. R. 19.)

[1]Eng. Com. Law Reps. vii. 83. [2]*Id.* vi. 295. [3]*Id.* xvi. 360. [4]*Id.* xiv. 349. [5]*Id.* xiv. 358.

ing that business in which she has acted for him (*g*). In such respects, the wife does not differ from any other agent. So an admission by a clerk usually employed in corresponding on business, is evidence (*h*).

An authority to receive payment on bonds, bills, &c. is usually evidenced by the custody of the instruments themselves (*i*). And it was held, that a payment to one who usually received money for an obligee of a bond, was not sufficient, unless he had the custody of the bond (*k*).

Recognition. *Fourthly.* A recognition by the principal of the agency in the particular instance, or in similar instances, is evidence of the authority to the latter (A). As, where one subscribes policies in the name of another, and, upon a loss happening, the latter pays the amount; this would be evidence of a general authority to subscribe policies (*l*). So where the defendant's son had, in three or four instances, signed bills of exchange by the direction of his father, it was held to be sufficient evidence for presuming an authority from the father to the son to sign a guarantee (*m*).

*44 *Mere evidence, however, that the agent has done acts in the name of a principal, will not bind the latter without some evidence of recognition on his part; and therefore, where a policy had been signed by one *Butler*, and it was proved that *Butler* had signed other policies in the name of the defendant, but no evidence was adduced of any authority given in the particular case, or of the defendant's having ever paid a loss on such policies, the evidence was held to be insufficient (*n*) (1). If an agent has authority to subscribe a policy, he has also authority to adjust it (*o*).

Where the defendant in an action on a policy of insurance had used an affidavit, made by a third person, for the purpose of putting off the trial,

Recognition of authority. it was held, that the statement in the affidavit, that the deponent had subscribed the policy on the behalf of the defendant, was admissible to prove the fact (*p*).

If a master send a servant to receive money, and the servant instead of money receives a bill, the master may, as soon as he knows it, dissent, and will not be bound by the payment; but acquiescence, or a small matter, it was said in the case of *Ward* v. *Evans* (*q*) (B) will be proof of the mas-

(*g*) *Emerson* v. *Blonden*, 1 Esp. C. 142; and see *Anderson* v. *Sanderson*,[1] 2 Starkie's C. 104. So where the wife kept a shop in the absence of her husband, and admitted a debt for goods sold and delivered. *Peto* v. *Hague*, 5 Esp. C. 134. *Clifford* v. *Burton*,[2] 1 Bing. 199.

(*h*) *Harding* v. *Carter*, Park on Ins. 4; vide *supra*, p. 42.

(*i*) 1 Chan. Cas. 193. *Owen* v. *Barrow*, 1 N. R. 101; 12 Mod. 564. See tit. PAYMENT.

(*k*) *Gerard* v. *Baker*, 1 Ch. Ca. 94. *Duke of Cleveland* v. *Dashwood*, 2 Eq. Cas. Ab. 709.

(*l*) *Courteen* v. *Touse*, 1 Camp. 43, n. (*a*); *Neal* v. *Irving*, 1 Esp. C. 61. *Haughton* v. *Ewbank*, 4 Camp. 80; although the agent acted under the power of attorney.

(*m*) *Watkins* v. *Vince*,[3] 2 Starkie's C. 368.

(*n*) *Courteen* v. *Touse*, 1 Camp. 43, n. (*a*).

(*o*) *Richardson* v. *Anderson*, 1 Camp. 43, n. (*a*).

(*p*) *Johnson* v. *Ward*, 6 Esp. C. 48. See also 2 T. R. 189, in not.; 2 Ld. Raym. 930; 11 Mod. 88.

(*q*) Salk. 442. *Watkins* v. *Vince*,[3] 2 Starkie's C. 368.

(A) (But if the act of the professed agent be under seal, the ratification must be under seal, to make the act the deed of the principal. *Blood* v. *Goodrich*, 12 Wend. 525.)

(B) (Where a principal is informed by his agent of what he has done, the principal must express his dissatisfaction within a reasonable time, otherwise, his assent to his agent's acts will be presumed. *Cairnes* v. *Bleecker*, 12 Johns. R. 300. *Bredin* v. *Dubarry*, 14 Serg. & Rawle, 27. *Amory* v. *Hamilton*, 17 Mass. R. 103. *Kingston* v. *Kincaid*, 1 Wash. C. C. R. 454.

The unauthorized act of an agent is not so absolutely void that his constituents may not ratify it and give it validity. *Den* v. *Wright*, *et al.* 1 Peters' C. C. R. 64. But the ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. *Owings* v. *Hull*, 9 Peters' R. 607; and see also, *Bell* v. *Cunningham*, 3 Peters' R. 81.

Where an agent has sold the goods of his principal without authority, neither a demand by the principal of the price of the goods from the purchaser, which has been refused, nor the bringing of an action of *assumpsit* against the purchaser for such price, which action was discontinued before the trial, is a ratification of the sale. *Peters* v. *Ballister*, 3 Pick. R. 495.)

(1) [See *Hooe & al* v. *Oxley & al.* 1 Wash. 19. *Hopkins* v. *Blane*, 1 Cal. 361.] {*Plant* v. *M'Ewen*, 4 Conn. 544.}

[1]Eng. Com. Law Reps. iii. 314. [2]*Id.* viii. 294. [3]*Id.* iii. 386.

ter's assent, and that will make the act of the servant the act of the master. In *Thorold* v. *Smith* (*r*), the servant having been sent for money received a cheque, which he kept in his own hands, without the knowledge of his master, and upon the banker's failure the servant sent back the bill; and Holt, Chief Justice, and Powell, J. seem to have been of opinion, that it was a question of fact for the jury, whether the servant, under the circumstances of the case, had authority from his master to receive bills instead of money; and a new trial was granted, for the purpose of ascertaining the fact (*s*).

Where the defendants' agent abroad received by their orders money on their account, and communicated the fact to them, which they acknowledged, and directed the disposal of it; it was held that the agent's letters were admissible as against the defendants to charge them with the receipt of the money, they having adopted and acted upon the assertions of their agent (*t*). A duty arising out of particular relations or circumstances, is properly alleged as an implied promise (*u*).

Such presumptions and implications of authority are in general applicable to civil cases only. Evidence of a wilful trespass by the servant will not show that the master is a trespasser, without express evidence that the act was done by his direction; for an authority to commit a trespass cannot be implied (*x*). But fraud will vitiate a contract, although the principal take *no part in it, for he is civilly responsible for the acts of his agent (*z*). *45 It is a general rule, that an agent cannot bind his principal by any act beyond the scope of the authority delegated to him (*a*) (A). Where the

Acts and declarations of an agent.

(*r*) 11 Mod. 87.

(*s*) But Holt, C. J. intimated his opinion that a jury at Guildhall would find payment by a bill to be a good payment, according to the common practice of the city; and Powell, J. said he *supposed* that the servant had many times received bills for his master, which was an authority for the purpose; but that that was matter of evidence, being according to the common practice of the world.

(*t*) *Coates* v. *Bainbridge*,[1] 2 Bing. 58, 1 M. & P. 142.

(*u*) *Callender* v. *Oelriche*,[2] 5 Bing. N. C. 58.

(*x*) *Macmanus* v. *Crickett*, 1 East. 106; 2 H. B. 443. See also *Harding* v. *Greening*,[3] Holt's C. 531; and *R.* v. *Johnston*, 7 East, 65, *infra*, tit. Libel. The tort of a servant or deputy does not affect the master. Mo. 777, 787; Com. Dig. Officer, [K.] 3. *Harris* v. *Nicholas*, 5 Munf. 483. Although an information for penalties is a criminal proceeding, yet it is also in the nature of a civil process to recover the Crown's debt; a party, therefore, carrying on trade by his servants, and deriving profits from their acts, is responsible for penalties incurred by their violation of the revenue laws. *Attorney General* v. *Siddon*, 1 Cr. & J. 220; 1 Tyrw. 41; and see *R.* v. *Dixon*, 3 M. & S. 11; and *R.* v. *Gutch*,[4] 1 Mood. & M. C. 433. In the case of an illegal distress, as damage feasant, by a servant, an authority to make the illegal distress cannot be inferred from lawful authority given in other instances, *Lyons* v. *Martin*, 3 N. & P. 509.

(*z*) *Doe* v. *Martin*, 4 T. R. 39. A principal is bound by the fraud or misrepresentation of an agent in making a contract for him. *Fitzherbert* v. *Mather*, 1 T. R. 12, Park. Ins. 321, 326. See further, App. 45.

(*a*) *Fenn* v. *Harrison*, 3 T. R. 357. A factor cannot pledge the goods of his principal by indorsement of the bill of lading, or even by delivery of the goods themselves. *Newson* v. *Thornton*, 6 East, 17. *Daubigny* v. *Duval*, 5 T. R. 604. *Paterson* v. *Tash*, 2 Str. 1178. *Martini* v. *Coles*, 1 M. & S. 140. Even although he has accepted bills on the faith of such consignments. *Graham* v. *Dyster*,[5] 2 Starkie's C. 21. *Fielding* v. *Kymer*,[6] 2 B. & B. 639; 5 Moore, *supra*, 42, note (*x*). But the rule does not apply to a banker who pledges an indorsed negotiable security deposited in his hands. I Bos. & Pull. 648, 651. The plaintiffs previously to a sale issued catalogues, and by one of the conditions of sale, payment was to be made on delivery by good bills on London, at four months from the date of the sale; one of the catalogues being sent to the defendants by their broker, they directed him to purchase certain lots, which he accordingly did, in his own name, and immediately drew on the defendants at four months, which they accepted, and paid when due. It appeared that at the sale the terms of payment were varied to known purchasers to "payment two and two months," by which the brokers were allowed to have the goods without giving bills at the time, and they subsequently became bankrupts. In an action against the defendants as the real purchasers, it was held that the defendants not having authorized any contract different from that mentioned in the condition, viz. a payment on delivery by good bills, and on the faith of which they might prop rly accept the bills, they were not bound by the contract varied at the sale, and that the plaintiffs therefore were not entitled to recover. *Horsfall* v. *Fauntleroy*,[7] 10 B & C. 755.

(A) (An authority to bring suit on a claim, and prosecute it to final judgment, does not imply an authority to compromise, which must be specially conferred. *Kilgour* v. *Ratcliff's Heirs*, 2 Martin, N. S. 292.)

[1]Eng. Com. Law Reps. xv. 368. [2]*Id.* xxxv. 29. [3]*Id.* iii. 176. [4]*Id.* xxii. 352. [5]*Id.* iii. 224. [6]*Id.* vi. 295. [7]*Id.* xxi. 160.

fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal (*b*), whose mere instrument he is; and then, whatever the agent says, within the scope of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal (*c*) himself; and it makes no difference whether the declaration be true or false, for they are just as binding upon the principal as if they had been actually made by him. But where the agent makes any declaration or representation of his own, and not as the instrument of his master, that declaration will not be evidence, but the agent himself must be called (*d*) to prove any fact within his knowledge; consequently, a letter
*46 written by *an agent to his principal of what he has done, being the representation of the agent to his principal of what he has done, is not admissible in evidence against the principal to prove the truth of the representation (*e*); for he is no longer the authorized instrument of the principal to bind him by such declarations (1).

So where the question was, whether the agent of the defendant had delivered to him a bond, alleged to have been made by the defendant to the plaintiff, it was held, by the Master of the Rolls, that the declaration by the agent, that he had delivered the bond to the defendant, was not admissible evidence to prove the fact (*f*). But it is otherwise where the principal refers himself to his agent's declaration on a particular subject, or constitutes a party his general agent for conducting his business, for then a declaration or acknowledgment by the latter falls within the scope of his authority (*g*).

Defence by an agent. An agent may generally repel an action against himself by proof that he acted on the footing of an agent, and was understood so to act (*h*) (A),

(*b*) The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. *Helyar* v. *Hawke*, 5 Esp. C. 72; and see *Irving* v. *Motley*,[1] 7 Bing. 543. *Garth* v. *Howard*,[2] 8 Bing. 451. *Schumack* v. *Locke*,[3] 10 Moore, 39. And see note (*l*).

(*c*) As to payments to an agent, see tit. Payment, and *Stewart* v. *Aberdeen*, 4 M. & W. 211.

(*d*) See *Kahl* v. *Jansen*, 4 Taunt. 566, and *Langhorn* v. *Allnutt*, 4 Taunt. 511. In the first of these cases the Chief J. observed, "when it is proved that *A.* is the agent of *B.*, whatever *A.* does or says, or writes, in the making of a contract, as agent of *B.*, is admissible in evidence, because it is part of the contract which he makes for *B.*, and which therefore binds him, but it is not admissible as the agent's account of what passes." See also *Mestaers* v. *Abraham*, (1 Esp. C. 375); the question was, whether the defendant, the purchaser of goods, had agreed to find bags for the carriage of them: according to the report of the case, the plaintiff offered in evidence the letter of the broker who sold the goods, (being the plaintiff's own agent,) written to the plaintiff, saying that the bags would be ready by a certain day; the broker was then in the box, and Lord Kenyon said, that he would admit evidence of what he had done on account of the defendant, but that it should be learned from himself, and not from his letter. See *Ashford* v. *Price*,[4] 3 Starkie's C. 185, *infra*, note (*g*).

(*e*) 4 Taunt. 511; Ib. 565, 663. As to admissions by an attorney, see tit. Attorney.

(*f*) *Fairlie* v. *Hastings*, 10 Ves. jun. 128.

(*g*) Vide *supra*, p. 29. A declaration by the clerk of an attorney, in taxing costs, that he would not charge extra costs, is evidence against the principal. *Ashford* v. *Price*,[5] 3 Starkie's C. 185; 1 D. & R. 48.

(*h*) See Vendor and Vendee. The office of clerk to a body of trustees being executed by a deputy, the clerk is not responsible for losses occasioned by the negligence of such deputy induced by the negligence of the trustees, nor for monies which came into his hands through their irregular acts; but he is for sums received at his office by such deputy without his authority, but which he had ground for believing would be paid there. *Whitmore* v. *Wilks*, 1 Mood. & M. 214. Notice that third parties are interested in a particular adventure, imposes upon an agent the duty of accounting with the latter, in respect of their proportion; but it is otherwise, if from subsequent transactions it be shown that they are content to rest upon the

(1) [See Mr. Day's notes to the cases of *Mestaers* v. *Abraham*, 1 Esp. C. 375, and *Helyear* v. *Hawke*, 5 Esp. C. 74. See also 5 Esp. C. 134. 1 Taunt. 398.)

(A) (An agent who makes a contract in behalf of his principal, whose name he discloses at the time to the person with whom he contracts, is not personally liable. *Rathbone* v. *Budlong*, 15 Johns. R. 1. *Mauri* v. *Hefferman*, 13 Johns. R. 58. *Meyer* v. *Barker*, 6 Binn. 234.)

[1]Eng. Com. Law Reps. xx. 233. [2]*Id.* xxi. 341. [3]*Id.* xvii. 133. [4]*Id.* xii. 352. [5]*Id.* xiv. 176.

unless he execute an instrument in his own name (*i*). A public officer, trading on behalf of the public, is not liable on contracts made by him in that capacity (*k*) (A). One who contracts on behalf of government is not liable, although the contract be by deed (*l*). But if a person represent himself to be an agent for one who resides abroad, it seems that he is personally liable (*m*).

So where a captain contracts for goods for the use of the ship (*n*).

*It is a settled rule of law (*o*), that an agent shall not be allowed to dispute the title of his principal. *47

One who agrees to be responsible as agent for the plaintiff in respect of a sale with the auctioneers, is liable, although the plaintiff appoint the auctioneer (*p*).

It is also a general rule, that an agent shall not be allowed to take an undue advantage of his principal through the medium of such agency, by standing in a double capacity (*q*).

responsibility of the other partners, and that the agents should account solely to them. *Killock* v. *Greg*, 4 Russ. 285. See further as to the defence that the party is but an agent. *Foster* v. *Blakelock*,[1] 5 B. & C. 328; and tit. Work and Labour. As to the liability of parishioners directing parish work to be done by the churchwardens, see *Lanchester* v. *Tucker*,[2] 1 Bingh. 201. See tit. Abatement—Churchwardens.

(*i*) *Appleton* v. *Binks*, 5 East, 148. But if an agent covenant in his own name, he will be personally bound, although he be described in the deed as covenanting on the part of another. *Appleton* v. *Binks*, 5 East, 147. *Wilks* v. *Backs*, 2 East, 142. *White* v. *Cuyler*, 6 T. R. 176. And if he draw a bill in his own name, he will be personally liable, although the plaintiff knew that he was merely an agent. *Leadbitter* v. *Farrow*, 5 M. & S. 345. *Thomas* v. *Bishop*, Str. 955. So where a solicitor undertakes in writing to pay rent on withdrawing a distress. *Burrell* v. *Jones*, 3 B. & A. 47. A party describing himself as agent or consignee of a vessel chartered for a specific purpose, signs an agreement in his own name, witnessing "that the said parties agree," &c., and acting as principal throughout the voyage, is personally liable. *Kennedy* v. *Gouveia*,[3] 3 D. & R. 503.

(*k*) *Macbeath* v. *Haldimand*, 1 T. R. 172.

(*l*) *Unwin* v. *Wolseley*, 1 T. R. 674.

(*m*) *De Gaillon* v. *L'Aigle*, 1 B. & P. 368; 3 B. & A. 47. *Burrell* v. *Jones*. *Appleton* v. *Binks*, 5 East, 148. *A.* appoints by power of attorney three persons to act in the management of his estates in Jamaica, as his attornies, one of whom, residing there, enters into an agreement with *R.* to undertake the factorage of the estates, together with others, on certain terms; *R.* cannot call upon *A.* for supplies furnished, but must look to the attorney with whom he contracted. *Pennant* v. *Simpson*, 1 Knapp, P. C. 399.

(*n*) *Farmer* v. *Davis*, 1 T. R. 108.

(*o*) And therefore, where an agent has received money on behalf of his principal, he cannot afterwards be allowed to say that he received it for some other person. *Dixon* v. *Hammond*, 2 B. & A. 310. The defendant in that case having effected an insurance for both Flowerden and Davidson, and having received the amount of a loss, it was held that he was bound to pay it over to the partnership, and could not pay it to Flowerden alone. In *Farrington* v. *Clarke*,[4] 2 Chitty's C. T. M. 429, an agent had taken out letters of administration in India for his principal, who had obtained administration of the intestate's effects; and it was held that the agent could not refuse to pay over the assets to his principal, on the ground that others had obtained administration. *Ib.* See also *Roberts* v. *Ogilby*, 9 Price, 269. *Gosling* v. *Birnie*,[5] 7 Bingh. 339; 5 M. & P. 160. *Hawes* v. *Watson*,[6] 2 B. & C. 541. *Stonard* v. *Dunkin*, 2 Camp. 334. But see *Saxby* v. *Wynne*, and *Ogle* v. *Atkinson*, Vol. II. Trover by Vendee.

(*p*) *Cholmondely* v. *Payne*, 8 C. & P. 482. And the plaintiffs receiving part of the proceeds from the auctioneer does not discharge the agent. *Ib.*

(*q*) *A.* being in this country, applied to *B.* to advise him as to dealing in foreign funds, and by his advice transferred foreign securities from one to another. It appearing that the funds purchased were *B.*'s own, and the transfers merely dealing with his own stock, it was held that the transaction could not be supported, the dealer standing in a situation of advantage which an agent is not permitted to be in dealing with his principal. *Brookman* v. *Rothschild*, 3 Sim. 153; and affirmed in Dom. Pr. 1 Dow. & C. 188. A party employed to purchase an estate, becoming the purchaser himself, is held in equity to be a trustee for his employer. *Lees* v. *Nuttall*, 1 Russ. & M. 53. Where the defendant having been employed by the plaintiff as broker, undertook (as he was bound to do under 6 Ann. c. 16, s. 4) to charge him only the cost price of the goods purchased, having violated his duty in every instance, the plaintiff is entitled to recover damages for such overcharges paid by him. *Proctor* v. *Brain*,[7] 2 M. & P. 284.

(A) (An agent of government, though known as such, is personally liable on a contract made by him on account of government, unless it appears that he contracted in his official capacity, and on account of government, and that the other party gave the credit, and intended to look to government for compensation. *Sheffield* v. *Watson*, 3 Caines' R. 69. See also *Rathbone* v. *Budlong*, 15 Johns. R. 1. *Swift* v. *Hopkins*, 13 Johns. R. 313;—but see *Hodgson* v. *Dexter*, 1 Cranch. 345. *Powell* v. *Finch*, 5 Yerg. 446. *Perry* v. *Hyde*, 10 Conn. R. 329.)

[1] Eng. Com. Law Reps. xi. 240. [2] *Id.* viii. 294. [3] *Id.* xvi. 174. [4] *Id.* xviii. 388. [5] *Id.* xx. 153. [6] *Id.* ix. 170. [7] *Id.* xvii. 207.

AGREEMENT. *See* ASSUMPSIT.

AMENDMENT. *See* Tit. VARIANCE; *and see* Append. Vol. II. 47.

APOTHECARIES.

An apothecary, by the stat. 55 Geo. 3, c. 194, s. 21, must, in an action for business done, prove either, that he *practised* (*r*) as an apothecary prior to or on the *first* day of August 1815, or that he has duly obtained his certificate (*s*) from the master, wardens, and society of Apothecaries. A diploma from a Scotch university does not exempt in England (*t*). In an action to recover penalties under the same act, sec. 20 (*u*), where the question was,
*48 *whether the defendant had *practised as an apothecary* previous to the 1st of August 1815, it was held, that the incapacity, proved on the defendant, to make up the prescriptions of physicians before that time, was cogent evidence to prove the negative (*v*); since the 5th section of the act describes it to be the duty of an apothecary to make up prescriptions for physicians. It has been held, that an apothecary who charges for attendance is not entitled to charge for the medicines which he finds, and *vice versâ* (*w*). In a later case, a surgeon and apothecary was allowed to recover reasonable charges for attendance, besides his charges for medicine (*x*).

APPLICATION OF PAYMENT. *See* PAYMENT.

APPORTIONMENT.

There can be no extinguishment, suspension or apportionment of rent contrary to the contract and agreement of the parties, but where the lessor enters wrongfully (*y*). But if the lessor take a part, then there shall be an apportionment (*z*); and the apportionment may be made by a jury (*a*). So if the lessee be evicted of part, and continue to hold the remainder (*b*).

(*r*) *Wogan* v. *Somerville*,[1] 7 Taunt. 401. It was there held that the house-apothecary of an infirmary, who officiates in making up medicines for the patients, is a person practising within the statute.

(*s*) *Sherwin* v. *Smith*,[2] 1 Bingh. 204. It was there held that a certificate from the Court of Examiners was conclusive to show that the party had served an apprenticeship. It is sufficient to prove the signature of one of the examiners of the Apothecaries' Company, which the certificate purports to bear, with evidence that it was issued by the court of examiners. *Walmesley* v. *Abbott*,[3] 3 B. & C. 218. By the 6 G. 4, c. 133, s. 7, the seal of the Apothecaries' Company is evidence of the certificate and qualification; but the seal must be proved. *Chadwick* v. *Bunning*,[4] 2 C. & P. 106; 1 Ry. & M. 306.

(*t*) *Apothecaries' Company* v. *Collins*,[5] 4 B. & Ad. 604.

(*u*) *Apothecaries' Co.* v. *Toby*,[6] 5 B &. A. 949. It was there held, that upon an information against the defendant to recover penalties for practising against the statute, it was necessary to show in defence that the defendant was in practice on the first day of August 1815, and that it was not sufficient to show that he was in practice on a previous day.

(*v*) *The Apothecaries' Company* v. *Warburton*,[7] 3 B. & A. 40. It is not sufficient to show that he professed to cure, and practised in local complaints only; to entitle himself to sue he must have compounded medicines, and practised the general duties of an apothecary. *Thompson* v. *Lewis*, 1 M. & M. 255. A practising in the service of another is not sufficient. *Brown* v. *Robinson*,[8] 1 C. & P. 264. *A.* bound himself apprentice to an apothecary, who resided eight miles from *H.* The apothecary then took a house at *H.*, in which *A.* resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients; held that this was a practising by *A.* as an apothecary within the meaning of 55 Geo. 3, c. 194, s. 20. *The Master, &c. of the Company of Apothecaries* v. *Greenwood*,[9] 2 B. & Ad. 708. If a person compounds medicines, &c. he is liable to penalties, although he cannot make up a physician's prescription. *Apothecaries' Company* v. *Allen*,[10] 4 B. & Ad. 625.

(*w*) *Towne* v. *Gresley*,[11] 3 C. & P. 581.

(*x*) *Handey* v. *Henson*,[12] 4 C. & P. 110. See further Bill of Exchange—Surgeon.

(*y*) *Hodgson* v. *Thornborough*, 2 Lev. 143. If *A.* lease to *B.*, reserving 20*l.* rent, and *B.* underlet *part* to *C.* without rent, and *C.* assign to *A.*, yet *A.* shall have the whole 20*l.* without apportionment.

(*z*) Per Popham, in *Smith* v. *Malings*, Cro. Jac. 160; Litt. s. 222; Co. Litt. 148 (*a*). So if the lessor grant or devise part of the reversion to another. Co. Litt. 148 (*a*).

(*a*) On *nil debet* pleaded in debt for rent. 1 Vent. 276; Com. Dig. Suspension [E.]; Cro. Eliz. 771; Cro. Jac. 160.

(*b*) *Smith* v. *Malings*, Cro. Jac. 160. *Smith* v. *Raleigh*, 3 Camp. 513. *Stokes* v. *Cooper*, Ib. 514, n. *Dal-*

[1]Eng. Com. Law Reps. ii. 154. [2]*Id.* viii. 291. [3]*Id.* x. 56. [4]*Id.* xxi. 247. [5]*Id.* xxiv. 123. [6]*Id.* vii. 313. [7]*Id.* v. 223. [8]*Id.* xi. 386. [9]*Id.* xxii. 175. [10]*Id.* xxiv. 128. [11]*Id.* xiv. 462. [12]*Id.* xix. 300.

APPROPRIATION. *See* PAYMENT.

The brokers of *B.* sell goods in their possession to *C.*, taking in payment a bill accepted by *D.* and return the goods on *C.*'s account, with instructions to sell, if at a profit. Before the bill becomes due, *D.* becomes bankrupt; the brokers, of their own accord, apply to *C.* for security, who authorizes them to sell the goods, and apply the proceeds in payment of the bill. Before they are sold, *C.* also becomes bankrupt; *C.*'s assignees cannot maintain trover against the brokers, or against *B.*, for the goods which, after the order from *C.* to the brokers to sell and apply the proceeds, remained in the hands of the latter subject to that charge, although the brokers, in requiring such security, acted without instructions from *B.*, he having by his conduct subsequently ratified their acts, and the brokers being entitled to act for their employers' benefit (*c*).

* APPROPRIATION OF PAYMENT. *See* PAYMENT. *49

APPURTENANT (*d*). *See* TRESPASS.

ARBITRATOR. *See* AWARD.

ARREST.

It must be proved that the arrest was by authority of the bailiff; but it is not necessary to show that he was actually present, or in sight, or within any precise distance (*e*) (A). *See* tit. SHERIFF.—TRESPASS.

ARSON.

To establish this offence it is essential to prove, *first*, the act of setting fire to and burning; *secondly*, the house, &c.; *thirdly*, of the owner specified in the indictment; *fourthly*, with a felonious intent (*f*).

First. The act of setting fire to and burning.—To constitute arson at common law, there must be an actual burning of the house, or of some part of it (*g*). And the statutable description "set fire to," does not enlarge the common law offence in this respect (*h*). It is necessary to prove that Act of setting fire to.

ston v. *Reeve*, Ld. Ray, 77. *Clun's Case*, 10 Rep. 128. *Burn* v. *Phelps*,[1] 1 Starkie's C. 94. *Tomlinson* v. *Day*,[2] 3 B. & B. 680. But the lessee may at his election, on eviction from part, abandon the whole.

(*c*) *Bailey* v. *Culverwell*,[3] 8 B. & C. 449, (and see Appendix). Here the act of the agent, ratified by the principal, had the effect of an order given by the principal, and accepted by the brokers. See *Carvalho* v. *Burn*. As to the appropriation of a cargo in the hands of an agent as a security for advances by a third person, see *Fisher* v. *Miller*,[4] 1 Bingh. 150. *A.* directs *B.*, his debtor, to pay *C.* his creditor, *B.* assents, and pledges himself to pay *C.*, *A.* cannot revoke the order. *Hodgson* v. *Anderson*,[5] 3 B. & C. 842. Before payment *A.* becomes a bankrupt. His assignees cannot recover, for *C.* is entitled in equity to an assignment of debt. *Crowfoot* v. *Gurney*,[6] 9 Bing. 372.

(*d*) Land cannot be appurtenant to land. *Buzzard* v. *Capel*,[7] 8 B. & C. 141.

(*e*) *Blatch* v. *Archer*, Cowp. 65. As to arrest within a privileged jurisdiction, see *Sparks* v. *Spinks*,[8] 7 Taunt. 311. If a sheriff arrest a defendant on one writ, he is arrested as to all writs then in the sheriff's office. Per Bayley, J., *Short* v. *Vansittart*, York, 1821. See tit. TRESPASS.

(*f*) See the allegations, Criminal Pleadings, 417.

(*g*) 3 Inst. 66; 1 Hale, P. C. 568; East's P. C. 1020; 1 Haw. c. 39, s. 4; 2 Bl. Comm. 222.

(*h*) This was so held under the stat. 9 Geo. 1, c. 22 (now repealed). East's P. C. 1020. *R.* v. *Spalding*. *R.* v. *Reeve*. *R.* v. *Taylor*, Leach C. C. L. 58. The late stat. 7 & 8 Geo. 4, c. 30, s. 2, uses the same words, and makes it capital, unlawfully and maliciously to set fire to any house, stable, coach-house, out-house, ware-house, office, shop, mill, malt house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same be then in the possession of the offender, or of any other person, with intent thereby to injure or defraud any person.

(A) (No manual touching of the body is necessary to constitute an arrest. *Gold* v. *Bissell*. 1 Wend. 215. *Strout* v. *Gooch*, 8 Greenl. 127. But see *United States* v. *Benner*, 1 Baldw. 239. *Huntington* v. *Blaisdell*, 2 N. Hamp. 318. Where one not generally known as an officer makes an arrest, he must show his authority, if required. *Arnold* v. *Steeves*, 10 Wend. 514. *State* v. *Curtis*, 1 Hayw. 471. Where one not generally known as an officer makes an arrest, he must show his authority if demanded, or he may be resisted. Ib. But a party not immediately submitting to such officer, has no right to make this demand. *Commonwealth* v. *Field*, 13 Mass. R. 321.)

[1] Eng. Com. Law Reps. ii. 310. [2] *Id.* vi. 315. [3] *Id.* xv. 261. [4] *Id.* viii. 276. [5] *Id.* x. 247. [6] *Id.* xxiii. 309. [7] *Id.* xv. 169. [8] *Id.* ii. 118.

some part of the house was burnt. Upon an indictment under the statute 9 G. 1, c. 22, for burning an out-house called a paper-mill, proof that a large quantity of paper drying in a loft of the mill had been set on fire, no part of the mill itself having been set on fire, was held to be insufficient (*i*). But it is not necessary to show that the whole was consumed (*j*) (1). The act may consist in the prisoner's burning his own house, if he do it with intent to burn the house of another, which is in consequence burnt, or even with a felonious intent to defraud an insurer (*k*).

House. *Secondly. The house, &c.*—Arson, at common law, is an offence against the habitation, and therefore the house must be proved to be a dwelling-house (*l*) (B). The offence at common law extends to the burning not only of the dwelling-house, but also of all out-houses which are parcel of
*50 the *dwelling-house, although not adjoining to it, or under the same roof (*m*). In what cases an out-house is to be considered as part of the dwelling-house will be more fully considered in treating of the evidence in case of burglary. The burning of a barn, containing corn and hay, was felony at common law (*n*). A common gaol was held to be a house, under the stat. 9 Geo. 1, c. 22 (*o*). An indictment under that statute for burning an *out-house*, was sustained by proof of burning an out-house, although it was part of a dwelling-house (*p*); for it is still an out-house, and the statute did not alter the nature of the crime, but only excluded the principal more clearly from clergy (*q*).

Ownership. *Thirdly. Ownership and possession.*—The house is described either as the house of a particular person specified in the indictment, or under the stat. 7 & 8 Geo. 4, c. 30, is described to be in the possession of the prisoner, or of some other person. If it be described generally as the house of another, then, since arson is an offence immediately against the possession, the house must be proved to be in the possession of that person, *suo jure* (*r*). Hence if the house be alleged to be the house of another, and it appear that the prisoner was in possession of the house under a lease for years, it is not felony (*s*). So an indictment against a prisoner for burning his own house was bad (*t*) before the stat. 43 Geo. 3, c. 58 (*u*); but it is no defence that the prisoner resided in the house by sufferance, as a pauper, by permission of the overseers, without any interest of his own; for the possession in such case is in the overseers, by the occupation of the pauper

(*i*) *R.* v. *Taylor*, Leach's C. C. L. 58.
(*j*) 3 Inst. 66; 1 Hale, 568; 1 Haw. c. 39, s. 4.
(*k*) *R.* v. *Probert*, East's P. C. 1030; 6 St. Tr. 222. And see the stat. *supra*, note (*h*).
(*l*) See Criminal Pleadings, note (*h*). And see the late stat. *supra*, note (*h*).
(*m*) 1 Hale, P. C. 567, 570; Summ. 86; 3 Inst. 67, 69; 1 Haw. c. 39, s. 1, 2; 4 Bl. Comm. 221.
(*n*) East's P. C. 1020; and so (*semble*) was the burning of a barn simply.
(*o*) *R.* v. *Donnovan*, Leach's C. C. L. 18. Repealed by the stat. 7 & 8 Geo. 4, c. 30.
(*p*) *R.* v. *North*, East's P. C. 1021. (*q*) *R.* v. *Breeme*, East's P. C. 1021.
(*r*) East's P. C. 1022. 1033. See East's P. C. tit. BURGLARY.
(*s*) *R.* v. *Holmes*, Cro. Car. 376. W. Jones, 351; 1 Hale, P. C. 568; 3 Inst. 66. The authority of this case was questioned by Mr. J. Foster, who thought that the house might with propriety be considered the house of the landlord; and in *R.* v. *Breeme*, East's P. C. 1026, Ld. Mansfield said, that if *Holmes' Case* had come again in question, he should have been of a different opinion.
(*t*) *R.* v. *Spalding*, East's P. C. 1025; 4 Bl. Comm. 222–3. *Poulter's Case*, 11 Co. 29. *R.* v. *Scofield*, Cald. 397. East's P. C. 1028.
(*u*) Now repealed, and the stat. 7 & 8 G. 4, c. 30, is substituted; vide *supra*, 49.

(1) [It is sufficient, if the fire is applied with a malicious intent, so as to take effect, however small a part is consumed. *Commonwealth* v. *Van Schaack*, 16 Mass. Rep. 105. *The People* v. *Butler*, 16 Johns. 203. *The People* v. *Cotteral & al.* 18 Johns. 120.]

(B) (Burning a school-house is arson; *State* v. *Obrien*, 2 Root, 516; *Jones* v. *Hungerford*, 4 Gill & Johns. 402; *Wallace* v. *Young*, 5 Monr. 156; so a common gaol. *Stevens* v. *The Commonwealth*, 4 Leigh, 683. *The People* v. *Van Blarcum*, 2 Johns. R. 105. *Commonwealth* v. *Posey*, 4 Call, 103. See further, *State* v. *Brooks*, 4 Conn. 446.)

(*x*). Where a widow, who was entitled to dower out of a house in the possession of a tenant, which had been mortgaged, her son, being entitled to the equity of redemption, procured another to burn the house, it was held that she was guilty as an accessory before the fact, since the possession was in the tenant on behalf of her son; and her title to dower, supposing the tenant's interest to be out of the case, did not give her even a right of entry (*y*). And it seems, that even if the prisoner had been entitled to the inheritance, and the tenant had been in possession, she would have been guilty of felony (*z*). As the offence is against the possession, it is essential to prove that person to be in possession who is alleged in the indictment to be the owner (*a*). In *Glandfield's Case* (*b*), the premises (which were out-houses) were alleged to be the mother's. It appeared in evidence that they were the property of *Blanche Silk*, widow, the mother, but that one part was occupied jointly by the mother and son, and the rest by the son alone, and the variance was held to be fatal. On an * indictment *51
against the prisoner for burning his own house, with intent to burn the house of *A. B.* in one count, and of *C. D.* in another count, it appeared that *A. B.*, the owner of the latter house, had let it to *C. D.* for ninety-nine years, who had let it to *E. F.* for one year, who had let it to *G. H.* for three months, and the variance was held to be fatal (*c*).

Fourthly. With a felonious intent, &c.—An indictment at common law alleges that the prisoner did the act *feloniously, wilfully, and maliciously* (*d*). And although the words maliciously and wilfully were no part of the description of the offence under the stat. 9 Geo. 1, c. 22 (*e*), yet, in order to oust the offender of his clergy under that statute, it was held that it must appear that the act was wilful and malicious (*f*). If *A.* set fire to his own house, with intent to defraud the insurer, and the house of *B.*, his neighbour, be burnt in consequence, and it was likely that this circumstance would happen, *A.* is guilty of arson, since the common law connects the primary felonious intention with the immediate consequence (*g*) (A). So if *A.*, intending to burn the house of *B.*, set fire to Felonious intent.

(*x*) *R.* v. *Gower*, East's P. C. 1027. *Qu.* whether in such a case the pauper could have committed a burglary in the house?

(*y*) *R.* v. *Ann Course*, Foster, 113. (*z*) Ibid.

(*a*) *R.* v. *Breeme*, Leach's C. C. L. 261. *R.* v. *Spalding*, Ib. 258; 11 Co. 29. *R.* v. *Holmes*, Cro. Car. 376. *Rickman's Case*, East's P. C. 1034.

(*b*) East's P. C. 1034.

(*c*) *R.* v. *Pedley*, Cald. 218; Leach's C. C. L. 277; 1 Hale's P. C. 268; East's P. C. 1026.

(*d*) See Criminal Plead. 417.

(*e*) Now repealed; the words of the stat. 7 & 8 G. 4, c. 30, are, unlawfully and maliciously, and with intent to injure or defraud any person.

(*f*) 1 Hale's P. C. 567, 569; 3 Inst. 67. *Minton's Case*, East's P. C. 1021. Ib. 1033. Criminal Pl. 419, n. (*o*).

(*g*) *R.* v. *Isaac*, East's P. C. 1031. The prisoner was indicted for a misdemeanor in setting fire to his own house, whereby the neighbouring and contiguous dwelling-houses of other persons were endangered; and upon its appearing, from the statement by counsel, that the act was done with intent to defraud the insurers, and that the adjoining houses were actually burnt, Buller, J. was of opinion that the misdemeanor was merged in the felony, and directed an acquittal. Note, that at that time the burning a man's own house with intent to defraud an insurer was but a misdemeanor; there was therefore no primary felonious intent. The offence was made felony by the express provisions of the stat. 43 Geo. 3, c. 58, s. 1, and by the subsequent stat. 7 & 8 Geo. 4, c. 30, the former act being repealed. And in *Probert's Case*, East's P. C. 1030, where the prisoner was indicted and convicted of a misdemeanor for having set fire to his own house, and thereby endangering contiguous houses, Grose, J. said, on passing sentence, that if any of the contiguous houses had been actually burnt in consequence of the defendant's wilful and malicious act in setting fire to his own house, (which was proved to have been done in order to cheat the insurance office,) it would clearly have amounted to a capital felony.

(A) (See *Sullivan* v. *The State*, 5 Stew. & Port. 175. The burning of one's own property unaccompanied with injury to, or a design to injure some other person, is not a punishable offence by common law. *Bloss* v. *Tobey*, 2 Pick. 325.)

the house of *C.*, and burn it, this, for the same reason, would be evidence of a felonious intent to burn the house of *C.* (*h*), although the house of *B.* escaped by some accident. So if *A.* procure *B.* to burn the house of *C.* and he does it, and the fire extends to the house of *D.* and burns it, *A.* is accessory to burning the house of *D.* (*i*). But if it appear that the house of the prosecutor was burnt by the negligence of the prisoner, however gross, or by accident, or even by his committing an unlawful act, which does not amount to a felony, the burning will not amount to arson. As, where an unqualified person, shooting at game, sets fire to the thatch of a house; or where a person is committing a trespass, by shooting at the poultry of another (*k*), provided he did not mean to steal them. Where the intent is laid to defraud the insurer, the books of the insurance company are not evidence without notice to produce the policy (*l*). Where the prisoner's goods, in a particular house, had been insured, and a memorandum had been indorsed on the policy, stating that the insured goods had been
*52 removed to another house, and the policy had been properly stamped, *but the memorandum had no new stamp; on the trial of the prisoner for setting the latter house on fire, it was objected that the memorandum could not legally be received in evidence for want of a stamp. The case was argued before the twelve Judges, and the prisoner was afterwards discharged (*m*). Where the indictment was framed under the stat. 43 Geo. 3, c. 58, s. 1 (*n*), it was held that the act of wilfully burning the property carried within itself sufficient evidence of an intention to injure the owner, without proof of any other act which indicated malice (*o*); although the principal object of the statute was to comprise the case of a person burning a house of which he was tenant or owner, to the injury of his landlord or neighbour, or to defraud the insurers (*p*).

General evidence. *General Evidence.*—In *Rickman's Case* (*q*), evidence was adduced that a bed and blankets, which had been taken from the house at the time of the fire, had been in the possession of the prisoners, and had been concealed by them from that time. Buller, J. doubted at first whether such evidence of another felony could be admitted in support of this charge; but, as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, the evidence was admitted. The evidence to prove this offence, as in other cases, resolves itself into the probable motives of the prisoner, his opportunity and means of committing the offence, and his conduct. Where the prisoner is charged with setting fire to his own house, with intent to defraud the insurer, the value of the property as compared with the amount insured, obviously becomes a question of great importance, in order to establish or repel the inference of motive.

Variance. A *variance* from the ownership, as laid in the indictment, is fatal (*r*). Upon a charge of burning an out-house the prisoner may be convicted,

(*h*) 1 Hale, 569; 3 Inst. 67; 1 Haw. c. 93, s. 5; East's P. C. 1019.
(*i*) Plowden, 475; East's P. C. 1019.
(*k*) 1 Hale, 569; 3 Inst. 67; 1 Haw. c. 39, s. 5; East's P. C. 1019.
(*l*) *R.* v. *Doran, cor.* Kenyon, C. J. 1 Esp. C. 127.
(*m*) *R.* v. *Gillson*, 2 Leach, 1007, 4th edit.; 1 Taunt. 95. Phillips on Evidence, 457.
(*n*) Now repealed; but the language of the stat. 7 & 8 G. 4, c. 30, is nearly similar, *supra*, 49, note (*i*).
(*o*) *Farrington's Case*, Russel, 1674. The fact of the prisoner having set his master's mill on fire was clearly proved by his own confession; but it appeared that he was in other respects a harmless inoffensive man, and that he had never had any quarrel with his masters. After conviction, sentence was respited to take the opinion of the Judges upon this clause of the statute; and they held the conviction to be proper, since the burning of the mill must, under the circumstances, have been done with an intention to injure.
(*p*) Ibid. (*q*) East's P. C. 1035.
(*r*) See above, p. 50; and *Rickman's Case*, East's P. C. 1034; *Glandfield's Case*, Ib.

although it appear that the out-house was part of a dwelling-house (*s*). An allegation that the offence was committed in the night-time need not be proved (*t*).

ASSAULT AND BATTERY.

For the evidence in an action for an assault and battery, see TRESPASS.

An *indictment* for an *assault* is supported by evidence of an attempt, with force and violence, to do a corporal hurt to another (*u*). An indictment for a *battery* is sustained by evidence of the smallest injury done to the person of a man, in an angry, rude, revengeful or violent manner (*x*) (A). A previous assault upon the defendant by the prosecutor is evidence in justification (*y*) under the plea of not guilty. But in order to make this a good justification, *it seems that it ought to appear that the striking by the defendant was in his own defence, and was in proportion to the attack made; and that if *A.* give *B.* a slight blow, it will not justify *B.* in maiming *A.*, or in beating him violently and outrageously, and without a view to his own defence (*z*) (B). Evidence upon an indictment. *53

Where the defendant is indicted for an assault, with intent to murder, and it appears that if death had ensued it would have amounted to manslaughter only, the defendant should be acquitted on the first count (*a*).

(*s*) *North's Case*, East's P. C. 1021. (*t*) *Minton's Case*, Ib.

(*u*) 1 Haw. b. c. 62. The riding after a plaintiff, and threatening to horsewhip him, so as to compel him to run into a place of shelter, is an assault in law. *Martin* v. *Shepper*,[1] 3 C. & P. 373.

(*x*) 1 Haw. b. c. 62. As by spitting upon him. *R.* v. *Cotesworth*, 6 Mod. 172.

(*y*) Per Holt, C. J., 6 Mod. 172.

(*z*) *Cockcroft* v. *Smith*, 2 Salk. 642. In an action for assault, battery and mayhem, the plea of *son assault demesne* was held to be a good plea, because it might be such an assault as endangered the party's life; but upon the question what assault was sufficient to maintain such a plea in mayhem, Holt, C. J. said that Wadham and Wyndham, Justices, would not allow it if it was an unequal return, but that the practice had been otherwise, and was fit to be settled; that for every assault he did not think it reasonable that a man should be banged with a cudgel; and that the meaning of the plea was, that he struck in his own defence. That if *A.* strike *B.*, and *B.* strike again, and they close immediately, and in the scuffle *B.* maims *A.*, that is *son assault;* but, if upon a little blow given by *A.* to *B.*, *B.* give him a blow that maims him, that is not *son assault demesne.* See 11 Mod. 43, S. C.

(*a*) Per Ld. Kenyon, *R.* v. *Mytton*, East's P. C. 411 *Bacon's Case*, 1 Lev. 146; 1 Sid. 230; Stanndf. 17. But if there be but one count, *semble* the defendant may be found guilty of the assault simply. See Crim. Pl. 388; and *R.* v. *Dawson*, *cor.* Holroyd, J., York Summer Ass. 1821, *infra*, tit. VARIANCE. The same point was also ruled by Hullock, B. York Summ. Ass. 1827; vide *infra*, tit. VARIANCE. The defendant, a soldier, marching in file along the Strand, wantonly jostled the prosecutor off the pavement, who thereupon struck him with a small stick which he had in his hand, on which the defendant aimed a blow at the prosecutor with his bayonet fixed on his musket, and thrust him under the ear; and Ld. Kenyon, being of opinion that if death had ensued it would have been manslaughter only, directed an acquittal on the first count. *R.* v. *Mytton*, East's P. C. 411.

(A) (An assault is an offer to strike, beat or commit an act of violence on the person of another, without actually doing it, or touching his person. A battery is the touching or commission of any actual violence to the person of another in a rude or angry manner. *Johnson* v. *Tompkins*, 1 Baldw. 600. If a man raise his arm against another, but accompany the action with words, showing a determination not to strike, it is not an assault. *Commonwealth* v. *Eyre*, 1 Serg. & R. 347. See also, *The United States* v. *Hand*, 2 Wash. C. C. R. 435. *The United States* v. *Ortega*, 4 Wash. C. C. R. 534. It is an assault to attempt to run against the wagon of another on the highway. *The People* v. *Lee*, 1 Wheeler's Cr. C. 364. But it is not an assault to point a cane at one in the street, in derision, and for the purpose of insult, but without an intention to strike. *Goodwin's Case*, 6 Rogers's Rec. 9. Striking anything attached to the person of another as a cane, is a battery. *Republica* v. *De Longchamps*, 1 Dall. 111. *State* v. *Davis*, 1 Hill, 146. An assault with intent to murder, is not a felony in common law. *Commonwealth* v. *Barlow*, 4 Mass. R. 439. A person advising, promoting, or aiding the commission of an assault and battery, is liable, though he were not present at the time the trespass was committed. *Bell* v. *Miller*, 5 Ohio, 251. *Avery* v. *Buckley*, 1 Root, 275. *Sikes* v. *Johnson*, 16 Mass. 389. But if husband and wife join in an assault and battery, he only is liable in damages. *Sisco* v. *Cheeney*, Wright, 9. Where persons fail when it is in their power to prevent a merciless battery upon a feeble old man, other slight circumstances may convict them all as principals in the trespass, though they did prevent his being murdered. *Gillon* v. *Wilson*, 3 Monr. 217.)

(B) (*Gates* v. *Lounsbury*, 20 John. R. 427; *Elliott* v. *Brown*, 2 Wend. 497; *Baldwin* v. *Hayden*, 6 Conn. 453. *State* v. *Lazarus*, 1 Rep. Const. C. 34; *Wartrous* v. *Steel*, 4 Verm. 629; *Shain* v. *Markham*, 1 J. J. Mash. 578; *State* v. *Wood*, 1 Bay. 351.)

[1] Eng Com. Law Reps. xiv. 355.

Assault with intent to rob.

Assault with intent to rob.—In *Parfait's Case* (*b*), the indictment charged an assault with a pistol, with intent to rob. It appeared in evidence that the prisoner did not make any demand or motion, or offer to demand the prosecutor's money, but only held a pistol in his hand towards the prosecutor, who was on the coach-box, and bade him stop; and L. C. J. Willes and Chappell, Justices, are said to have held, that the case was not within the act, because, no demand was proved; but the words of the act are in the *disjunctive;* and where the indictment is framed upon the first branch of it, a demand is unnecessary, and it is for the jury to decide with what intent the assault was made (*c*).

In *Thomas's Case* (*d*) it appeared that the prosecutor, *Lowe,* was in a chaise, and that the prisoner, after following it for some time, presented a pistol, to *Dring*, the postboy, bidding him stop, with many violent oaths, but making no demand of money: the carriage stopped, and the prisoner rode up to the chaise, but perceiving that he was pursued, immediately rode away. Upon an indictment for an assault on *Lowe* with intent to rob him, the prisoner was acquitted, because there was no evidence of an assault upon *Lowe.* And he was acquitted upon an indictment for an assault on *Dring*, the postboy, with intent to rob him, because it appeared that there was no intent to rob him; for when he stopped, the prisoner made no demand upon him, but went up to the person in the chaise (*e.*)

And in the case of *Trusty* and *Howard* (*f*), where the prisoners were
*54 indicted *for a felonious assault, with an offensive weapon, with intent to rob, it appeared that one of them, presenting a pistol to the prosecutor, bade him stop, which he did, but called out for assistance; on this the prisoners threatened to blow his brains out if he called out any more, which he nevertheless continued to do, and the men were taken; and, although no demand of money was made, they were convicted and transported. Under this branch of the act it must be proved that the assault was made upon the person whom the prisoner intended to rob. And if the assault be made on *A. D.*, and it appear in evidence that the intent was to rob *C. D.*, the prisoner cannot be convicted.

In *Sharwin's Case* (*g*), it was held, that an allegation that the assault was made with an offensive weapon called a wooden staff, was satisfied by evidence of an assault made with a stone (*h*).

Assault with intent to spoil clothes.

Assault with intent to spoil clothes, &c., 6 Geo. 1, c. 23, s. 66 (*i*).—In *Renwicke Williams's Case* (*k*), a majority of the Judges appear to have been of opinion that a prisoner ought not to be convicted where it appeared in evidence that his primary intention was to injure the person, and not the clothes. But, Buller, Justice, was of a different opinion, relying on the authority of *Coke* and *Woodburn's Case.* He considered that the intent of the prisoner was to wound the party, by means of cutting through her clothes; and the jury, whose sole province it was to find the intent, had found that fact. The case was ultimately decided on a different point, and therefore, cannot be considered as a direct authority upon this point. On the other hand, the case of *Coke* and *Woodburn* is a most strong and express authority on the other side, and seems to rest upon a very plain and substantial principle of justice, frequently recognized by one of the most

(*b*) East's P. C. 406. Under the stat. 7 G. 2, c. 20. This is now repealed; but the stat. 7 & 8 G. 4, c. 29, s. 6, makes it felony, punishable with transportation for life, &c. to assault with intent to rob, or with menaces, or by force to demand property, with intent to steal, &c.

(*c*) See East's P. C. 417.

(*d*) East's P. C. 417; Leach, C. C. L. 372.

(*e*) East's P. C. 417; Leach, C. C. L. 372.

(*f*) Sess. Pap. 735; Crim. Pl. 404.

(*g*) East's P. C. 421.

(*h*) See Crim. Pl. 85. 405.

(*i*) See the averments, Crim. Pleadings.

(*k*) Leach's C. C. L. 597; East's P. C. 424.

enlightened Judges that have presided in our courts; namely, that every man shall be presumed to contemplate that which is the natural and immediate consequence of his act.

Assault on account of money won at play.

Under an indictment for an assault, on account of money won at play (*l*), it is necessary to adduce proof to show that the assault was made or challenge given on account of money won at play, which is question of fact for the jury; and this may be proved, although the assault was not committed at the time of playing, and although it was not committed till the day after (*m*). The prosecutor having lost his money to the defendants, they proposed to depart; the prosecutor objected; and complained that they would not give him an opportunity of recovering his loss: Buller, Justice, directed an acquital, being of opinion, that since the game was over before the assault began, it could not be said to have arisen out of the game, but out of what had been said to the defendants; and that to bring the case within the statute, it was necessary that the assault should arise out of the play, and during the time of the game (*n*). But in the subsequent case of the *King* v. *Darley* (*o*), it was held that the act was not confined to an assault during the time of play (*p*); and it was considered to be a question for the *jury, whether a subsequent assault was made on account of the money previously won (*q*). *55

ASSETS.

Assets.

The principle of distributing assests is, that where there are two funds, and one party may claim under either, but another is confined to one, the former party will primarily be excluded from the latter fund (*r*).

ASSIGNEE.

For the evidence in an action by the assignee of a bankrupt, see tit. Bankrupt.

For the evidence in an action by an assignee of a reversion or term, see Covenant.

Where a plaintiff brings an action as assignee, and the assignment is put in issue by the pleadings, he must give regular evidence of the different steps, by the production and proof of the requisite deeds, will, or probate, (if the subject-matter be of a chattel interest), according to the circumstances of the case. Where a defendant is sued as the assignee of a term, it is sufficient *primâ facie* evidence, on the part of the plaintiff, to prove the payment of rent by the defendant, or even to show that he is in possession of the premises (*s*); for he is not privy to the defendant's title. But if the defendant show that he is but the under-tenant under the original lessee, that will defeat the action, although a reversion of one day only be left in the original lessee (*t*).

An admission by a lessee that he has assigned the premises to another, is evidence of the fact against himself, although it could not have been effected without an instrument in writing (*u*).

(*l*) Under the stat. 9 Ann. c. 14. See Crim. Pleadings, 407, and the stat. there cited.
(*m*) *R.* v. *Darley*, 4 East, 174.
(*n*) *R.* v. *Randall and others*, East's P. C. 423. (*o*) 4 East, 174.
(*p*) Ld. Ellenborough observed, that it more frequently happened that such disputes did not arise till after the play was over.
(*q*) Heath, J., who tried the question, left it to the jury to say whether the result was committed on account of the abusive language used at the time, or on account of the money won the day before.
(*r*) 2 Powell on Dev. by Jarman, 30.
(*s*) *Doe* v. *Parker*, *cor.* Ld. Kenyon, Stafford Summ. Ass. 1788, Peake's Ev. 304. *Holford* v. *Hatch*, Doug. 133. *Hare* v. *Cator*, Cowp. 766.
(*t*) Ibid. (*u*) *Doe* v. *Watson*,[1] 2 Starkie's C. 230.

[1]Eng. Com. Law Reps. iii. 328.

ASSUMPSIT (*x*).

The essentials to this action (*y*), to the proof of which the plaintiff may be put by proper pleas, are a *promise* by the defendant (A), as stated in the declaration, founded upon a sufficient *consideration* (B) (*z*), and in some instances the *performance of conditions precedent* by himself and a *breach* of that promise by the defendant. The declaration is either upon a *special contract*, or upon a general *indebitatus assumpsit*.

Proof of the promise.

A special promise may be proved; 1st. By a written agreement. 2dly. In some instances by oral evidence. Or, 3dly. It results from the special circumstances of the case.

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Written agreement.

**First. By a written agreement.*—In order to establish a written contract, the plaintiff, if he have it in his possession, must produce it, and prove it by evidence of the defendant's signature (*a*); or by the evidence of the attesting witness, if the instrument be so attested. It may then be read in evidence, provided a proper stamp has been affixed to it (*b*).

(*x*) For proofs in actions of special assumpsit on bills of exchange, guaranties, &c., see the titles respectively.

(*y*) Assumpsit is the proper form of action in all cases of injury from a breach of contract not under seal.

(*z*) A consideration may consist in any act or omission either beneficial to the defendant, or prejudicial to the plaintiff. See *Bunn* v. *Guy*, 4 East's R. 194; *March* v. *Culpepper*, Cro. Car. 70; *Sturlyn* v. *Albany*, Cro. Eliz. 67; 4 Taunt. 611. It is sufficient if the benefit accrue to a third person at the defendant's request; and it seems that any benefit of *value* will be sufficient to support a promise. But the consideration must be of some value. A promise in consideration that the plaintiff would make an estate at will to the defendant was held to be insufficient, for the plaintiff might immediately revoke it. 1 Roll. Ab. 23, pl. 29. So the mere performance of an act which the plaintiff was otherwise bound to perform, is not a sufficient consideration. *Harris* v. *Watson*, Peake's C. 72. *Stilk* v. *Meyrick*, 2 Camp. 317. The allowing the defendant to weigh the plaintiff's boilers will support a promise to return them. *Bainbridge* v. *Firmeston*, 1 P. & D. 1.

Natural affection, though sufficient to raise an use, will not support a promise. *Brett* v. *J. S. & Wife*, Cro. Eliz. 755; and it is very doubtful whether a mere moral consideration is sufficient. See note to *Wennall* v. *Adney*, 3 B. & P. 249; and see the case of *Wennall* v. *Adney*, and *infra*, 69. But the release of a merely equitable right is a good consideration in law. *Wells* v. *Wells*, 1 Lev. 273. *Thorpe* v. *Thorpe*, Ld. Raym. 663. Contra, *Preston* v. *Christmas*, 2 Wils. 87. So the consideration may consist in some loss or damage to the plaintiff himself. As if he forbear a legal suit to the debtor, 1 Roll. Ab. 29. pl. 40. *Bond* v. *Payne*, Cro. J. 273. *King* v. *Wills*, Str. 873; Cro. J. 47. But the forbearance must either be for some certain or definite, (*Mapes* v. *Sidney*, Cro. J. 683. *Fisher* v. *Richardson*, Cro. J. 47; 1 Roll. Ab. 23, pl. 25, 26), or at least a reasonable time. *Johnson* v. *Whitcott*, 1 Roll. Abr. 24, pl. 33. See also *Scott* v. *Stephens*, Sid. 89; Lev. 71; Roll. R. 27. *Keech* v. *Kennegall*, 1 Ves. 125. Where the plaintiff was about to enforce a debt of 57*l.* and costs 65*l.*, by an execution against the goods of *A.*, the defendant, in consideration the plaintiff would forbear to execute the writ, promised to pay him 107*l.* in seven days, it was held to be a sufficient consideration to support the promise, and that the action was maintainable. *Smith* v. *Algar*,[1] 1 B. & Ad. 603. In *assumpsit* for breach of an agreement "to remain with the plaintiff two years, for the purpose of learning the business of," &c., held, that there being no stipulation to instruct, and no consideration for the defendant's undertaking, it was not binding on the latter to serve. *Lees* v. *Whitcomb*,[2] 5 Bing. 34; 2 M. & P. 80; and 3 C. & P. 289. Again, the consideration must move from the plaintiff. *Bourne* v. *Mason*, 1 Vent. 6. *Crow* v. *Rogers*, Str. 592; *Dutton et ux* v. *Poole*, 2 Lev. 210; 1 Vent. 318, 334. For the very notion of a contract *implies* mutuality of intention and privity between the parties. *A.* agrees to pay the rent of tolls hired from the commissioners of a road to the treasurer; the treasurer cannot recover. *Pigott* v. *Thompson*, 3 B. & P. 147, *infra* *A.* having made a contract with *B.* to supply him with a carriage for three years, transfers his interest to *C.*, a secret partner; *A.* and *C.* cannot jointly sue *B.*, who refuses to continue the contract with *C.* *Robson* v. *Drummond*,[3] 2 B. & Ad. 303. Lastly, the consideration must be legal, vide *infra;* for it would be against legal policy to sanction in any way an illegal agreement.

(*a*) The signature of the party would not conclude him without acceptance by the other party; see *Payne* v. *Ives*,[4] 3 D. & R. 664; but the very delivery of an absolute undertaking, signed by the defendant, would be evidence of a mutual agreement, till the contrary was shown.

(*b*) Vide *infra*, tit. STAMP.—AGREEMENT.

(A) (A promise by *A.* to *B.* for the benefit of *C.*, will enable *C.* to maintain an action against *A.* *Schermerhorn* v. *Vanderheyden*, 1 Johns. R. 139. So an action will lie on an implied promise, though there be also a special one in writing. *Gibbs* v. *Bryant*, 1 Pick. R. 118.)

(B) (See *Miller* v. *Drake*, 1 Caines R. 45. *Powell* v. *Brown*, 3 Johns. R. 100. *Gardner* v. *Hopkins*, 5 Wend. 23. In all actions of assumpsit a consideration must be alleged, otherwise no cause of action is shown, and the declaration will be bad after verdict in error. *Bender* v. *Manning*, 2 N. Hamp. 289. *Moreley* v. *Jones*, 5 Munf. 23. *Connolly* v. *Cottle*, 1 Breese, 286.)

[1]Eng. Com. Law Reps. xx. 452. [2]*Id.* xv. 357. [3]*Id.* xxii. 81. [4]*Id.* xvi. 180.

If the written contract has been lost or destroyed, after due proof of its former existence and subsequent loss or destruction, parol evidence may be given of its execution by the defendant, and of its contents (A), such secondary evidence is also admissible where the plaintiff has proved that the instrument is in the possession of the defendant, and that he has had notice to produce it. If parol evidence be given of an agreement proved to have been lost, it should also be proved that it bore a proper stamp (*c*). But against a party who refused to produce it, a proper stamp would be presumed (*d*). Proof of written contract.

Parol evidence cannot be received where the instrument was not, when in existence, duly stamped, even although it has been destroyed by the party objecting to the want of a stamp (*e*).

**Secondly. By oral evidence.*—An oral contract, agreeing with that stated in the declaration, may be proved by any witness who was present at the time, or who heard the defendant admit the existence of such a contract. In two classes of cases, however, parol evidence is inadmissible: *first*, where the parties have condescended upon a written contract, for that is the best and only evidence of the intention of the parties, so long as it exists, that can be produced; and when it is lost, or in the hands of the defendant, who refuses to produce it after notice, secondary evidence is to be given of its contents; *secondly*, where written evidence of the contract is expressly required by the Statute of Frauds (*f*). *57 Proof of the contract by oral testimony.

Where a party proposes to prove that which has been agreed on in writing, it is necessary to produce the writing as being the best evidence (*g*).

(*c*) *Supra*, Vol. I. Index, tit. Stamp. *Goodier* v. *Lake*, 1 Atk. 246. *R.* v. *Sir T. Culpepper*, Skinn. 677.

(*d*) *Crisp* v. *Anderson*,[1] 1 Starkie's C. 35.

(*e*) *Rippiner* v. *Wright*, 2 B. & A. 478. *Non constat* that the commissioners would have stamped it on payment of the penalty.

(*f*) *Infra.* Frauds, Statute of.

(*g*) See vol. I. and Index, tit. Best Evidence, and *infra.* tit. Parol Evidence. In an action for work and labour in building, &c., it appeared that there was an agreement in writing, relating to the claim, and it was held that the plaintiff could not proceed without producing it, nor recover for items as *extras* proceeded on even after an admission by the defendant that they were such, and which the written instrument might furnish a means of ascertaining the amount to be paid for: the course would be highly inconvenient if the Judge were to be called upon to look into it, to ascertain whether items alleged to be *extras* were or were not to be included in it. *Vincent* v. *Cole*,[2] 1 Mo. & M. 257, and 3 C. & P. 481. Where, after the plaintiff had made out and closed his case, it appeared from the defendant's evidence that there existed a written contract, but which, for want of being properly stamped, he was unable legally to produce; it was held that the plaintiff could not be nonsuited for its non-production, upon the mere assertion of the defendant, since the written instrument, if produced, might have turned out not to apply to the contract in question. *Fielder* v. *Ray*,[3] 6 Bing. 332, and 4 C. & P. 61. Where, in an action for work and labour in printing, the case was opened on the *quantum meruit*, without stating that there was a special contract; after which, the defendant having proved that the plaintiff had agreed to do the work at a certain sum, the plaintiff proposed to show the special contract, which was different from that set up by the defendant; it was held that he could not be permitted to abandon the cause of action first relied on, and resort to that which he ought to have set up in the outset, nor be allowed to impeach that proved by the defendant. *Soulby* v. *Pickford*,[4] 2 Moore & P. 545. Where one of the parties to an agreement, after its execution, and within the twenty-one days allowed for stamping it, obtained possession of it, and swore it was lost, the Court ordered him to produce a copy in his possession to be taken to the Stamp-office, and that if the plaintiff should produce the same on the trial, stamped, the defendant should not be permitted to produce the original agreement. *Bousfield* v. *Godfrey*,[5] 5 Bing. 418. Where a written agreement refers specifically to a plan, if there be clear and satisfactory

(A) (*Cauffman* v. *Congregation of Cedar Spring*, 6 Binn. 59. *Jackson* v. *Neely*, 10 John. R. 376. But proof of a voluntary and deliberate destruction of a note by a plaintiff will not let in parol evidence of its contents. *Blade* v. *Noland*, 12 Wend. 173. *Riggs* v. *Tayloe*, 9 Wheat. 483. But the bare circumstance of the party not having it in his power to produce a paper, is not sufficient reason for admitting parol evidence. It will always be a question whether with proper exertions he might not have had it in his power; and sometimes it will be a question, whether if the paper be in existence, its production is not indispensable. It seems there is no case where parol evidence has been admitted merely because the paper is in the hands of a third person, and a *subpœna duces tecum* has been refused. *Gray* v. *Pentland*, 2 Serg. & R. 31. See also *McCalley* v. *Franklin*, 2 Yeates, 340. *Hamilton* v. *Van Swearingen*, Addis. 48.)

[1]Eng. Com. Law Reps. ii. 283. [2]*Id.* xiv. 400. [3]*Id.* xix. 94. [4]*Id.* xvii. 216. [5]*Id.* xv. 485.

In an action for use and occupation, it appeared upon cross-examination that there was an agreement in writing, which had not been stamped, and the plaintiff was nonsuited (*h*). The rule does not apply where a mere memorandum has been made in writing, preparatory to an agreement, but which has not been signed as an agreement (*i*). Upon the letting of premises to a tenant, a memorandum of an agreement was drawn up, the terms of which were read over, and assented to by him; and it was agreed that he should, on a future day, bring a surety, and sign the agreement, which he never did: it was held that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms might be proved by parol evidence (*i*). So where a verbal contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but the memorandum is not signed by
*58 the vendor, it need not *be produced (*k*). The plaintiff in ejectment having made out a *primâ facie* case, by proof of a payment of rent, and notice to quit, it appeared upon cross-examination of his witness, that an agreement relative to the same land had been given in evidence on a former trial between the same parties, and had been seen the same morning in the hands of the plaintiff's attorney, the contents of which the witness did not know; no notice having been given by the defendant to produce that paper, it was held that the plaintiff was not bound to produce it; for although it was an agreement relative to the land it might not at all effect the question between the parties (*l*).

From special circumstances.

Thirdly. Where the promise results from the special circumstances of the case, those circumstances must be proved; as, where the plaintiff declares upon a contract by the defendant, as his tenant, to use the farm in a husbandlike manner, according to the customary course of good husbandry in that part of the country, the plaintiff must prove that the defendant occupied the lands in question as his tenant, and the promise results as an inference of law from the premises (*m*) (A).

parol evidence to identify it, it is admissible for that purpose; where however it was not satisfactorily shown to the Court that the parties had agreed upon either of two suggested, the Court held that it was properly refused. *Hodges* v. *Horsfall*, 1 Russ. & M. 116.

(*h*) *Brewer* v. *Palmer*, 3 Esp. 213, *cor.* Ld. Eldon; and see *Jeffery* v. *Walton*,[1] 1 Starkie's C. 267.

(*i*) *Doe* v. *Cartwright*, 3 B. & A. 326.

(*k*) *Dalison* v. *Stark*, 4 Esp. C. 163. See *Doe* v. *Morris*, 12 East, 236; 3 B. & A. 326.

(*l*) *Doe* dem. *Wood* v. *Morris*, 12 East, 237. See also *Doe* v. *Pearson*, Ibid. 238, where in a similar case it appeared, on cross-examination of the plaintiff's witness, that an agreement as to the time of quitting did exist, and the objection that the plaintiff was bound to produce it was overruled by Chambre, J. See also *Buell* v. *Cook*, 5 Conn. Rep. 206. And where the plaintiff, in an action for work and labour, proved his case, and the defendant's witness proved that a written agreement had been entered into, but had not been stamped, and the defendant had given no notice to produce it, it was held that the plaintiff's case was not disturbed. *Stevens* v. *Pinney*,[2] 2 Moore, 439. *Sed quære*, the general rule seems to be, that where the subject-matter of proof is vouched by a written contract, it ought to be produced and proved by the party who relies on the contract. Where the master had undertaken, by the bill of lading, to deliver goods to the consignee on payment of freight, it was held that he could not maintain an action for not unloading in a reasonable time, on an implied contract. *Evans* v. *Forster*,[3] 1 B. & Ad. 118. And see *Brouncker* v. *Scott*, 4 Taunt. 1. Where a party engaged to perform works under a written contract, during which a separate order was given for other work, it was held that it was not necessary to produce the written contract. *Reid* v. *Batte*,[4] 1 Mood. & M. C. 413. In an action for not delivering goods, manufactured by the defendant in pursuance of an order signed by the plaintiff only, the precise terms of the contract, and the defendant's accession to it, may be proved by parol. *Ingram* v. *Lea*, 2 Camp. C. 521. An assignee of a lease, who has been compelled by distress to pay rent due before, the lessee having granted the lease by deed of assignment with the usual covenant for quiet enjoyment, cannot recover on an implied promise. *Baber* v. *Hamil*, P. & D. 360.

(*m*) *Powley* v. *Walker*, 5 T. R. 373; *Legh* v. *Hewitt*, 4 East, 154. So in special actions against carriers,

(A) (*Assumpsit* will not lie to recover the value of specific articles, in the possession of one person, which are claimed by another. *Willet* v. *Willet*, 3 Watts' R. 277.)

[1]Eng. Com. Law Reps, ii. 385. [2]*Id.* iv. 117. [3]*Id.* xx. 354. [4]*Id.* xxii. 343.

*The plaintiff must establish his right of action, and contract, in evidence, as set forth in the declaration; and a variance in any circumstance that is essential to the contract will be fatal (*n*) (A). Variance.

It is now perfectly well established, that a misjoinder of plaintiffs is a ground of nonsuit, as also is a joinder of too many defendants; but that the omission of any party who jointly promised, must be pleaded in abatement (*o*). Where the action is brought by several, or against several, it must appear either that the promise was so expressly made (B), or that the plaintiffs in the one case, or the defendants in the other, were partners, and that the contract was made in behalf of all: this is a consequence which usually follows, from proof of the partnership itself (*p*). In order to establish the fact of partnership, it is sufficient even for the plaintiffs to prove that they have carried on business as partners, without proving the partnership deeds. Parties.

The allegation of a contract between the plaintiff and defendant, is proved by evidence of a contract made between their agents on their behalves (*q*).

&c., where the alleged promise is a legal duty resulting from the nature of the particular service which the defendant has undertaken to perform, it is sufficient to prove the original undertaking. *Nelson* v. *Aldridge*,[1] 2 Starkie's C. 435. Although (as it seems) the declaration allege a specific promise to do or omit that which in performance of the general duty, the defendant was bound to do or omit. *Ibid.* And therefore, where the declaration alleged an undertaking on the part of an auctioneer, employed to sell goods, not to rescind a contract made by him as such auctioneer, &c., it was held, that general evidence of employment was sufficient. *Ibid.* In *Witherington* v. *Buckland*, Cas. Temp. Hardw. 309, Lord Hardwicke is reported to have said, that where the plaintiff does not declare on any general custom, but on a special contract, the contract must be proved as laid. But in that case, where the plaintiff had declared on an undertaking to repair and enlarge a house, and particularly a certain room in the house called the club-room, it appeared that the defendant had been employed not by the plaintiff, but by an insurance company, except as to some alterations in the club-room, and therefore the plaintiff was nonsuited. Promises in law exist in those cases only where there is no special agreement between the parties. Per Buller, J. *Toussaint* v. *Martinnant*, 2 T. R. 100. An agreement to grant a lease contains no implied engagement for general warranty, nor for delivery of an abstract of the lessor's title. *Gwillim* v. *Stone*, 3 Taunt. 433. *Temple* v. *Brown*,[2] 6 Taunt. 60; vide *infra*, Vendor and Vendee. A party agreeing *to let*, virtually undertakes to give possession, and not a mere right of action; where therefore the premises were held over by a preceding occupier, it was held that the plaintiff was not driven to his ejectment, but might support an action for breach of agreement. *Coe* v. *Clay*,[3] 5 Bing. 440.

(*n*) 1 T. R. 140; Gilb. Law. Ev. 229. *Shute* v. *Hornsey*, Doug. 643. *Bristow* v. *Wright*, Doug. 640. *Grant* v. *Astle*, Doug. 695; 3 T. R. 646.

(*o*) B. N. P. 152; 2 M. & S. 23; 2 Str. 820. *Wilsford* v. *Wood*, 1 Esp. 183. A joint contractor must be sued, although he be a certificated bankrupt. *Bevil* v. *Wood*, 2 M. & S. 23.

(*p*) See tit. Partners.

(*q*) See tit. Agent—Partners—Set-off—Vendor and Vendee. In general an action may be brought either in the name of the person with whom the contract was made, or in the name of the party really interested, (*Skinner* v. *Stocks*, 4 B. & A. 437) (C); and therefore joint owners of a vessel employed in the whale fishery may sue a purchaser of whale oil, although the contract of sale was made by one of the part-owners,

(A) (A contract must be proved as laid in the declaration. *Crawford* v. *Morrell*, 8 John. R. 253; *Goulding* v. *Skinner*, 1 Pick. 162. The rule is, that a trivial variation, in setting out a contract or written instrument is fatal, if the plaintiff has it in his possession, or can by due exertions obtain it. *Dunbar* v. *Jumper*, 2 Yeates, 74.)

(B) An allegation of a several promise is not proved by evidence of a joint one, or that of a joint promise by evidence of a several one. *Conolly* v. *Cottle*, 1 Breese, 287; *Erwin* v. *Devine*, 1 J. J. Mash. 205; *Musgrave* v. *Gibbs*, 1 Dall. 216; *Latshaw* v. *Steinman*, 11 Serg. & R. 357.)

(C) (A verbal promise made by one party to another that the promiser will pay to a third party, may be enforced by an action in the name of the latter, wherever as between the contracting parties there is a legal obligation, and the payee was not a stranger to the consideration. *Clarke* v. *M'Farland's Exrs.* 5 Dana, 45. When a promise is made to *A.* for the benefit of *B.*, either of them may sue for a breach of it. *U. S.* v. *Kennan*, Peters' C. C. R. 169. A promise by a debtor to his creditor to pay his debt to a third person, will not enable such person to maintain an action in his own name to recover it. *Owings* v. *Owings*, 1 Harr. & Gill, 484.)

[See *Upton* v. *Gray*, 2 Greenleaf, 373. *Bickerton* v. *Burrell*, 5 M. & S. 383. *Rathbone* v. *Budlong*, 15 Johns. 1. *Vischer* v. *Yeates*, 11 Johns. 23. *Sargent* v. *Morris*,[4] 3 B. & A. 281. Per Bayley, J. *Motley & al.* v. *Rogerson*, Metcalf's Digest, 263. *Duke of Norfolk* v. *Worthy*, 1 Camp. 337.]

[1]Eng. Com. Law Reps. iii. 419. [2]*Id.* i. 306. [3]*Id.* xv. 492. [4]Id. v. 282.

A contract alleged as between the plaintiff and defendant, is not proved by evidence of a contract between the plaintiff and a deceased partner with the defendant; but it is sufficient to prove that the defendant and a deceased partner made the contract with the plaintiff (*r*).

Where the plaintiffs sue in a particular capacity, as where they sue as assignees of a bankrupt upon promises to the bankrupt, they must, under the general issue, prove their title to sue as assignees (*s*).

Promise. The contract consists of the promise itself, and the consideration on which it is founded. A promise alleged absolutely is not supported by proof of a promise in the *alternative* (*t*) (A). The allegation of a promise to deliver forty bags of wheat immediately, and the remainder of one hundred bags on the next market-day, is not supported by proof of a promise to deliver forty *or* fifty bags immediately, and the residue on the next market-day (*u*). So an absolute promise varies from a conditional promise (*x*).

*60 *The allegation of a promise to pay the amount of a promissory note on
Variance. the death of *J. S.*, is not supported by proof of a promise to pay the amount
Promise. on the death of *J. S.*, *provided* he left the party sufficient, *or* he was able to pay it (*y*).

So if the plaintiff allege a promise by the defendant to sell his tallow to the plaintiff at four shillings per stone, and prove an agreement by the defendant to sell his tallow to the plaintiff at four shillings per stone, but that if the plaintiff gave more to any other person, he should give the same to the defendant (*z*).

An agreement to pay 20*l.* if a given number should be drawn on a given day, varies from an agreement to deliver an undrawn ticket, *or* pay 20*l.* (*a*). One of two pleas of usury stated the forbearance to be until September 1st, 1785; the second until January 1st, 1786. The evidence was an agreement of forbearance till *either* of those days; and it was held that the evidence did not support either of the pleas (*b*).

Subject-matter. So a variance as to the *subject-matter* contracted for will be fatal. A declaration on a promise to deliver good merchantable wheat, is not supported by evidence of an agreement to deliver good second-sort of wheat (*c*) (B). A contract to deliver *soil* or *breeze*, varies from a contract

and the purchaser did not know any other person in the transaction. The statutes of set-off do not prevent the action from being maintainable in the names of all the parties interested. *Ibid.* So in case of policies of insurance. *Ibid.* See *Lloyd* v. *Archbowle*, 3 Taunt. 324. *Mawman* v. *Gillett*, Ib. 325.

(*r*) *Richards* v. *Heather*, 1 B. & A. 29. *Hyat* v. *Hare*, Comb. 383. *Smith* v. *Barrow*, 2 T. R. 479. *Slipper* v. *Stidstone*, 5 T. R. 493. Contra, *Spalding* v. *Mure*, 6 T. R. 363. See *Rice* v. *Shute*, 5 Burr. 2663. *Whelpdale's Case*, 5 Rep. 109. (*s*) See tit. BANKRUPT.

(*t*) 8 East, 8; 2 B. & P. 116. In assumpsit on the warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63*l.*, but the consideration as proved was, that the plaintiff would pay that sum, and if the horse was lucky, would give the defendant 5*l.* more, or the buying of another horse: held no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting in point of law to a promise. *Guthing* v. *Lynn*,[1] 2 B. & Ad. 232.

(*u*) *Penny* v. *Porter*, 2 East, 2; 8 East, 8. *White* v. *Wilson*, 2 B. & P. 116. *Shipham* v. *Sanders*, 2 East, 4.

(*x*) *Churchill* v. *Wilkins*, 1 T. R. 447. *Layton* v. *Pearce*, Doug. 14.

(*y*) *Roberts* v. *Peake*, 1 Burr. 325. The court were of this opinion, but the case was not decided on this point.

(*z*) *Churchill* v. *Wilkins*, 1 T. R. 447. (*a*) *Layton* v. *Pearce*, Doug. 14.

(*b*) By Lord Kenyon, and Buller, and Grose, Js., *Tate* v. *Willing*, 5 T. R. 531.

(*c*) Ld. Ray. 735.

(A) (A contract in the alternative must be so set forth, or the variance will be fatal. *Russell* v. *South Britain Society*, 9 Conn. 508; *Hatch* v. *Adams*, 8 Cow. 35; *Stone* v. *Knowlton*, 3 Wend. 374; *Trask* v. *Duval*, 4 Wash. C. C. R. 97. If the money counts allege the promise to have been made to pay on demand *with interest*, the action cannot be maintained unless an express promise to pay interest is proved. *Tappan* v. *Austin*, 1 Mass. R. 31.)

(B) (Where the declaration stated a contract of warranty to be of a good and superior quality, to wit,

[1]Eng. Com. Law Reps. xxii. 63.

to deliver *soil* (*d*). A contract to carry goods, and deliver them to *A. B.* the plaintiff, varies from a contract to carry goods and deliver them to *J. S.* (*e*). A contract to deliver so many bushels of corn varies from a contract to deliver so many bushels, according to a particular measure, which is greater than the Winchester measure, since by the bushel generally, the Winchester bushel must be understood (*f*).

It is no variance that the defendant promised some other distinct matter in addition to that alleged, since the proof supports the declaration as far as is requisite (*g*). It is true that the defendant did promise that which is alleged, although he further promised some other thing in addition; therefore a declaration on a contract to pay 52*l.* 10*s.* for rum-money, is supported by proof of a note, by which the defendant undertook to pay the plaintiff 52*l.* 10*s.*, *together* with a pint of rum per day (*h*). So a promise to deliver a horse which should be worth 80*l.*, and be a young horse, is supported by proof of a promise to deliver a horse which should be worth 80*l.*, and be a young horse, with a warranty that it had never been in harness (*i*).

It is no variance that a part of the contract has not been alleged which merely regards some *collateral* engagement as to the subject-matter of the contract. The declaration alleged that the defendant bought of the plaintiff

(*d*) *Cook* v. *Munstone*, 1 N. R. 351.
(*e*) *Leery* v. *Goodson*, 4 T. R. 687.
(*f*) *Hockin* v. *Cooke*, 4 T. R. 314. See the stat. 12 Hen. 7, c. 5; 22 Car. 2, c. 8.
(*g*) *Cotterell* v. *Cuff*, 4 Taunt. 285. *Tempest* v. *Rawling*, 13 East, 630. For other instances, see tit. VARIANCE.
(*h*) *Baptiste* v. *Cobbold*, 1 B. & P. 7.
(*i*) *Miles* v. *Sheward*, 8 East, 7. [See Godb. 154, pl. 202. Yelv. 57 *note* (1), and cases there cited.]

prime quality winter oil, and the proof was that the defendant warranted the oil to be prime quality winter oil, it was held not to be a variance. *Hastings* v. *Lowring*, 2 Pick. 214. A promise to pay $9 25 a month for twelve months work, was held not to be supported by proof of a promise to pay $92 50 for ten months work. *Cranmer* v. *Graham*, 1 Blackf. 406. The declaration was on a promise to pay $100 for improvements. Proof of a promise, if the promisor should obtain a contract for the land, is a fatal variance. *Lower* v. *Winters*, 7 Cow. 263. If a promissory note in the French language is declared on as if it were in English, the variance is immaterial. *Lambert* v. *Blackman*, 1 Blackf. 59. Where a note was made payable to the payee or his order, if he declare on it, as payable to himself, it is not a material variance. *Fay* v. *Goulding*, 10 Pick. 122. Proof of a note dated the 26th of July does not support a declaration stating a note dated on the 25th—the date is a material part of a note. *Stephens* v. *Graham*, 7 Serg. & R. 505.)

[A declaration for the sale and delivery of pine timber is not supported by evidence of the sale and delivery of spruce timber. *Robbins* v. *Otis*, 1 Pick. 368. A declaration alleging that certain machines were warranted to be good and merchantable, is not supported by proof that they were warranted to be equal to any in America. *Goulding & al.* v. *Skinner & al.* 1 Pick. 162. Where a declaration stated, that in consideration the plaintiff would deliver a certain note to a third person, there to remain until the defendant should pay a note given by the plaintiff to A. the defendant promised the plaintiff to save him harmless, &c.—and the evidence was that the plaintiff agreed to deliver the note to a third person, and let it remain until he should return from a journey, and that in consideration, &c. the defendant promised; the variance was held to be fatal. *Colt* v. *Root*, 17 Mass. Rep. 229. The plaintiff cannot give in evidence an entire contract relating to two distinct subjects, when he declares only as to one of them. *Crawford* v. *Morrell*, 8 Johns. 253; and where the contract declared on was that the defendant should pay for half the land for a highway, and the contract proved was that he should pay for all the land, it was held to be a fatal variance. *Ibid.* A declaration on a promise to deliver cloth to the plaintiff is not supported by the evidence of a contract to deliver cloth at the defendant's factory. *Clark* v. *Todd*, 1 Chip. 213. A note payable at sixty days cannot be given in evidence to support a count which does not state when the note was payable. *Sheehy* v. *Mandeville*, 7 Cranch, 208. In New Jersey a declaration on a contract to carry salt for $1 87½ per tierce, was supported by evidence of a written agreement to carry it for fifteen shillings, and by proof, that by the currency of New York, the amount was the same. *Salter* v. *Kirkbride*, 1 Southard's Rep. 223. And in action on a promise of indemnity, alleging that A. had recovered a certain sum against the plaintiff, proof of the recovery of a different sum by A. was held not to be a fatal variance, because the recovery was stated by way of inducement, and not as the ground of the suit. *Ripsher* v. *Shane*, 3 Yeates, 575. See also *Livingston* v. *Swanwick*, 2 Dallas, 300. *Cunningham* v. *Kimball*, 7 Mass. Rep. 65. *United States* v. *Colt*, 1 Peters' Rep. 153. *Ferguson* v. *Harwood*, 7 Cranch, 408. *Henry* v. *Henry*, 1 Chip. 265. *Silver* v. *Kendrick*, 2 N. Hamp. Rep. 160. *Porter* v. *Talcott*, 1 Cowen, 359. *Wroe* v. *Washington*, 1 Wash. 351.]

a quantity of East India rice, according to the conditions of sale of the East India Company, at a specified price, to be put up at the next Company's sale, if required; and it appeared in evidence, that in addition to those conditions, the rice was to be sold *per sample;* it was held that this was no variance, for it was not a description of the commodity, but a collateral engagement that it should be of a particular quality (*k*).

*61 Consideration.

*In assumpsit, the *consideration* is of so entire a nature, that not only must it be proved to the extent alleged, but an omission to allege any part is fatal; for if any part be omitted, then the basis of the promise is misdescribed (A). It is not true, as stated, that the defendant's promise was founded upon the consideration alleged, when it was in fact founded upon that and something else, which is also essential to its support (*l*). An averment that stock was to be transferred *on request*, is not proved by evidence that it was to be transferred on a particular day (*m*).

An allegation of an *executory* consideration is not proved by evidence of an *executed* consideration, though it is otherwise where an *executed* consideration is alleged, and the law implies the promise (*n*). An averment that a note was given in repayment of monies paid, is not satisfied by proof of a note given to secure money to be paid (*o*). So if the moral obligation on which the action is founded is misdescribed (*p*).

So where the declaration alleged an agreement to sell goods expected by the Fanny Almira, and the agreement proved was for the goods expected by the Fanny *and* Almira (*q*). So an agreement alleged to be for the delivery of all merchandisable skins, varies from the proof of a contract to deliver all merchandisable calf-skins (*r*).

(*k*) *Parker* v. *Palmer*, 4 B. & A. 387. The goods did not correspond with the samples, but after seeing the samples the defendant had taken upon himself the disposition of the goods, and had put them up to sale at a limited price, and bought them in again, and the Court held that after this he could not repudiate the contract; and the jury found that he had not repudiated the contract within a reasonable time; therefore the sale was in effect complete. So where the plaintiff declared that the defendant had agreed to buy of the plaintiff a large quantity of head-matter and sperm oil, in the possession of the plaintiff, and the contract proved was for the purchase of all the head-matter and sperm oil per the Wildman, it was held that there was no variance, for the allegations were proved as far as they went, and the additional matter proved (that it was oil by the Wildman) was immaterial; it did not qualify or annex any condition to what was stated. *Wildman* v. *Glossop*, 1 B. & A. 9. So if part of the contract has not been alleged, which merely regards the liquidation of damages after a right has accrued by a breach of the contract; for it is matter of evidence only in reduction of damages. *Clarke* v. *Gray*, 6 East, 564. In an action against a carrier it is not necessary to allege the limitation of his responsibility by notice. *Ibid.* See 1 Starkie's C. 267.[1] In an action of assumpsit for breach of an agreement for the assignment of a lease, alleging that the defendant had no title to assign, held that it was no variance that the declaration did not set out a clause in the agreement restraining the plaintiff from carrying on a certain trade in general terms, that not forming any part of the consideration. *M'Allen* v. *Churchill*,[2] 11 Moore, 483.

(*l*) *Swallow* v. *Beaumont*, 2 B. & A. 265.

(*m*) *Bordenave* v. *Gregory*, 5 East, 111.

(*n*) 3 Lev. 98. Com. Dig. Action on the Case.—Assumpsit [F.] 6.

(*o*) *Amory* v. *Merreyweather*,[3] 2 B. & C. 573.

(*p*) The declaration alleged that the plaintiff had supplied goods to *Elizabeth S.* to the amount of 16*l.* and that in consideration of the premises and of the said sum being unpaid, the said *E. S.* afterwards promised to pay as soon as it was in her power; averment, that though it was afterwards in her power, she refused. The proof was, that the goods were supplied to her when she was a feme covert, living apart from her husband, and that she after his death promised to pay. Held, that as the price of the goods originally constituted a debt from the husband and not from the defendant, the ground of the supposed moral obligation, on which the assumpsit proceeded, was not properly set out in the declaration, and therefore the plaintiff could not recover. *Semble*, that a moral obligation is not in every case a sufficient consideration for a promise. *Littlefield, Executrix*, v. *Shee*,[4] 2 B. & Ad. 811.

(*q*) *Boyd* v. *Siffkin*, 2 Camp. 326.

(*r*) B. N. P. 145.

(A) (The words for value received in setting forth a promissory note in a declaration are words of description; and if not proved the variance is fatal. *Saxton* v. *Johnson*, 10 John. R. 418. *Rossiter* v. *Marsh*, 4 Conn. R. 196. But see *Wilson* v. *Codman*, 3 Cranch, 193. *McWilliams* v. *Smith*, 1 Call. 123. See also *Welch* v. *Lindo*, 7 Cranch, 159. Chitty on Bills, 583 (8th Ed.) *Bulkley* v. *Landon*, 2 Conn. R. 404. *Fouquet* v. *Hoadley*, 3 Conn. R. 534. *Robertson* v. *Lynch*, 18 John. 451. *Bender* v. *Manning*, 2 N. Hamp. R. 289.)

[1] Eng. Com. Law Reps. ii. 385. [2] *Id.* xxii. 418. [3] *Id.* ix. 183. [4] *Id.* xxii. 187.

In an action against a carrier, if the contract be alleged to be to carry from *A.* to *B.*, the *termini* are material, and must be proved as laid (*s*).

*It is in all cases sufficient to prove the promise alleged according to the *substance* and *legal effect* of the allegation. Where the declaration alleged an agreement to purchase eight tons of hemp under a *videlicet*, and the contract proved was for the purchase of *about* eight tons; and it also appeared that after the contract the hemp had been weighed, and amounted to eight tons, it was held that the variance was not material, for when the weight had been ascertained, the contract was in effect for eight tons (*t*). *62

Variance. Substance and legal effect.

A variance as to the time and place of the contract is not material (A), unless they be made part of the description of a written instrument (*u*). But where a particular sum, magnitude or quantity, is part of the contract, and the allegation is material, it must be proved as laid, though it be averred under a *videlicet*. Thus, where the defendant averred that the plaintiff held certain lands of him as his tenant, at a certain rent, to wit, at 110*l.* rent, payable half-yearly; upon *non-tenet* pleaded, it appeared that the land had been let by a written contract at 15*s.* per acre, and that the whole amounted to 111*l.*; the variance was held to be material (*x*).

Time, place, magnitude, &c.

(*s*) *Tucker* v. *Cracklin*,[1] 2 Starkie's C. 387. So where a sailor declared for wages, and the average price of a negro slave, due to him in consideration of service during a certain voyage, to wit, "A voyage from London to the coast of Africa, and from thence to the West Indies," and in the articles it was described as "A voyage from London to the Coast of Africa, from thence to the West Indies or America, and afterwards to London in Great Britain, or to some delivering port in Europe," the variance was held to be fatal, notwithstanding the *scilicet*. *White* v. *Wilson*, 2 B. & P. 116. So a declaration which alleges a retainer to cause the plaintiff's ship to proceed to Gottenburgh, in order that she might afterwards proceed to Petersburgh, is not proved by evidence of a retainer to cause the ship to proceed to Gottenburgh, and afterwards, under certain conditions, to Petersburgh. *Lopez* v. *De Tastet*,[2] 1 B. & B. 538. In the case of *Frith* v. *Gray*, 4 T. R. 561, n., in an action for not building the plaintiff a booth at a horse-race to be run on Barnet Common, in the county of Middlesex, it was proved that the whole of Barnet Common was in the county of Hertford. But Lord Mansfield and the rest of the Court, on a motion for a new trial on the ground of variance, held that as it was perfectly immaterial whether Barnet Common was in Middlesex or not, those words might be rejected as surplusage: *tam. qu.* A warranty to buy a horse at a certain price, *scil.* 86*l.* 5*s.*, is not supported by evidence of a warranty upon the purchase of two horses jointly for the sum of 60 guineas. *Hart* v. *Davis*, N. P. Dec. 1796.

(*t*) *Gladstone* v. *Neale*, 13 East, 409. So where the alleged promise was to deliver stock on the 27th of February, but the contract proved was to deliver stock on the *settling day*, which at the time was fixed for and understood by the parties to mean the 27th of February, it was held that the proof was sufficient, the contract proved being in substance the same with that alleged. *Wilks* v. *Gordon*, 2 B. & A. 335. So an allegation of a contract for the delivery of gum-senegal is supported by evidence of a contract for the delivery of rough gum-senegal, coupled with evidence that all gum-senegal, on its arrival in this country is called rough. *Silver* v. *Heseltine*,[3] 1 Chitty's R. 39; vide *infra*, 63, note (*z*).

(*u*) Where the promise was laid on the 24th of March, and to a plea of tender, the plaintiff replied a bill filed on the 12th of February; upon the objection being taken, the Court held that the day was alleged merely for form, and that the plaintiff would not have been confined to it in evidence; but, that if it had been the case of a note it would have been different, since then the day would have been an essential part of the agreement (*Matthews* v. *Spicer*, Str. 806); and *semble*, not even then, unless it had amounted to a misdescription of the instrument, by alleging that it bore date on sueh a day. Where an action was brought on a note dated 1704, and the replication alleged a bill filed in 1713, and that the cause of action arose within six years, it was held to be a departure because the day was material, and judgment was arrested. *Stafford* v. *Farrer*, cited Stra. 22. [See Ballentine on Limitations, chap. x. 1 Chit Pl. 622, 623. Yelv. 71, *note* (2).]

(*x*) *Brown* v. *Sayer*, 4 Taunt. 320. Mansfield, C. J. observed, that the record would certainly be evidence as to the amount of the rent between the same parties in another action. So where the plaintiff alleged that he had agreed to sell, and that the defendant had agreed to buy, certain goods and merchandises, to wit, 328 chests and 30 half-chests of oranges and lemons, at and for a certain price, to wit, the price of 623*l.* 3*s.* and the contract proved was for 308 chests and 30 half-chests of China oranges, and 20 chests of lemons; it

(A) (Where the time of doing a thing is material it must be proved as laid. Aliter where the time is immaterial, *Drown* v. *Smith*, 3 New Hamp. 301. *Perry* v. *Botsford*, 5 Pick. 189. See, also, *Hollingsworth* v. *Fry*, 4 Dall. 345. *M'Crelish* v. *Churchman*, 4 Rawl. 26. A variance in the date, or in the substance of a note offered in evidence, from that set out in the statement, is a fatal objection to such evidence. *Church* v. *Feterow*, 2 Penn. 301. In a declaration on a former note, the omission of the place where it is payable is fatal. *Sebree* v. *Dorr*, 9 Wheat. 558; but see *Bank of the U. S.* v. *Smith*, 11 Wheat, 171.)

[1] Eng. Com. Law Reps. iii. 394. [2] *Id.* v. 180. [3] *Id.* xviii. 23.

Variance. * And even where it is unnecessary to allege the precise sum, quantity or magnitude, yet if it be alleged without a *videlicet*, precise proof will, it seems, be necessary. Thus where the declaration in an action on a warranty of soundness on the sale of sheep, alleged the consideration for the purchase to be 54*l.* 11*s.* 6*d.*, and it turned out to be 54*l.* 19*s.* 6*d.*, the variance was held to be fatal (*y*).

So where the consideration was alleged to be the forbearance of 21*l.* 6*s.* without a *videlicet*, and the proof was of a forbearance of 20*l.* 18*s.*, the variance was held to be fatal (*z*).

But where the declaration alleged that *S. F.*, the father of the defendant, was indebted to the plaintiff in a certain sum, to wit, the sum of 26*l.* 13*s.* 6*d.*, being the unpaid balance of a larger sum, and that in consideration of the plaintiff's forbearance to sue for the recovery of the balance of 26*l.* 13*s.* 6*d.*, the defendant undertook to accept a bill for the amount of 26*l.* 13*s.* 6*d.*, and the balance really due was 26*l.*, it was held to be no variance; the payment of the balance being the consideration for the promise, the statement of a particular sum was unnecessary (*a*).

Legality. It is essential that the agreement should be such as the law will sanction; if it be illegal or contrary to justice and sound policy, no action can be founded upon it (*b*).

Where the illegality is set forth upon the record, the objection may be taken either by demurrer or in arrest of judgment. Where it does not appear on the record, the defendant may show that the claim is in reality founded upon an illegal and noxious agreement. In some instances, however, the plaintiff's claim is even founded upon the illegality of the agreement; as, where he seeks to rescind an illegal contract, whilst it is executory, and recover the money which he has advanced under it (*c*).

was held to be a fatal variance. *Crispin* v. *Williamson*, 1 Moore, 547. In an action for not retaining the plaintiff as a servant at a yearly salary, the declaration averred the agreement to pay 250*l.* per annum for the service; it was held to be necessary to prove the specific sum as alleged, though it was laid under a *videlicet*, *Preston* v. *Butcher*,[1] 1 Starkie's C. 3. So, in general, where the sum, quantity or magnitude, is material and traversable, the averment under a *scilicet* will not render it immaterial, so as to protect from a traverse, or to render precise proof unnecessary. See the observations of Lawrence, J. in *Grimwood* v. *Barrett*, 6 T. R. 463. *Johnson* v. *Pickett*, which was an action on the statute of Usury, cited Ibid. S. P. *Pope* v. *Foster*, 4 T. R. 590, cited also by Lawrence, J. Also, *Symmons* v. *Knox*, 3 T. R. 65; 2 Will. Saund. 207.

(*y*) *Durstan* v. *Tatham*, cited in *Symmons* v. *Knox*, 3 T. R. 67; cited by Dampier, J., in *Arnfield* v. *Bates*, 3 M. & S. 175.

(*z*) *Arnfield* v. *Bates*, 3 M. & S. 175. In the case of *Laing* v. *Fidgeon*, 6 Taunt. 108, it was held that an allegation of a contract to deliver saddles to the plaintiff at a reasonable price, was supported by proof of an agreement to deliver saddles at 24*s.* and 26*s.*; and it seems, that if the declaration state the consideration to be certain reasonable reward, proof that a specific sum was agreed on, will not be material as to variance. *Bayley* v. *Trecker*, 2 N. R. 458.

(*a*) *Bray* v. *Freeman*,[2] 2 Moore, 114.

(*b*) In conformity with the rule of civil law, *ex turpi causâ non critur actio*, no action can be maintained if any part of the entire consideration (Cro. J. 103), or any branch or part of the matters promised, be so. T. Jones, 24.

(*c*) In general, where the demand arises out of any agreement which is illegal or immoral, or contrary to sound policy, the Courts will not lend their aid to enforce it. See *Jordaine* v. *Lashbrook*, 7 T. R. 601; *Cockshott* v. *Bennett*, 2 T. R. 763; and the cases cited; tit. MONEY HAD AND RECEIVED; MONEY PAID; *Aubert* v. *Maze*, 2 B. & P. 371. *Booth* v. *Hodgson*, 6 T. R. 405; *Mitchell* v. *Cockburne*, 2 H. B. 379. As where the consideration is a simoniacal presentation to a living (Cro. Car. 337, 353, 361), or the escape of a prisoner in execution. *Martin* v. *Blithman*, Yelv. 197, 1 Roll. R. 313. Where money has been advanced in furtherance of a joint illegal agreement, or received upon an executed illegal agreement (*see the cases under the count for money had and received*). So where the consideration is any act inconsistent with the party's duty as a sheriff or other public officer. *Morris* v. *Chapman*, T. Jones, 24. *Martin* v. *Blithman*, Gil. 197. So if the consideration be the sale of spirituous liquors, unless to the amount of 20*s.* at one time; 24 G. 2, c. 40; and the statute applies though the spirits be sold in a state mixed with other ingredients; as where grog is sold. *Gilpin* v. *Kendle*, Devonshire Lent Ass. 1809; Sel. N. P. 61. It has been held, that this statute does not extend to a security given in payment for small quantities of spirituous liquors. *Spencer* v. *Smith*, 3 Camp. 9; *contrà Scott* v. *Gilmore*, 3 Taunt. 226. The statute is not confined to sales to the con-

[1]Eng. Com. Law Reps. ii. 268. [2]*Id.* iv. 68.

* Where the promise is merely conditional, upon some precedent act to be performed by the plaintiff, the promise must be so alleged in the declara- Condition Precedent.

sumer. *Bennyatt* v. *Hutchinson*, 5 B. & A. 241; overruling, as it seems, *Jackson* v. *Attrill*, Peake's C. 40. So, in general, agreements against the principles of sound policy are void. As, for instance, all agreements for the sale of public offices; or that one person shall hold an office of trust for another. *Parsons* v. *Thomson*, 1 H. B. 322. *Blackford et al.* v. *Preston*, 8 T. R. 89. *Layng* v. *Payne*, Willes, 571; 3 T. R. 19; 2 Wills. 133. *Garforth* v. *Fearon*, 1 H. B. 327; and see the stat. 12 R. 2, c. 2; 5 & 6 Ed. 6, c. 15. So, all agreements are illegal and void which tend to the obstruction or hindrance of public justice: as to prevent the due examination of a bankrupt by the commissioners. *Perott* v. *Wallace*, 3 T. R. 17. To omit to call the defendant up to receive judgment for a misdemeanour. *Pool* v. *Bousfield*, 1 Camp. C. 55. So, all agreements in restraint of trade are illegal; but an agreement not to use a trade in a particular place is legal. Cro. J. 596. *Bunn* v. *Guy*, 4 East, 190. So is a general agreement among those who use a particular trade to establish a general lien. *Hickman* v. *Shawcross*, 6 T. R. 14. It is also a general rule that fraud will vitiate a contract: for illustrations of this position, see tit. Bills of Exchange.—Fraud.—Money had and received.

Thus, any secret agreement or stipulation, or compositions with insolvents, by means of which one creditor seeks to obtain an unfair advantage, are void. *Cockshott* v. *Bennett*, 2 T. R. 763. *Leicester* v. *Rose*, 4 East, 372. *Stocke* v. *Madder*, 1 B. & P. 286. *Thomas* v. *Courtnay*, 1 B. & A. 1; or by which any unfair advantage may be obtained over a third person (*Jackson* v. *Duchaire*, 3 T. R. 551. *Pidcock* v. *Bishop*,[1] 3 B. & C. 605), is void. So also no action will lie in furtherance of any agreement whatsoever of a vicious or immoral tendency. As if lodgings be let for an illegal purpose. *Crisp* v. *Churchill*, 1 B. & P. 340, 1, n. *Girardy* v. *Richardson*, 1b. As prostitution, 1b. Or where the plaintiff lodges unfortunate women and partakes of the profits. *Howard* v. *Hodges*, *cor.* Ld. Kenyon, C. J. Dec. 2, 1796. Nor for the price of immoral, libellous, or indecent prints, per Lawrence, J., 4 Esp. C. 97. It seems, however, that though clothes or lodgings are supplied to a prostitute, the mere knowledge on the part of the plaintiff of her situation and circumstances will not exclude his right of action, unless they were directly supplied for that purpose; or under an agreement or expectation, at least, that he should be paid out of the illegal profits. *Bowry* v. *Bennett*, 1 Camp. 348. It was held that a washerwoman might recover for the washing of expensive clothes and dresses, though it was obvious that the plaintiff must have known that they were to be used for improper purposes. Buller, J. observed, "This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used for an improper purpose, and which were not." *Lloyd* v. *Johnson*, 1 B. & P. 341; and see tit. Money had and received.

Some of the decisions upon this head have conflicted, not so much in consequence of any doubt upon general principles, as of the difficulty in applying them. The general principle and foundation of them all is this, that the law will not lend its aid in furtherance of an illegal or immoral transaction, or of any contract which is in general inconsistent with sound policy; but that, on the contrary, it will interfere for the purpose of preventing the execution of an illegal agreement, and of furthering the enactments of any prohibitory or remedial statute. The application of this principle is strongly exemplified in the case of the action for money had and received, where the law prohibits or enforces the recovery of the money, just as the prohibition or enforcement will further the object of the legislature. If the money has been paid upon an illegal agreement which remains *executory* between the parties, the law enforces the recovery of the money, because it thereby prevents a violation of the law by carrying the illegal agreement into effect; it affords the party a *locus pœnitentiæ*, and encourages him to recede from the illegal contract before it is too late. Where the money has been paid by one who was the object of the law's protection, and who is not equally culpable with the defendant who has received the money, the Courts allow it to be recovered, although the agreement has been carried into effect, since the object of the statute was to protect the plaintiff. But where both parties are equally implicated in guilt, and the illegal contract has been carried into effect, the law denies its aid; for both parties are equally guilty, and equally undeserving of the aid of the law, and the best policy is to favour neither. (See *Lacaussade* v. *White*, 7 T. R. 535, *contra*; but this case has often been denied.) (1) The principal difficulty has arisen where a claim has been made by one partner in an illegal transaction against another. It has been allowed on all hands, that where one partner has paid money for another in an illegal transaction, no action can be maintained, without evidence of an express request made by the defendant to the plaintiff to pay the money, since no implied assumpsit to pay the money can arise out of an illegal transaction; where such request has been made, many learned Judges have been of opinion that the partner or agent in the illegal transaction who paid the money, might rely on the express assumpsit, and that he had no more concern with the illegal transaction itself in the course of which the money was paid, than if a mere stranger had paid it at the defendant's request; and that therefore where the illegal object was merely *malum prohibitum*, the plaintiff was entitled to recover. In other and later instances very learned Judges have held, that a partner in such an illegal transaction, who had paid money even at the express request of his co-partner, could not recover, since his claim is mixed up and contaminated with the illegal agreement itself, and cannot be separated from it; that the distinction founded on an express request is untenable, because in every case of such a partnership the jury would be warranted in finding an assent to the payment; and lastly, that the distinction between *malum prohibitum* and *malum in se* is not a sound one. It is indeed a distinction very difficult to be supported; every act which is immoral, must, it

(1) [See Evan's "Essay on the action for Money had and received," Part II. where the inaccuracy of the report of *Lacaussade* v. *White* is very satisfactorily exposed, and the actual decision of the court shown to be conformable to previous and subsequent cases.]

[1]Eng. Com. Law Reps. x. 197.

tion, * or the variance would be fatal. Where the promise depends upon
*66 the *performance of a condition precedent, the plaintiff either alleges per-

should seem, be *malum in se*, and it can scarcely be denied that the wilful violation of any positive law is not more or less immoral. A man may in fact be more guilty in a moral point of view in doing that which is usually termed a mere *malum prohibitum*, than in committing that which is *malum in se*. The destruction of the current coin of the realm to the prejudice of the whole community is merely *malum prohibitum*, if there be any virtue in the distinction; yet surely any act tending to this prejudice is more mischievous and more immoral than the telling a lie, which is *malum in se*. In reality, an act is immoral, independently of any prohibitory law, in proportion to the evil which is likely to result from it; in a moral point of view, every act from which evil is likely to flow is *malum in se*, and the abstract immorality does not depend on any positive prohibition. The broad, general, and intelligible test for the decision of these cases, seems to depend upon the question, whether the sustaining such actions would encourage and support illegal or immoral contracts, or whether the immorality be not so far out of the question that no rule or principle of sound policy is violated in enforcing a contract which in conscience ought to be performed? If money be advanced in order to effectuate a criminal purpose, and be applied in furtherance of that object, a Court, in lending its aid to the recovery of that money, would be sanctioning and consummating a contract founded in criminality; the affording legal protection to the lender would encourage the affording of aid and supplies for such purposes in future, and in consequence encourage the committing of the offence itself.

A party who lends his aid to the commission of an offence is himself criminal in point of law as well as morals. If a man were to advance money to another to purchase a weapon for the committing of treason or murder, would he not at least be guilty of a misprision of treason or felony? In such cases, and where the money is so applied, the plaintiff's claim is tainted with criminality, and he seeks to recover through the medium of an illegal transaction. It can make no difference in principle whether the money was advanced by a partner, or by a stranger, provided the criminal object was known and intended, or whether the contract was express or implied. Upon the same principle of policy, the law, in many instances, permits money supplied for an illegal purpose to be recovered before the object has been executed; for it is the policy of the law to assist and encourage parties in receding from illegal projects. Where money has been paid in execution of an illegal contract to the agent, whose principal is a *particeps criminis*, the principal, it seems, ought to recover it; the party who paid it to the agent is not entitled to it, since it has been paid in consummation of an executed illegal contract, and it would be against conscience that the agent should be allowed to retain it; it is the money of the principal, and the case seems to be the same in effect as if the principal had received the money with his own hands, and then delivered it to the agent. He does not claim as from the agent, through the medium of an illegal contract: his title arises immediately from the act of the agent in receiving the money to his use; and therefore the case differs widely from that of money knowingly lent for an unlawful purpose, where the illegal object is immediately connected with the lending, which is the consideration for the promise.

The case of *Cannon* v. *Bryce*,[1] 3 B. & A. 179, seems to remove the doubts formerly entertained upon questions of this nature, vid. *infra*, 77–93.

For further illustration of the principles above adverted to, it may be proper to refer to the following decisions. Where the plaintiff received into his employment the defendant, a person of competent but inferior skill in the plaintiff's profession, upon a stipulation that he might discharge him upon three months' notice, and the defendant covenanted in case of dismissal not to practise within 100 miles, it was held that the contract was one which contained a restraint on the defendant in respect to his trade far larger than was necessary for the protection of the plaintiff in the enjoyment of his, and could not therefore form the subject of an action. *Horner* v. *Graves*,[2] 7 Bing. 735. So where the consideration of an agreement, by which a party undertook to work exclusively for another, was wholly without adequate consideration, and placed him entirely at the mercy of the latter; and a promissory note, given by the former for breaches of the agreement on his part, cannot be set off against his claim for work performed by him before he became bankrupt, in an action by his assignees, such note being void for want of consideration. *Young* v. *Timmins*, 1 Cr. & J. 330, and 1 Tyrw. 226. Where three persons carrying on a similar trade, and vending their manufactures about the country, entered into an agreement for their mutual benefit, to confine themselves to certain districts, and that neither should purchase certain articles at or beyond a certain price, and that if any other persons should set up the same trade, and oppose them, that then they would meet together, and enter into such mutual agreement as should be beneficial to their mutual interests, it being their intention not to do any acts prejudicial, but to aid and assist each other in the said trade to the utmost of their power; held that such agreement not operating as a general restraint of trade, was valid, and that there was on the face of it a sufficient consideration for the partial restraint it contemplated. *Wickens* v. *Evans*, 3 Y. & J. 318: and see *Davies* v. *Mant*, 5 East, 120. An agreement, reciting that the plaintiff was possessed of the means of furnishing evidence enabling the defendant to recover certain sums, of which it was alleged that he had been defrauded, and stipulating that he should use his utmost means and influence for procuring evidence to substantiate the defendant's claims, and that he should receive a certain proportion of the amount recovered by his means; was held to be illegal. *Stanley* v. *Jones*,[3] 7 Bing. 369, and 5 M. & P. 193. An agreement between two sons to convey and assign, the one to the other, a moiety of all such real or personal estate as they should respectively derive under their father's will, so that each should take an equal moiety, and that in such division all sums, &c. received in his lifetime as advancement should be taken into account, was held to be valid. *Wethered* v. *Wethered*, 2 Sim. 183. So was an agreement between two parties having expectancies from a third party, to divide equally what he might leave them respectively. *Harwood* v. *Tooke*, 2 Sim. 192. Where the plaintiff had purchased the certificates or obligations of a revolted colony of a foreign State assuming to be an independent State, but not recognised by the government of this country, the defendants representing that they had entered into a contract for the loan, and expected it would bear a premium; held

[1] Eng. Com. Law Reps. v. 255. [2] *Id.* xx. 310. [3] *Id.* xx. 165.

formance, *or alleges some matter in excuse for the non-performance (*d*); and the proof varies accordingly. And where the agreement contains mutual conditions or covenants to be performed at the same time, the plaintiff must either aver performance, or a readiness to perform his part of the contract (*e*).

that independently of any question of fraud, the purchase being founded on a contract which the Court upon grounds of public policy could not sanction, it could not relieve the plaintiff as to the instalments he had paid; held also, that as it did not appear that the payments of the interest on such instruments were to be paid in this country, the stipulation for six per cent. interest was not usurious. *Thompson* v. *Powels*, 2 Sim. 195. A publican cannot recover for beer, &c. furnished to third persons, by order of a party who has been allowed to become previously intoxicated; the permitting persons to become so in his house being illegal, he cannot take advantage of an offence which he has been instrumental to. *Brandon* v. *Old*,[1] 3 C. & P. 440. Where, pending an action, a party undertook to pay the plaintiff's attorney his costs, in consideration of the plaintiff's, with his attorney's consent, giving an authority to the defendant to pay over the debt sued for to a creditor of the plaintiff; it was held, that the action could not be supported. *Taylor* v. *Watson*, 4 M. & Ry. 259. Where the plaintiff, a creditor, having seized goods in execution, afterwards at a meeting of creditors declared he would not come into a composition nor withdraw the execution, without security for a certain part of his debt, to which a third party consented, and gave a guarantee, and he there upon signed the deed; held that such security was *fraudulent* as against the rest of the creditors, and void. *Colman* v. *Waller*, 3 Y. & J. 212. Upon a previous agreement with a third person for a benefit by supplying coals, to a stated amount, if the plaintiff would sign an agreement for a composition with his debtor for 10*s* in the pound, and for which the defendant afterwards signed a joint and several note, although the coals were supplied, and no other creditor was acquainted with or influenced by the transaction, it was held that the plaintiff could not recover on the note. *Knight* v. *Hunt*,[2] 5 Bing. 432. Where the insolvent having been opposed by a creditor was remanded to a future day, and in the meantime his attorney undertook, in consideration of the creditor's withdrawing his opposition, that he should be appointed sole assignee, and receive a certain sum within a fixed time, held that such agreement being contrary to the policy of the Insolvent Acts, no action could be maintained thereon. *Murray* v. *Reeves*,[3] 8 B. & C. 421. Where a party elected died before taking his seat, held that the representation having become vacant on his death, the plaintiff, a publican, could not recover for beer, &c. supplied to voters on a canvass by a third party on behalf of a candidate at the following election, although the latter neither ordered nor was shown to have knowledge of the treating; held also that the Treating Act was not confined merely to successful candidates. *Ward* v. *Nanney*,[4] 3 C. & P. 399. Where a contract for the purchase of a heifer was made on a Sunday, but the defendant retained possession, and subsequently promised payment, held that the plaintiff was entitled to recover for the value on a *quantum meruit*, though not for the price agreed on upon the bargain completed on Sunday, *Williams* v. *Paul*,[5] 6 Bing. 653. Where the lessee of premises covenanted that he would indemnify the parish against all costs whatsoever, for or by reason of his taking an apprentice or servant, who should thereby gain a settlement, or become chargeable to the parish; the agreement was held on demurrer to be valid. *Walsh* v. *Fussell*,[6] 6 Bing. 163. The forbearing to petition against the return of a sitting member on the ground of bribery, is an illegal consideration for a promise to pay money. *Coppocke* v. *Bower*, 4 M. & W. 361. The agreement, although unstamped, was admitted in evidence. In assumpsit on an agreement to pay a sum in consideration of the plaintiff using his influence, and securing an appointment to the defendant; plea (*inter alia*) that the plaintiff had procured the appointment through fraudulent representation; it was held that the issue was whether the representation was false to the knowledge of the plaintiff at the time. *Neeley* v. *Locke*,[7] 8 C. & P. 527.

(*d*) *Ughtred's Case*, 7 Rep. 10, *a*. 1 T. R. 638. Doug. 690. Com. Dig. Pleader, c. 51. Chitty on Pleading, 309. An allegation of the actual performance of a condition precedent, or of readiness to perform a condition conusant, is not satisfied by evidence of a discharge, or excuse for non-performance by the act or omission of the defendant. Ib. And see the observations of the Court in *Heard* v. *Wadham*, 1 East, 619. *Jones* v. *Berkeley*, Doug. 659. *Kingston* v. *Preston*, cited Ib. *Rawson* v. *Johnson*, 1 East, 203. P. C. *Berry* v. *Deighton*, K. B. Mich. 1827. Where, in an action on a breach of a contract to convey on board of plaintiff's ship, a *boat* not exceeding certain dimensions, which when tendered proved to be a *decked boat* within that size, which the plaintiff refused to receive unless the defendant would consent to remove the deck, as obstructing the navigation of the ship; held that evidence of its being always usual to take off the deck of such boats in stowing them, was properly admitted, and that the plaintiff having declined to permit it, could not recover for breach of the contract. *Haynes* v. *Holliday*, 7 Bing. 587.

(*e*) See 1 East, 203. The question, what will constitute a condition precedent, is purely a consideration of law, arising upon the inspection and construction of the agreement itself. (See 1 Will. Saund. 320, *a*.) Since, however, the omission to aver the performance of a condition precedent is a ground of nonsuit at the trial, when it appears that the defendant has not undertaken or covenanted absolutely, but only upon the performance of some condition by the plaintiff, the performance of which he has not alleged, it may be proper to observe, in the first place, that the covenants and agreements are to be construed according to the intention and meaning of the parties, to be collected from the whole instrument. *Porter* v. *Shephard*, 6 T. R. 668. *Hotham* v. *East India Company*, 1 T. R. 645. *Campbell* v. *Jones*, 6 T. R. 571. *Morton* v. *Lamb*, 7 T. R. 130. And see above, note (*d*).

If a day be appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen before the thing which is the consideration for the payment of the money, or the

[1]Eng. Com. Law Reps. xiv. 384. [2]*Id.* xv. 488. [3]*Id.* xv. 254. [4]*Id.* xiv. 369. [5]*Id.* xix. 192. [6]*Id.* xix. 40. [7]*Id.* xxxiv. 514.

*To satisfy an averment that the plaintiff was ready and willing to transfer, and requested the defendant to accept stock, which he refused, the plaintiff must prove an actual tender and refusal; or that he waited at the Bank on the day appointed for the transfer, until the close of the transfer books, the latest moment when the transfer could have been effected (*f*) (A).

doing of any other thing, an action may be brought for the breach before performance, since it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. 1 Will. Saund. 320, *a*. And so it is where no time is fixed for the performance of that which is the consideration for the payment of the money or other act. Ibid.; and see *Campbell* v. *Jones*, 6 T. R. 572; *Thorpe* v. *Thorpe*, 1 Salk. 171; 1 Ld. Raym. 665; 1 Lut. 250; 12 Mod. 461; 1 Vent. 177; *Peters* v. *Opie*, 1 Salk. 113; 2 H. B. 389. But where the consideration is to precede the act covenanted for, it is a condition precedent. Ibid.; and *Boon* v. *Eyre*, 1 H. B. 273; 1 Salk. 171; 1 Ld. Raym. 665; 12 Mod. 462; 1 Lutw. 251; Dyer, 76, *a*. Where a covenant goes to part only of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of such covenant, without averring performance. *Boon* v. *Eyre*, 1 H. B. 273, n. *a*. *Campbell* v. *Jones*, 6 T. R. 570; 1 Will. Saund. 310, *b*. But where the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, and performance must be averred. *Duke of St. Albans* v. *Shore*, 1 H. B. 270. *Large* v. *Cheshire*, 1 Vent. 147. Where the two acts are to be done at the *same time*, they are also mutual conditions; as, where *A*. covenants to convey an estate to *B*. on the day specified, and in consideration thereof *B*. covenants to pay *A*. a sum of money on the same day. 1 Salk. 112, 113, 171. *Thorpe* v. *Thorpe*, 2 Salk. 623; 1 Will. Saund. 320, *c*. and the cases there cited. Where upon an arrangement of cross actions it was agreed, *inter alia*, that the defendant, the attorney of one party, should give his note for ——*l*. as a collateral security for the amount to be paid to the other, and that the latter should give up all the effects which he had of the former into the defendant's hands; which note was given immediately after the signing of the agreement; it was held that the delivery of the goods was not a condition precedent to the right to recover on the note. *Irving* v. *King*,[1] 4 C. & P. 409. Where upon a building contract, the defendant covenanted to pay a further sum, provided the pavement were laid and other work completed before a certain day, held that the non-completion of the pavement by that time, although occasioned by bad weather, defeated the right to such further sum. *Maryon* v. *Carter*,[2] 4 C. & P. 205. By an agreement with a foreign mining company the plaintiff was engaged as superintendent for three years, at a salary increasing yearly, with a proviso for a twelvemonth's notice of dismissal, or a twelvemonth's salary, and the reasonable expenses of his return; and if he stayed the three years, he should also be entitled to all reasonable expenses of the return to his family; the defendant dismissed him before the expiration of the second year, without notice, or paying the year's salary or expenses; held that he could only recover such damages as he would have received if notice had been given, and not for the salary which would subsequently have accrued, or the expenses of the return to his family. *French* v. *Brookes*,[3] 6 Bing. 354. Where the defendant subscribed and paid a deposit for a "New History of Scotland, by," &c., and the work when delivered appeared to be only a translation of Buchanan's work, with notes and continuation by *J. H.*, which the defendant had insisted upon the plaintiff's taking back; held that the latter could not recover the price. *Paton* v. *Duncan*,[4] 3 C. & P. 336. The plaintiff consented to a composition with other creditors, but the trustees afterwards refused to allow him to sign the deed, alleging that his claim was usurious; held that he was remitted to his original legal rights. *Garrard* v. *Woolner*,[5] 4 C. & P. 471. *R*. agreed to supply *W*. with straw, to be delivered at *W*.'s premises at the rate of three loads in a fortnight, during a specified time, and *W*. agreed "to pay *R*. 33*s*. per load, for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time, *W*. refused to pay for the last load delivered, and insisted on always keeping one load in arrear; held, that according to the true effect of the agreement, each load was to be paid for on delivery; and that on *W*.'s refusal to pay for them, *R*. was not bound to send any more. *Withers* v. *Reynolds*,[6] 2 B. & Ad. 882. Upon a stipulation in a charter-party, that if the ship did not arrive at the port of loading on or before ——, unless prevented by stress of weather or other unavoidable impediment, the freighter should not be obliged to ship a cargo; held, that the captain was only bound to use ordinary diligence, and that if the arrival of the vessel had been delayed by impediments not to be overcome without unusual exertion, the defendant was liable for a breach of the covenant to ship a cargo. *Granger* v. *Dent*,[7] 1 Mood. & M. C. 475. Where the terms of the contract of the charter-party (dated June 30) were, that the vessel should be ready "forthwith," and not being so on the 4th of July, the plaintiffs renounced the contract, and sued the defendants for the default; held, that having regard to the state of the vessel, which was known to both parties, the question was, whether the vessel could, with reasonable and proper diligence, have been got ready; and if the jury thought that it could not have been reasonably expected to be so, that the defendants were entitled to the verdict, *Simpson* v. *Henderson*,[8] 1 Mood. & M. C. 300.

(*f*) *Bordenave* v. *Gregory*, 5 East, 107.

(A) (A militia-man was drafted to perform a tour of duty, and contracted with *C*. to pay him for performing that tour for him, "upon his return from performing the same." Held, that the performance of the duty was a condition precedent to the payment of the money, and that *C*. having deserted before he had fully performed it, could not recover. *Conrod* v. *Conrod*, 2 Virg. Cases, 138. Where one party covenants to give a deed on a certain day, and the other covenants to pay money on the same day, neither can maintain an action against the other until he has performed or tendered performance on his part. *Green* v. *Reynolds*, 2 Johns. R. 207. *Meriwether* v. *Can*, 1 Blackof. 413).

[1]Eng. Com. Law Reps. xix. 401. [2]*Id.* xix. 392. [3]*Id.* xix. 100. [4]*Id.* xxi. 335. [5]*Id.* xix. 478. [6]*Id.* xxii. 203. [7]*Id.* xxii. 361. [8]*Id.* xxii. 313.

Where the plaintiff alleged, in an action for not completing the purchase of certain shares, that he was *lawfully entitled* to so many shares, and it appeared from the act of parliament which created the shares that no legal *title had been vested in him, it was held to be a ground of nonsuit (*g*). *69
Where a mere duty is to be paid on request, the bringing of the action is a sufficient request; but if the defendant promise to pay a collateral sum on request, an actual request must be alleged and proved. As where the defendant undertakes to pay 10*l.* on request if he does not perform an award (*h*).

Indebitatus assumpsit.

The general count of *indebitatus assumpsit* is founded upon an implied promise to pay a certain debt or duty, upon a consideration, executed at the instance and request of the defendant, or upon a legal obligation arising from the particular circumstances of the case (*i*). The plaintiff must prove, 1st, a consideration executed; 2dly, at the *request* of the defendant. The necessity of proving a request, or that which is equivalent to it, or is evidence from which a request may be inferred, follows from the principle of law, that no one can constitute another person his debtor without his permission; and consequently it is not sufficient that the plaintiff should have rendered services to the defendant (*k*), without also showing that the defendant assented to the services, and expressly or impliedly agreed to remunerate the plaintiff for them. In order to show this it is essential, in every declaration in *assumpsit*, which is founded upon a past consideration, to allege it to have been done at the special instance and request of the defendant (*l*); and, in evidence, it is necessary in some instances to prove an express request by the defendant, and in others, to prove circumstances from which a previous request may be inferred (*m*) either in fact or in law (1).

Proof of actual request.

If the service be not for the benefit of the defendant himself, evidence of an express previous request is essential, and a subsequent promise is not sufficient (A). *A.*'s servant being arrested, *B.*, the friend of *A.*, bailed him, and *A.* afterwards undertook to indemnify *B.*; and it was held that this promise was not binding, because the consideration was past; but that

(*g*) *Latham* v. *Barber*, 6 T. R. 67. (*h*) B. N. P. 151; 1 Saund. 33; 1 Str. 68.

(*i*) See B. N. P. 129; *Bell* v. *Burrows*, 5 Geo. 3, cited 1bid. *Indebitatus assumpsit* will not lie in any case where debt would not lie; *Hurd's Case*, Salk. 23. But it will not lie in all cases where debt would lie; it is not maintainable on a specialty. But it will lie on a foreign judgment. *Plaistow Van-Uxem*, Doug. 5, n. and on *an Irish* judgment. *Vaughan* v. *Plunkett*, 3 Taunt. 85, n. *Harris* v. *Saunders*,[1] 4 B. & C. 411. *Crawford* v. *Whittall*, Doug. 4, n.

(*k*) See *Birks* v. *Trippett*, Saund., as to the distinction between a duty and a collateral undertaking. *Back* v. *Owen*, 5 T. R.

(*l*) *Lamplugh* v. *Braithwaite*, 1 Roll. Ab. 11. *Bosden* v. *Thin*, Cro. J. 18; 1 Will. Saund. 264, n. (1); Dyer, 272; Hob. 106. *Hayes* v. *Warren*, Str. 933.

(*m*) *A.* requests *B.* to endeavour to procure a pardon for *A.*; if, after endeavour made, *A.* in consideration thereof, promises to pay *B.* a certain sum, it is a good consideration. 1 Roll. Ab. 11, pl. 6.

(1) [See Yelv. 41. *a.* note, and cases there collected. 16 Johns. 284. note. *Inhabitants of Roxbury* v. *Worcester Turnpike Corporation*, 2 Pick. 41.]

(A) (But where the interest of a man is promoted, though not at his request, and he afterwards deliberately engages to pay, his promise will bind him. *Greeves* v. *M'Allister*, 2 Binn. 591. No action lies against overseers of the poor for medical or other services rendered to a pauper, although in the most pressing necessity, without their request, or express promise to pay. *Gourley* v. *Allen*, 5 Cow. 644. *Everts* v. *Adams*, 12 John. R. 352. *Miller* v. *Inh's. of Somerset*, 14 Mass. R. 396. And an *assumpsit* cannot be raised by doing an act against the will of the person sought to be charged. *Schureman* v. *Wilkes*, Anth. N. P. 168. n. a. *Mayor, &c. of Baltimore* v. *Hughes*, 1 Gill & Johns. 497. *Richardson* v. *M'Ray*, 1 Const. Rep. 472. *Assumpsit* lies on an implied promise to discharge a legal obligation created by statute. *The Inh's. of Bath* v. *The Inh's. of Freefort*, 5 Mass. R. 325. So *assumpsit* can be maintained for a pecuniary legacy without any express promise. *Clark* v. *Herring*, 5 Binn. 33. A request by a father that a physician will attend on his son who is of full age, and sick at his father's house, does not render the father liable to pay for the service rendered. *Boyd* v. *Sappington*, 4 Watts, 247; and the natural affection and moral duty arising from the connection between a father and his illegitimate child, do not constitute a sufficient consideration to impart a legal obligation to a verbal promise. *Clarke* v. *M'Farland's Ex'rs.* 5 Dana, 45.)

[1] Eng. Com. Law Reps. x. 370.

it would have been otherwise had *A.* previously requested *B.* to bail his servant (*n*).

Request when presumed.

But if the defendant voluntarily derive benefit from the service, that will be *evidence* of a previous request: as, where the plaintiff has paid a sum of money for the defendant, or bought goods for him without his knowledge or consent, and he afterwards assents to the payment or uses the goods (*o*) (A).

From legal obligation.

Where the defendant was under a legal obligation to procure the service to be done, a subsequent promise to pay will be evidence of a previous request. And therefore, where a pauper was suddenly taken ill, and an apothecary attended her without the previous request of the overseers, and cured her, and afterwards the overseers promised payment, it was
*70 holden to be *binding (*p*). But a mere moral obligation is insufficient without a previous request (*q*), or a subsequent express promise (*r*), in respect of a debt due in point of natural justice, but which, for technical

(*n*) Dyer, 272, *a*; 1 Roll. Ab. 11, pl. 2, 3.

(*o*) Assumpsit lies by the owner of a market for stallage, without showing any contract with the occupier. *Mayor, &c. of Newport* v. *Saunders*,[1] 3 B. & Ad. 411.

(*p*) *Watson* v. *Turner*, B. N. P. 129, 147, 281. See also *Wing* v. *Mill*, 1 B. & A. 105. And where a casual pauper accidentally fractured his leg, and was attended by a surgeon who attended the parish poor, with the knowledge of the overseer of the poor, who visited the pauper there, it was held that a request by the overseer might be presumed. *Lamb* v. *Bunce*, 4 M. & S. 275. An accident having happened to one of the defendant's children, who were residing at a distant place under the care of servants, the latter called in the plaintiff, an apothecary, to attend: held, that the father was liable, although he never knew of the plaintiff's attendance, and the accident was owing to the servants' negligence; held also, that he was liable for attendance on one of his servants, in illness brought on in consequence of the service, but not for illness occasioned by the servant's own imprudence, unless the master had been informed of it, and acquiesced. *Cooper* v. *Phillips*,[2] 4 C. & P. 581. An executor having assets is liable, upon an implied contract, to pay suitable funeral expenses, although ordered by a third party, it not appearing that they were furnished upon his credit. *Rogers* v. *Price*, 3 Y. & J. 28. And see *Tugwell* v. *Hayman*, 3 Camp. C. 298.

(*q*) See the note 3 B. & P. 249, and the cases there collected. [Yelv. 41. 6 note;[3] 5 Taunt. 37; 13 John. 259.]

(*r*) A feme covert having an estate settled to her separate use, gave a bond for repayment, by her executors, of money advanced at her request, on security of that bond, to her son-in-law; after her husband's death, she wrote, promising that her executors should settle the bond; and it was held that the executors were bound. *Lee* v. *Muggeridge*, 5 Taunt. 36. This, with many other cases, falls within a very general principle, that wherever a debt in point of natural justice is due, but cannot be legally claimed by reason of the intervention of some positive law, the consideration will support an express promise: for a party may always waive a provision for his own benefit. The principle, therefore, applies not only in the above case, where the legal claim was impeded by coverture, but also where it is prevented by the Statute of Usury (*Barnes* v. *Heady*, 2 Taunt. 184); or of Limitations (*Hyeling* v. *Hastings*, Ld. Raym. 589; see tit. Limitations); or by the defendant's infancy (*Southerton* v. *Whitlock*, 2 Str. 690, *& infra*, tit. Infancy); or by an insolvent act (*Mucklow* v. *St. George*, 4 Taunt. 613); or by the Statute of Bankruptcy (*Fleming* v. *Haynes*,[4] Starkie's C. 370; *Linbuy* v. *Weightman*, 5 Esp. C. 198); or where the holder of a bill of exchange omits to give due notice of the dishonour to the drawee. (*Lundie* v. *Robertson*, 7 East, 231. *Roper* v. *Alder*, 6 East, 10, n.) In such cases, however, it is a general essential that the promise should be distinct and unequivocal. Per Lord Ellenborough, in *Fleming* v. *Haynes*,[4] 1 Starkie's C. 370. A promise made to pay an old debt discharged by an insolvent act, by instalments, without specifying the amount or time of payment, was held to be insufficient. *Mucklow* v. *St. George*, 4 Taunt. 613. And if the subsequent promise be conditional, it is incumbent on the plaintiff to show performance. *Besford* v. *Saunders*, 2 H. R. 116. By the stat. 6 Geo. 4, c. 16, s. 131, a certificated bankrupt is not liable on a subsequent promise, unless it be in writing. A subsequent promise will not revive a *void* security. *Cockskott* v. *Bennett*, 2 T. R. 763.

(A) ("It is a general rule, that when the parties have made an express contract, the law will not imply a contract. How far this rule will apply, when the express contract is of such a nature, that no remedy will lie for a breach of it, when at the same time there is a sufficient consideration to support an implied contract, may be a question." Per Parsons, Ch. J. *Worthen* v. *Stevens*, 4 Mass. R. 449. A promise to pay, will be implied from an agreement of parties, to abide by the decision of individuals named between them, to appraise the value of certain work and services done and performed by one party for the other. *Efner* v. *Shaw*, 2 Wend. 567. Where an agreement does not designate the person to whom its consideration is to be paid, the law will raise an *assumpsit*, and this is always implied in favour of those who are the meritorious cause of action, or from whom the consideration moves. *Higden* v. *Thomas*, 1 Harr. & Gill, 139. If a surety have paid money for his principal, the law implies an *assumpsit*, and the proper form of action is *indebitatus assumpsit* for money paid. *Smith* v. *Sayward*. 5 Greenl. 504. *Gray* v. *Bowls*, 1 Dev. & Bat. 437. So even if the contract made with the principal be usurious, if made without the surety's knowledge of the usury. *Ford* v. *Keith*, 1 Mass. 139.)

[1]Eng. Com. Law Reps. xxiii. 108. [2]*Id.* xix. 535. [3]*Id.* i. 10. [4]*Id.* ii. 431.

reasons cannot otherwise be enforced. A master is not liable on an implied *assumpsit* to pay for medical attendance on his servant (*s*). And the overseers of a parish to which a pauper belongs are not liable, without an express promise, to reimburse the overseers of another parish, for medicines supplied to the pauper during his casual residence there (*t*). Where the obligation is a *legal one*, the parties who ought to discharge it are liable, though there be no previous request or subsequent promise. Thus the overseers of a parish are liable, not only in respect of necessary medical attendance on a casual pauper accidentally disabled within the parish, but even for such attendance in the pauper's own parish, to which they have improperly removed the pauper (*u*).

*Where goods are supplied to a feme covert living apart from her husband, without any fault of her own, suitable to her rank in life (*x*); or where the plaintiff, to save himself, pays money for the defendant, which the latter was in law bound to pay (*y*), no evidence of a previous request or subsequent promise is necessary (*z*). So in many instances, where the defendant has committed a *tort* with respect to the property of the plaintiff, the latter may *waive the tort*, and bring his action for goods sold and delivered, or for use and occupation, according to the circumstances of the case (*a*). In these cases no evidence, either of a previous request or subsequent promise, is necessary; for as soon as, in point of law, a debt certain is due from the defendant to the plaintiff, the law infers a promise on his part to pay it; whereas, in the other cases, either a previous request, or subsequent promise, or some evidence of assent, is essential to constitute a perfect legal duty. *71

When the terms of a special agreement have been performed so as to leave a mere simple debt or duty between the parties, the plaintiff may give the circumstances in evidence, and recover under a general count of *indebitatus assumpsit* (*b*) (1). But in such case if it appear that the work Proof by special agreement.

(*s*) *Wennall* v. *Adney*, 3 B. & P. 247. But see *Newby* v. *Wiltshire*, 2 Esp. C. 739; *Scarman* v. *Castel*, 1 Esp. C. 270.

(*t*) (In *Atkins* v. *Banwell*, 1 East, 505, a pauper residing in the parish *A.* was relieved there, and supplied with medicines by the parish officers, and it was held that the officers of the parish *B.*, to which the pauper belonged, were not bound to repay the money so expended. And see *Tomlinson* v. *Bentall*, 5 B. & C. 738. *Gent* v. *Tompkins*, 5 B. & C. 746.

(*u*) *Tomlinson* v. *Bentall*,[1] 5 B. & C. 738. Note, that after the removal, one of the defendants sent for the surgeon, who resided in the pauper's own parish, in order that he might attend the pauper; but the Court seem to have decided the case wholly on the ground of legal obligation. See *R.* v. *Inhab. of St. James, Bury St. Edmunds*, 10 East, 25. In the case of *Gent* v. *Tompkins*, 5 B. & C. 746, the pauper being settled in *N.* met with an accident in *W.*, and was attended by a surgeon of *W.*: the defendant who was the overseer of *N.*, after a fortnight's attendance, called and desired of the surgeon (the plaintiff) that the pauper might continue to receive every attention, saying that he (the defendant) would see the plaintiff paid. The Court were of opinion that the overseers of *W.*, where the pauper met with the accident, and not those of *N.*, to which the pauper belonged, were liable in the first instance, but expressed a doubt whether the defendant might not be liable if, in consequence of his promise, the plaintiff continued to attend, and thought that this point ought to have been left to the jury; and on that ground granted a new trial.

(*x*) *Jenkins* v. *Tucker*, 1 H. B. 90. So for the funeral expenses of the wife. Ibid. *Secus*, where she leaves the house of her husband without necessity. *Horwood* v. *Heffer*, 3 Taunt. 421.

(*y*) Vide *infra*, 58.

(*z*) *Qu.* Whether in the former case the wife, and in the latter the plaintiff, may not be considered to be the agents of the defendant?

(*a*) Vide *infra*, 83.

(*b*) *Gordon* v. *Martin*, Fitzg. 303. B. N. P. 139; Gilb. Law of Evid. 191: Tri. per Pais, 399; Style, 461. But an *indebitatus assumpsit* does not lie on a collateral undertaking. *Mines* v. *Sculthorp*, Camp. C. 215, such as in guarantee.

(1) [But a plaintiff cannot recover on an implied *assumpsit* for the value of goods delivered, where there is an existing written contract, in part performance of which the goods were delivered. *Wood & al.* v. *Edmunds & al.* 19 Johns. 205. {See *Willoughby* v. *Raymond*, 4 Com. Rep. 130.} Where both parties have departed from the special agreement, an action may be maintained on an implied promise. *Goodrich* v. *Lafflin & al.* 1 Pick. 57. Or where a special agreement contains nothing more than the law will imply. *Gibbs* v. *Bryant*, 1 Pick. 119. See also *McWilliams* v. *Willis*, 1 Wash. 199. So where a special agreement is void

[1]Eng. Com. Law Reps. xii. 368.

has been done under a written agreement, the plaintiff must produce and prove it, or he will be nonsuited; so if he produce it and it cannot be received in evidence for want of a proper stamp (*c*).

If goods are to be paid for at a specified time, an *indebitatus assumpsit* will lie when the time has expired (*d*). If goods are to be paid for by a bill at two months, although the acceptance of the bill be refused, the action of *indebitatus assumpsit* cannot be brought until the expiration of the time of credit, and then the action will lie (*f*). If a bill be given in payment for goods, and there be no agreement as to time, and the bill turn out to be worthless, an action may be commenced immediately (*g*) (1).

*72 And it is *sufficient, if, from the memorandum, it appear that the bill was filed after the time when the credit expired (*h*).

If the plaintiff declare upon a special contract, as well as upon the general count, and fail in his proof upon the special count, but yet establish a special contract, the terms of which have been performed, he will still be entitled to recover on the general count, provided he would have been entitled to recover on that count if no special agreement had been laid in the declaration (*i*). If he declare upon a special agreement, and prove a special agreement which varies from that laid, and which still remains in force, the special performance or rescinding of the agreement not having raised a simple debt or duty, he cannot recover; for he cannot recover on the special count, on account of the variance; nor on the general count, since the terms of the special agreement have not been rescinded, or reduced

(*c*) See *Brewer* v. *Palmer*, 3 Esp. C. 213, *cor.* Ld. Eldon. *Jeffery* v. *Walton*,[1] 1 Starkie's C. 267; *supra*, 56.

(*d*) *Mussen* v. *Price*, 4 East, 147. Where the time of delivery is specified, the plaintiff having delivered part of the goods before the time, cannot recover the price of such part before the expiration of the time; for the contract is entire, and cannot be split. *Waddington* v. *Oliver*, 2 N. R. 61.

(*e*) *Dutton* v. *Solomonson*, 3 B. & P. 582.

(*f*) *Mussen* v. *Price*, 4 East, 75, 147. *Brooke* v. *White*, 1 N. R. 330. Lord Alvanley's *dictum*, 3 B. & P. 582, *contra*. See tit. GOODS SOLD AND DELIVERED. [See *Henry* v. *Donaghy*, Addison's Rep. 39. *Roget* v. *Merritt, & al.* 2 Caines' Rep. 117. *Salem Bank* v. *Gloucester Bank*, 17 Mass. Rep. 1.]

(*g*) *Stedman* v. *Gooch*, 1 Esp. 5. *Puckford* v. *Maxwell*, 6 T. R. 52. *Owenson* v. *Morse*, 7 T. R. 64. A debtor is not discharged by giving an unproductive cheque, though he has previously tendered cash. *Everett* v. *Collins*, 2 Camp. C. 505. Though the cheque was given by an agent of the buyer, who was at the time indebted to his principal in a larger amount. Ib.

(*h*) *Swancott* v. *Westgarth*, 4 East, 75. Vid. *infra*, tit. TIME.

(*i*) B. C. P. 139. *Harris* v. *Oke*, Winch. Summ. Ass. 1759. In Buller's C. P. 139, it is laid down, that if a man declare upon a special agreement, and likewise upon a *quantum meruit*, and upon the trial prove a special agreement, but different from what is laid, he cannot recover on either count; not on the first, because of the variance; nor on the second, because there was a special agreement; but in a subsequent part of the same paragraph it is intimated that the plaintiff ought to have been suffered to recover on the *indebitatus assumpsit* count, provided the terms of the special agreement had been performed.(2)

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on account of illegal consideration, *assumpsit* will lie on an implied promise to pay what was justly due before the special agreement was made. *Thurston* v. *Percival*, 1 Pick. 415.]

(1) [See *Ellis* v. *Wild*, 6 Mass. Rep. 321. *Wiseman & al.* v. *Lyman*, 7 Mass. Rep. 286. *The People* v. *Howell*, 4 Johns. 296. *Johnson* v. *Weed & al.* 9 Johns. 310. *Wilson* v. *Force*, 6 Johns. 119. *Putman* v. *Lewis*, 8 Johns, 389. *Markle* v. *Hatfield*, 2 Johns. 455.]

(2) [Where there is a count on a special agreement, coupled with a general count for goods sold, the plaintiff may, undoubtedly, abandon his special count, even after he has attempted to prove it, and failed; and may then resort to his general count. But this can be done only where the proof is *adapted* to the general count. It can never be allowed, where the goods were, in truth, delivered under a special agreement, and where the plaintiff might, beyond all question, sustain a proper count on the special agreement. A contrary rule would enable the plaintiff in every case, by his mere volition, to convert a special contract into a general *indebitatus assumpsit*. *Robertson* v. *Lynch*, 18 Johns. 456. Where the plaintiff declares on a special contract, and adds the general counts, if the special count is ruled insufficient on demurrer, he cannot give the special contract in evidence under the general counts, on the issue of *non-assumpsit*. *Culver* v. *Barnet*, 1 Tyler, 182. In an action of general *indebitatus assumpsit* for services rendered, the plaintiff cannot give in evidence an agreement to pay him in specific articles: He should declare on the special agreement. *Brooks* v. *Scott's Ex'r*. 2 Munf. 314. S. P. *Spratt* v. *McKinneys*, 1 Bibb. 595. See *Keyes* v. *Stone*, 5 Mass. Rep. 391. *Tuttle* v. *Mayo*, 7 Johns. 132, and note (*a*) 2d edition. Where the special contract is still in force, the plaintiff cannot resort to the general counts. *Raymond & al.* v. *Bernard*, 12 Johns. 274. *Jennings* v. *Camp*, 13 Johns. 94. *Clark* v. *Smith*, 14 Johns. 326.]

[1] Eng. Com. Law Reps. ii. 385.

by performance to a mere duty (A). In *Cooke* v. *Munstone* (*k*), the plaintiff declared for not delivering thirty-five chaldrons of *soil* or *breeze*, according to a special contract. It was proved that the contract was for the delivery of thirty-five chaldrons of *soil* (only), and that the plaintiff had paid 2*l.* 5*s.*, as earnest, and that it had not been delivered on account of a dispute between the parties as to the wharf from whence the soil should be loaded; and it was held that the plaintiff could not recover on the special count, on account of the variance, *soil* and *breeze* being distinct things; nor upon the count for money had and received, since the contract had never been rescinded (*l*).

Indebitatus assumpsit: effect of special contract.

Where the plaintiff proves a special agreement and work done, but not pursuant to such agreement, it is said that he shall recover upon the *quantum meruit;* for otherwise he would not be able to recover at all (*m*). As if, on a *quantum meruit* for work and labour, the plaintiff should prove that he had built a house for the defendant, though the defendant should prove that there was a special agreement about the building of it, *viz.* that it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover on the *quantum meruit,* although such proof on the part of the defendant might be proper to lessen the quantum of damages (*n*).

*Where the plaintiff, under a special agreement, has executed the work improperly, since he has not done that which he engaged to do, and which is the consideration of the plaintiff's promise to pay, it seems to be now settled (*o*) that the plaintiff must recover, if at all, upon the *quantum meruit,* and that he cannot recover more than the value of the work and materials to the defendant (*p*). And where the plaintiff has executed his work so ill that the defendant has derived no benefit from it, or none which exceeds in value the sum which he has paid, the plaintiff is not entitled to recover at all (*q*), even for the labour and materials (1). *73

(*k*) 1 N. R. 351.

(*l*) See tit. MONEY HAD AND RECEIVED, for the different cases in which a contract is to be considered as rescinded. See also *Towers* v. *Barret*, 1 T. R. 133. *Weston* v. *Downes*, Doug. 23. *Power* v. *Wells*, Cowp. 818. *Giles* v. *Edwards*, 7 T. R. 181. *Hunt* v. *Silk*, 5 East, 449. *Payne* v. *Bacomb*, Doug. 628. [Mr. Day's note to *Taylor* v. *Hare*, 1 N. R. 263, (*g*).]

(*m*) B. N. P. 139. Mr. *Keck's Case*, at Oxon, 1744. But in such case it should be shown that the defendant has *voluntarily* derived some benefit from the work, for otherwise he would be made to pay for work which he never contracted for, and against his assent. See *Ellis* v. *Hamlin*, 3 Taunt. 55.

(*n*) It seems, however, to be clear, that the plaintiff is not entitled to recover on the *quantum meruit* or *quantum valebant*, where a specific sum or price has been agreed on. 2 Will. Saund. 122, *n.* 2. And as he may recover on the general *indebitatus assumpsit* as much as the work is worth, &c. the *quantum meruit* and *valebant* counts are unnecessary.

(*o*) *Basten* v. *Butter*, 7 East, 479. It had before been held that the remedy of the defendant was by a cross-action, and had been so ruled by Buller, J. in *Brown* v. *Davis*, Taunton Lent Ass. 1794, where the plaintiff had built a booth for the defendant on a race-course so ill that it fell down, and the defendant had paid part of the sum agreed for.

(*p*) But where this defence is intended to be set up, the defendant ought to give the plaintiff notice to that effect. *Basten* v. *Butter*, 17 East, 479.

(*q*) *Basten* v. *Butter*, 7 East, 473. *Ellis* v. *Hamlin*, 3 Taunt. 52; vid. *infra*, WORK AND LABOUR.

(A) (Where the terms of a special agreement have been performed by the plaintiff, and nothing remains, but the mere duty on the part of the defendant to pay money, the plaintiff may recover on the common money counts in assumpsit. *Bomeisler* v. *Dobson*, 5 Whart. 398. But where the time for the performance of a covenant under seal, was enlarged by parol, although the performance was only in pursuance of the parol enlargement, it was held that the plaintiff could not recover in assumpsit, but must bring covenant. *Green* v. *Roberts*, 5 Id. 84. Indebitatus assumpsit will not lie upon a special contract, unless the payment was to be in money, and the plaintiff has performed or executed the agreement on his part, and the time of payment has arrived. But if the contract was to pay in a bill or note due at a future day, and that day has passed, the action will lie. *Carson* v. *Allen*, 6 Dana, 397. Indebitatus assumpsit will not lie on a collateral undertaking to pay the debt of another; in such case the action must be special. *Elder* v. *Warfield*, 7 Har. & I. 391.)

(1) (*Taft* v. *Inhabitants of Montague*, 14 Mass. Rep. 282. *Rose* v. *Parker*, 2 Southard's Rep. 780.)

Where a builder undertook a work of specified dimensions, and deviated from the specification, it was held that he could not recover on a *quantum meruit* for work and labour and materials (*r*). Where a special contract has been entered into for the performance of a work, according to a specification, and deviations are made by mutual consent, the plaintiff is entitled to recover according to the terms of the contract and specification, as far as they are applicable, and upon a *quantum meruit* as to the rest (*s*). A lessor contracted to pay his tenant, at a valuation, for certain erections, pursuant to a plan to be agreed upon, provided they were completed in two months; no plan was agreed upon, and the lessee proceeded, after condition broken, with the assent of the lessor; and it was held, that the lessee might recover, as for work and labour, upon an implied promise, arising out of so many of the facts as were applicable to the new agreement (*t*). Upon an *indebitatus assumpsit* for board, schooling and clothes, with a count on a *quantum meruit*, stating, that, in consideration that the plaintiff had taken *J. W.* as a scholar in an academy kept by him, and that he had left it without giving due notice, the defendant promised to pay so much as the plaintiff reasonably deserved to have, it was held that the plaintiff was entitled to recover for one quarter beyond the time when *J. W.* left; a quarter's notice not having been given, according to the original terms of the contract (*u*).

Variance. The plaintiff, in this form of action, may recover in respect of any number of different claims included in the same count, provided it be applicable to them. Thus, under a count alleging that the defendant was indebted to the plaintiff in the sum of 1,000*l.* for work and labour, goods sold and delivered, money had and received, &c., the plaintiff may recover in respect of any number of demands proved within the different descriptions (*x*). Under the same count he may recover money due from the defendant solely, and money due from him as surviving partner (*y*).

*74 *In order to sustain the count for *money paid*, laid out and expended for

Money paid. the use of another, the plaintiff must prove,

First. The payment of the money.

Secondly. At the request of the defendant, either express or implied (*z*).

(*r*) *Ellis* v. *Hamlin*, 3 Taunt. 52.

(*s*) *Robson* v. *Godfrey*,[1] 1 Starkie's C. 275. *Pepper* v. *Burland*, Peake's C. 103.

(*t*) *Burn* v. *Miller*, 4 Taunt. 745.

(*u*) *Eardley* v. *Price*, 2 N. R. 333. And see *Gandall* v. *Pontigny*,[2] 1 Starkie's C. 198. *The African Company* v. *Langdon*, 15 Vin. Ab. tit. Master and Servant, G. Pl. 5, Ch. Pr. 221. And *Miles* v. *Solebay*, 2 Mod. 242. [S. C. 4 Camp. 375. In this case, a servant hired by the quarter, having been discharged without sufficient cause in the middle of a quarter, was held entitled to his full quarter's wages, under a count in indebitatus assumpsit for work and labour.]

(*x*) *Webber* v. *Tivil*, 2 Saund. 121.

(*y*) Ib. and *Richards* v. *Heather*, 1 B. & A. 29.

(*z*) Vide *supra*, 69. Where the plaintiff, a sheriff's officer, had been obliged to pay the debt and costs on an attachment against the sheriff for not putting in bail above, and the defendant, both before and after the sheriff had been fixed, had repeatedly promised to indemnify the plaintiff, and repay him the money expended: held, that to the extent of the debt it was money paid to the defendant's use. *White* v. *Leroux*,[3] 1 M. & M. 347. The defendant received from *H.*, as a security for goods sold, a bill accepted without consideration by the plaintiff; *H.* afterwards paid for the goods, and required the bill to be delivered back, which the defendant refused to do, and afterwards indorsed it over to a third person, who sued and recovered the amount from the plaintiff; held, that the plaintiff was entitled to recover the amount from the defendant as for so much money paid for his benefit, but not for the costs of the action, which he ought not to have defended. *Bleaden* v. *Charles*,[4] 7 Bing. 246. After an agreement by the inhabitants in vestry to prosecute a party for encroachments, a committee had been formed, who retained an attorney, and a judgment was obtained; the attorney having recovered the amount of his bill, and with costs of the action, against the plaintiff, one of the committee, it was held that he might recover contribution from the others as for money paid. *Holmes* v. *Williamson*, 6 M. & S. 158. Goods were consigned from India to London, the bill of lading expressed the freight to have been paid, the consignee indorsed the bill of lading for value, after which it was found, that, through the default of the shipper, the freight had not been paid; held, that the ship owners could not detain the goods until payment of the freight from the assignees of the bill of lading, and that the brokers of the latter, paying

[1] Eng. Com. Law Reps. ii. 380. [2] *Id.* ii. 354. [3] *Id.* xxii. 331. [4] *Id.* xx, 119.

The plaintiff must show an actual payment of money, or its equivalent, the mere giving a *security* for the payment is not sufficient (A). A surety for the defendant, who had been discharged under an insolvent debtors' Act, was obliged to give a bond and warrant of attorney as a new security for the debt; and it was held that he could not hold the defendant to bail as for money paid to his use (*a*). Payment of the money.

So, where one of several joint makers of a bill gave the holder a bond, and then sued the rest for contribution, in an action for money paid, it was held that the action was not maintainable, no money having in fact been paid (*b*). And it has been held that the receipt of stock cannot be considered as the receipt of money, either upon an agreement to pay a per centage on the receipt of money (*c*), or in an action for money had and received (*d*).

*The damages to be recovered are measured by the sum which the plaintiff has actually at the express or the implied request of the defendant. Where the payment has been compulsory, the plaintiff cannot recover more than he was under the necessity of paying; and therefore although bail above may recover from their principal any sum which they have fairly expended in endeavouring to take him, they cannot recover the costs which have been occasioned by unadvisedly resisting the payment of those expenses (*e*). *75

Secondly. *At the defendant's request.*—Where there is no *request*, either express or implied, the action cannot be maintained (*f*), and therefore it cannot be maintained where the money has been paid against the express direction of the party for whose use it is supposed to have been paid. Where two parishes had long been united, and paid a joint sexton, and afterwards one claimed a right of electing a separate sexton, it was held that the other parish could not, after notice, recover a moiety of the sum Request.

the freight in order to obtain the goods, after instructions from their employers not to pay the freight, it having been paid in India, as they supposed, paid it in their own wrong, and could not recover it as money paid for their principals. *Howard* v. *Tucker*,[1] 1 B. & Ad. 712. One who has been obliged to pay a joint debt, cannot recover a proportion from the rest of the share of one jointly liable who has become insolvent. *Brown* v. *Lee*,[2] 6 B. & C. 689.

(*a*) *Taylor* v. *Higgins*, 3 East, 169.

(*b*) *Maxwell* v. *Jameson*, 2 B. & A. 51.

(*c*) *Jones* v. *Brindley*, 1 East, 1.

(*d*) *Nightingale* v. *Devismes*, 5 Burr. 2589. The cases of *Taylor* v. *Higgins*, and *Maxwell* v. *Jameson*, seem to overrule that of *Barclay* v. *Gooch*, 2 Esp. C. 271; where the plaintiffs having become sureties for the defendant, and having been called upon after his bankruptcy to pay the money, gave their promissory note for the amount; and Lord Kenyon held, that as the club had consented to take the note as money in payment, it was to be so considered for the purpose of the action, and the plaintiff had a verdict, and a new trial was refused. In *Israel* v. *Douglas*, 1 H. B. 239, the defendants being indebted to Delvaleé, who was indebted to the plaintiff, Delvaleé gave an order to the plaintiff, on the defendant's requiring them to pay what was due to him to the plaintiff, and they accepted the order, but on Delvaleé's becoming bankrupt, refused to pay the amount; and the Court of Common Pleas (Wilson, J. *dissentiente*) held, that the defendants were to be considered as having received so much money as they owed Delvaleé to the use of the plaintiff. Lawrence, J. in the case of *Taylor* v. *Higgins*, said, that the case of *Israel* v. *Douglas* had been afterwards disapproved of upon that point, and that he had a note of the case, which differed materially from that cited. Wilson, J. although he differed from the rest of the court in their opinion, that this was money had and received, was of opinion that this was evidence under the count, upon an *account stated*. And see *Wade* v. *Wilson*, 1 East, 195; *Surtees* v. *Hubbard*, 4 Esp. C. 203; and *infra*, 79 (*g*).

(*e*) *Fisher* v. *Fullows*, 5 Esp. 171.

(*f*) *Alexander* v. *Vane*, 1 M. & W. 711.

(A) [It seems that a count for money paid can never be sustained without proof either of an actual payment in money or in negotiable paper. The giving of a bond is not sufficient to prove the allegation. *Camming* v. *Hackly*, 8 Johns. R. 202. *Craig* v. *Craig*, 5 Rawle, 91. But the giving of a note is not equivalent to the payment of money, unless it is so received. *Van Ostrand* v. *Reed*, 1 Wend. 424. This count will not lie where property has been parted with. *Morrison* v. *Berkey*, 7 Serg. & R. 246. *Dobler* v. *Fisher*, 14 Id. 179; though it has been held to be otherwise where property has been received as money. *Ainslie* v. *Wilson*, 7 Cow. 662.)

[1]Eng. Com. Law Reps. xx. 478. [2]*Id.* xiii. 294.

paid as the sexton's salary, as money paid to the use of the seceding parish (*g*). So where the holder of stock authorized his broker to contract for the transfer of it, upon the opening of the stock which was then shut, and the broker sold without disclosing the name of his principal, and the stock rising in value, the principal refused to transfer, alleging that the broker had sold the stock at a lower rate than he was authorized to do, and the broker paid the deficiency to the purchaser; it was held that since he had paid the money without the consent of the principal, and could not be considered as a guarantee for his principal, he could not recover for money paid to the use of the principal (*h*).

The request may be implied from the special circumstances. The action lies against a shipowner for money supplied to the captain, either in a foreign or English port, for necessary repairs, provided it be expressly borrowed for that purpose (*i*) and be so applied. A request is never implied when a party is compelled to pay money through his own neglect, or breach of duty (*k*). (A).

Assent implied; surety.

The defendant's assent is implied (*l*) in all cases where the plaintiff is compelled to pay the debt of another through his default (*m*); as where a surety is compelled to pay money on the default or his principal (B). The plaintiff in such case must prove the execution of the bond, or other instrument, by which he became the surety for the defendant, and that he be-

(*g*) *Stokes* v. *Lewis*, 1 T. R. 20.

(*h*) *Child* v. *Morley*, 8 T. R. 610. So if the vendor of stock to be transferred on a certain day make default, the vendee purchasing the amount with his own money cannot recover the price as money paid. *Lightfoot* v. *Creed*,[1] 8 Taunt. 268.

(*i*) *Thacker* v. *Moates*, 1 Mo. & R. 79. *Robinson* v. *Lyall*, 7 Price, 392. *Rocher* v. *Busher*,[2] 1 Starkie's C. 27. *Palmer* v. *Gooch*,[3] 2 Starkie's C. 428.

(*k*) *Pitcher* v. *Bailey*, 8 East, 171. *Copp* v. *Topham*, 6 East, 392.

(*l*) The defendant is not liable in this form of action, unless he be primarily liable or the liability be incurred at his express request. An agreement with the plaintiff to pay money to a third party is not sufficient. *Spencer* v. *Parry*,[4] 3 Ad. & Ell. 331. *Lubbock* v. *Tribe*, 3 M. & W. 607.

(*m*) *Exall* v. *Partridge*, 8 T. R. 310; *Dawson* v. *Linton*, 5 B. & Ad. 521. The plaintiff need not declare specially. *Vanderheyden* v. *Paiba*, 3 Wils. 528. Bail may recover such sums as they have been necessarily and fairly obliged to expend; as in sending after and securing their principal after he has absconded, in order to surrender him. *Fisher* v. *Fallows*, 5 Esp. C. 571. In the case of *Exall* v. *Partridge*, above referred to, *A. B. C.* being joint lessees of premises, and *B.* and *C.* having assigned their interest to *A.*, the plaintiff, with notice of the facts, placed his carriage on the premises where *A.* carried on business as a coach builder, to be repaired; the carriage was seized as a distress for rent, and the plaintiff having paid rent in the name of the three to redeem his goods, it was held that all three were liable on an implied promise. Note, that if the carriage had been sold, and the money paid over to the landlord, the plaintiff could not have maintained his form of action, for then this money would not have been paid by him. *Moore* v. *Pycke*, 11 East, 52. The law will not sanction a promise of repayment where the necessity for payment has been occasioned by the default or failure of the party who has so paid it; as where an auctioneer, for want of taking proper precautions in putting up an estate for sale has been compelled to pay the auction duty. *Copp* v. *Topham*, 6 East, 392. But a bailiff who seizes and sells the goods of a bankrupt after an act of bankruptcy has been committed, may after a recovery against himself and the execution creditor, in an action of trover by the assignees, recover from the creditor the amount as paid under mistake, though he cannot sue him upon an implied engagement to indemnify him. 2 Camp. 452. So there is no implied *assumpsit* on the part of a sheriff to indemnify an auctioneer employed by the *sheriff's bailiff* to sell goods under a *fi. fa.* *Farebrother* v. *Ansley*, 1 Camp. 343. Where a person has been induced ignorantly to commit an illegal act, an express promise of indemnity is valid. *Fletcher* v. *Harcott*, Hutt. 55. *Secus* where the party indemnified had notice, or may from the nature of his office, be presumed to have known, that the act was illegal. *Martin* v. *Blithman*, Yelv. 197. But it seems that where one person at the request of another ignorantly commits a trespass, he is entitled to a remedy in doing that which is apparently legal. An executor who has paid legacy duties in full, and afterwards paid the legacy duty, may recover from a legatee. *Foster* v. *Ley*,[5] 2 Bing. N. C. 269.

(A) (Money paid will lie where one obtains money by extortion or oppression, and by taking an undue advantage of a party's situation, or by deceit and mala fide. *Bliss* v. *Thompson*, 4 Mass. 488.)

(B) (The first endorser of a negotiated accommodation note who pays the whole sum cannot call on the second endorser for contribution though the maker is insolvent. *Hixon* v. *Reid*, 2 Litt. 174. *M'Donald* v. *Magruder*, 3 Peters, 470.)

[1] Eng. Com. Law Reps. iv. 100. [2] *Id.* ii. 280. [3] *Id.* iii. 416. [4] *Id.* xxx. 107. [5] *Id.* xxix. 331.

came so at the request of the defendant, or that he assented to it: (1) and that he was called upon to pay the money, and gave the defendant notice to pay it.

*Notice to the party for whom the indemnity is given is not necessary previously to defending an action on a guarantee: but if he refuse after notice to defend the action, he is estopped from saying that the plaintiff was not bound to pay the money (*n*). *76

Where there are two sureties, each of whom has been obliged to pay part of the debt, separate actions should be brought (*o*), unless the payment has been made out of a joint fund (*p*). Where several are sureties for another, and one of them is compelled to pay the whole debt, he may by separate actions compel the others to contribute their proportions towards his loss (*q*). (2).

The defendant as principal, and the plaintiff as his surety, made a joint and several promissory note; the holder gave time to the defendant, *L.*, a stranger, subscribing his name by way of additional security; the plaintiff having paid the money, is entitled to recover the amount as money paid; the payment was not voluntary and the subscription did not annul his original liability (*r*).

Where one who has been bail sues another who was bail with him, he must prove the judgment as well as the execution (*s*).

Money paid by compulsion (A).

Where a verdict has been obtained against several in an action of assumpsit, and the damages have been levied upon one, he may maintain

(*n*) *Duffield* v. *Scott*, 3 T. R. 374. *Smith* v. *Compton*,[1] 3 B. & Ad. 408.

(*o*) *Beard* v. *Boulcot*, 3 B. & P. 235.

(*p*) *Osborne* v. *Harper*, 5 East, 225; as where the two sureties jointly borrowed the money which they paid, and gave a joint note for it.

(*q*) *Cowell* v. *Edwards*, 2 B. & P. 268. *Johnson* v. *Johnson*, 11 Mass. Rep. 359. *Bachelder* v. *Fiske & al.* 17 Mass. Rep. 464. *The People* v. *Duncan*, 1 Johns. 311. *Secus*, where the surety who has paid induced the co-surety to join, and has taken a bill of sale from the principal for his own security. *Turner* v. *Davis*, 2 Esp. C. 478.

(*r*) *Catton* v. *Simpson*,[2] 8 Ad. & Ell. 136.

(*s*) *Belldon* v. *Tankard*,[3] 1 Marsh, 6.

(1) (The surety may recover in this form of action where he has paid the debt of his principal, by conveying land which is accepted in satisfaction. *Barney* v. *Seely*, 2 Wend. 481. *Randall* v. *Rich*, 11 Mass. 498. If a surety pay in depreciated paper he is entitled to remuneration only to the extent of the value he actually paid. *Crosier* v. *Grayson*, 4 J. J. Marshall, 517. Co-trespassers and other joint wrong-doers are not entitled to contribution, whoever pays the whole of a judgment recovered against them. *Campbell* v. *Phelps*, 1 Pick. 65. *Dupuy* v. *Johnson*, 1 Bibb. 562. Where money is paid by a surety for two principals, the law implies a promise by each principal to reimburse the surety for the whole amount paid. *Duncan* v. *Keiffer*, 3 Binney, 126. But where *A.* was surety in a bond for *B.*, and *C.* agreed with *B.* that if *B.* would pay one half of the debt, he would pay the other half on account of *C.*, and *B.* accordingly paid one half; it was held that *A.* could not maintain an action against both principals to recover the amount he had paid; the express agreement counteracting the general implication of law. *Ibid.* A surety, *qua* surety, cannot call on his principal at law, until he has actually paid the money. *Powell* v. *Smith*, 8 Johns. 249. Thus if judgment be obtained against a surety, who is taken in execution and afterwards discharged under an insolvent act, he cannot maintain an action against the principal, without showing payment, or a promise to indemnify him from all damages and costs, *ibid.* And if the surety of *A.* and his partners, pay the amount, he can bring no action against the partners, but must look to *A.* alone. *Tom* v. *Goodrich*, 2 Johns. 213. See also *Stuby* v. *Champlin*, 4 Johns. 461. See *Hassinger* v. *Solms*, 5 Serg. & Rawle. 4.)

(2) [In North Carolina, one joint surety, who has paid the whole debt cannot maintain assumpsit against the other, without an express promise,—but must seek relief in chancery. *Carrington* v. *Carson*, Cam. & Nor. 216. And if a person become surety, at the request of another surety who pays the debt, he is not liable to the latter, in law or equity for contribution. *Taylor* v. *Savage*, 12 Mass. Rep. 102. If one surety in a bail-bond voluntarily satisfy the judgment recovered against the principal, after execution issued, and *non est inventus* returned, but before *scire facias* served and entered, he cannot compel contribution from the co-surety, because the latter is thus deprived of the privilege of surrendering the principal. *Skillin* v. *Merrill*, 16 Mass. Rep. 40.]

(A) (The owner of property in the possession of a tenant of demised property, may buy it on a sale of the same as a distress for rent and bring his action for money paid against the tenant. *Wells* v. *Porter*, 7 Wend. 119. If a defendant acting *bonâ fide* and without connivance with the plaintiff, is compelled in due

[1]Eng. Com. Law Reps. xxiii. 106. [2]*Id.* xxxv. 355. [3]*Id.* iv. 326.

actions against the rest for money paid to their use (*t*), and the record will
*77 *be evidence against them (*u*). But no action can be maintained by one of several co-trespassers, or other wrong-doers, to recover such contribution; for where the transaction is illegal, the law will not raise any implied assumpsit (*x*). So where the plaintiff, in consequence of the default of the defendant, has been compelled to pay money to relieve himself, which the defendant ought to have paid, the defendant's consent will be implied; as where the goods of the plaintiff, a lodger in the house of the defendant, are distrained upon by the landlord, and the plaintiff, on default of the defendant's paying his rent, pays the amount to redeem his goods (*y*). Where an accommodation acceptor defends an action at the request of the drawer, he may recover the costs as money paid to the use of the drawer (*z*). Where a carrier by mistake delivered to *B.* the goods of *C.*, and *B.* appropriated the goods, and the carrier on demand, and without action, paid the money, it was held that he might recover against *B.* for money paid to his use (*a*).

A. and *B.* were employed as assurance brokers, and *A.* paid the premium with his own money; after the bankruptcy of *B.* it was held that *A.* might maintain the action in his own name (*b*).

In an illegal transaction.

If one of two *debtors* pay the whole of a joint debt, the law gives him a right to recover a moiety in an action for money paid to the use of the other, on the ground that both are liable to pay; but if one pay the whole of a debt in furtherance of an illegal contract, he cannot recover a moiety upon an implied contract to pay, since no implied contract can arise out of an illegal transaction (A). And although the contrary was formerly
*78 held (*c*), it *seems to be now settled, that if one of the parties pay the whole

(*t*) *Merryweather* v. *Nixon*, 8 T. R. 186. There may, however, be contribution if the plaintiff were not aware that the transactions were illegal or doubtful. *Betts* v. *Gibbins*,[1] 2 Ad. & Ell. 57. *Pearson* v. *Skelton*, 1 M. & W. 504.

(*u*) Dic. in *Pawel* v. *Layton*, 2 N. R. 365. (*x*) *Merryweather* v. *Nixon*, 8 T. R. 186.

(*y*) *Exall* v. *Partridge*, 8 T. R. 308; *supra*, note (*m*). It has even been held, that an intermediate indorser of a bill who pays part of the amount to a remote indorsee, who has obtained a verdict against the acceptor for the whole amount, but who has not levied an execution for the part so paid, may recover the sum so paid from the acceptor, though there was no privity between them, except on the bill which the indorsee still continued to hold. *Pownal* v. *Ferrand*,[2] 6 B. & C. 439. But he cannot recover the costs of a former action. *Dawson* v. *Morgan*,[3] 9 B. & C. 618; and see *Smith* v. *Napier*, *supra*, 147; *Fisher* v. *Fallows*, *supra*, 76. Money *paid* by the drawer and indorser of a bill of exchange to the indorsee is paid for the acceptor. *Le Sage* v. *Johnson*, Forrest, 23. *A.* holds a lease under a covenant for re-entry for non-repair, and underlets to *B.*, who undertakes to repair within three months after notice; after default by *B.*, *A.* may repair, and recover the amount expended. *Colley* v. *Stretton*,[4] 2 B. & C. 273. Note, the plaintiff declared specially.

(*z*) *Howes* v. *Martin*, 1 Esp. C. 162.

(*a*) *Brown* v. *Hodgson*, 4 Taunt. 189. But see *Sills* v. *Laing*, 4 Camp. 81.

(*b*) *Thacker* v. *Shepherd*,[5] 2 Chitty's C. T. M. 652.

(*c*) In *Faikney* v. *Reynous*, 4 Burr. 2069, the defendant had given a bond to the plaintiff to secure the amount of one moiety of 3,000*l.*, paid by the plaintiff for the differences in certain illegal stock-jobbing transactions for himself and one Richardson, in which transactions the plaintiff and Richardson were jointly concerned; and the Court held, that since the bond was not given for the payment of the composition-money, which is prohibited by the statute, but only to secure the repayment of money which the plaintiff

course of law to pay what another, and not that plaintiff is entitled to, he may in an action by that other against him to recover the same money, plead the former judgment in bar. The money so recovered is to be considered as money had and received to the use of the real owner, who may maintain assumpsit against the person so receiving. *Mayer* v. *Faulkrod*, 4 Wash. C. C. R. 503. So where money has been paid under such circumstances as gives it the character of a payment by compulsion, as money paid to release a raft of lumber detained in order to exact an illegal toll. *Chase* v. *Devnial*, 7 Greenl. 134.)

(A) (Where money has been paid upon an illegal transaction, if the party paying it be not equally guilty with the other party, as where the latter has taken advantage of the former and oppressed him, it may be recovered back. *Inhabitants of Worcester* v. *Eaton*, 11 Mass. 376. Where the parties are in *pari delicto*, it cannot be recovered back. *Greenwood* v. *Curtis*, 6 Mass. 381. *Barnard* v. *Crane*, 1 Tyler, 457. See also *Perkins* v. *Savage*, 15 Wend. 412.)

[1]Eng. Com. Law Reps. xxix. 29. [2]*Id.* xiii. 230. [3]*Id.* xvii. 457. [4]*Id.* ix. 83. [5]*Id.* xviii. 444.

of such a debt at the express request of another party, and upon a promise of repayment, he cannot maintain the action, even upon the express promise. It seems to be now also settled on broad and satisfactory principles, notwithstanding the doubts which once prevailed, that money advanced by one person to another, with a knowledge that it is to be applied in furtherance of an illegal purpose, cannot, after it has been so applied, be recovered. For another in an illegal transaction.

In the late case of *Cannan* v. *Bryce* (*d*), which was an action to recover money lent, and applied to the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, it was held, on very broad principles, that such an action could not be maintained. The distinction between *malum prohibitum* and *malum in se*, was denied. It was said, that if it be unlawful in one man to pay the money, how can it be lawful in another to furnish him with the means of payment; and it was held, that the case was not distinguishable in principle from that of the druggist, who sold to the brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by act of parliament from mixing with the beer (*e*).

Where an officer permitted a prisoner to go at large, on his promise to pay the debt, in consequence of which the officer himself was obliged to

had advanced for Richardson, upon contracts in which they had been jointly concerned, the bond was good.

It was observed by Lord Kenyon, in *Petrie* v. *Hannay*, 3 T. R. 418, that the decision in *Faikney* v. *Reynous* turned wholly on the consideration, that the action was upon a bond, and that nothing had been disclosed in the plea which showed any illegality between the parties, and that they could not take into consideration matter not properly introduced by the plea. But according to the report, 2 Burr. 2069, the Court seemed to have considered that the agreement to repay was not illegal; and see the opinions of Ashurst, Buller, and Grose, Justices, in *Petrie* v. *Hannay*.

That case was as follows: *A.* and *B.* having been jointly engaged in stock-jobbing transactions, came to a settlement with their broker, who paid all the differences; *A* paid his own share to the broker, and drew a bill on *B.* for his share, which *B.* accepted; *A.'s* executors were afterwards sued upon the bill by the broker, who recovered the amount, and the exeeutors afterwards brought an action for money paid for the defendant's use. It seemed to be admitted on all hands, that the money was to be considered as paid with the consent of the defendant; and the question turned upon the illegality of the transaction. Three of the Judges, Ashurst, Buller, and Grose, were of opinion that the money was recoverable, since the action was not founded on any promise arising by implication of law out of the illegal transaction, but on an express subsequent promise; and they considered the case as undistinguishable from that of *Faikney* v. *Reynous*, and as standing upon the same footing as if the broker had paid the amount with the consent of the defendant, and brought the action; or the testator had himself paid him. Lord Kenyon was of opinion, that *A.* and *B.* were to be considered as *particeps criminis*, and that the money was not recoverable. In *Steers* v. *Lashley*, 6 T. R. 61, the defendant having engaged in stock-jobbing transactions with the different persons, his broker paid the differences, and a bill was drawn by the broker, and accepted by the defendant, for part of the sum awarded by the plaintiff, and three others, to be due from the defendant to the broker on account of these differences; and it was held that the plaintiff, who was the indorsee of the bill, and privy to the transaction, could not recover upon it. And in *Brown* v. *Turner*, 7 T. R. 630, where the broker had paid the differences in stock-jobbing transactions, and the defendant, his employer, had accepted a bill for the amount, the court held, on the construction of the act of parliament, and the authority of *Steers* v. *Lashley*, that the plaintiff, to whom the broker had indorsed the bill after it became due, was not entitled to recover. In *Mitchell and others* v. *Cockburne*, 2 H. B. 380, (Buller, J. being absent), *A.* and *B.* had entered into a partnership for insuring ships in the name of *A.*, and *A.* had paid the whole of the losses, and it was held that he could not recover a moiety of such payments from *B.*; and Eyre, L. C. J. distinguished the case from those of *Faikney* v. *Reynous*, and *Petrie* v. *Hannay*, since those cases were one step removed from the illegal contract itself, and did not arise immediately out of it; and Heath, J. observed, that it did not appear that the payments had been made by *A.* at the request or with the consent of *B.* In the case of *Aubert* v. *Maze*, (2 B. & P. 371,) it was held that money paid by one of two partners on joint insurances, could not be recovered from the other partner. Lord Eldon in this case questioned the soundness of the decision in *Petrie* v. *Hannay*, and the distinction grounded upon an express consent of the partner; and Heath and Rooke, Justices, denied the distinction between the case of money paid in a concern which is *malum prohibitum*, and where it is paid in a transaction which is *malum in se*. The cases of *Booth* v. *Hodgson* (6 T. R.) and *Sullivan* v. *Greaves*, (Park on Insurance, 8,) were also relied upon by the Court as strong instances to show that the Court would not assist a plaintiff in enforcing an agreement which is contrary to law. [See 13 Ves. 313, 14 Ves. 191.]

(*d*)[1] 3 B. & A. 179.

(*e*) *Langton and others* v. *Hughes and others*, 1 M. & S. 594.

[1]Eng. Com. Law Reps. v. 255.

pay the creditor, it was held that he could not recover the money from the
*79 *debtor, having been guilty of a breach of duty, from which he could not derive a cause of action (*f*).

Money lent. The assignment of a debt without the assent of the debtor does not confer a right of action, the ordinary rule being, that choses in action are not assignable; but if the debtor assent to the arrangement, it seems that the transaction is equivalent to a loan by the assignee to the debtor. If *A.* owe money to *B.*, and *B.* owe the same sum to *C.*, and the parties agree to the transfer, it is equivalent to a loan by *C.* to *A.* (*g*). Where the money has been advanced to the defendant's agent, the authority of the defendant to the agent must be proved. Such authority may arise out of the special circumstances. Thus a shipowner is liable for money advanced to the master in case of *necessity* (*h*).

A promissory note given by the defendant to the plaintiff is evidence under this count (*i*), since the note imports the maker's having so much money of the payee in his hands. But the mere circumstance of the defendant having received money from the plaintiff is *primâ facie* evidence of the payment of an antecedent debt, and not of the loan of money (*k*).

So the receipt of money by the defendant, on a cheque drawn by the plaintiff on his banker, *primâ facie* imports a payment, and not a loan, and is not evidence to go to a jury; unless the plaintiff can give evidence of money transactions between himself and the defendant, from which a loan can be inferred, or of some application by the defendant to borrow money (*l*).

Interest cannot be recovered without proof of a contract to that effect express or implied, or unless a written security be given for the payment of the money at a time specified (*m*).

A lender of money who has received goods as a security, may recover without proof of having returned or tendered the goods (*n*).

Money had and received. Under the count for money had and received, the plaintiff must prove, 1st, the *receipt* of *money* by *the defendant* (*o*); 2dly, that it was received to his (the plaintiff's) use; *i. e.* his title to it (*p*) (A).

(*f*) *Pitcher* v. *Bailey*, 8 East, 171.

(*g*) *Wade* v. *Wilson*, 1 East, 195. The assent of the debtor is essential, for he may have an account against the assignor, and choose to insist on his set-off; but if there be anything like an assent on the part of the holder of the money, it seems that the action for money had and received may be supported. See Lord Ellenborough's observations in *Surtees* v. *Hubbard*, 4 Esp. C. 203; and *supra*, 75, note (*d*). It must appear that at the time of the promise to pay the debt a defined and ascertained sum was due. *Fairlie* v. *Denton*,[1] 8 B. & C. 395. Where the debtor of the plaintiff having goods at the defendant's wharves, gave an authority to the defendant to sell them, and out of the proceeds to pay the plaintiff the balance of freight due to him, and the defendant accordingly sold the goods and received the proceeds, held that the authority did not require a stamp as an order for payment of money, and that, after the sale and receipt of the money, the plaintiff was entitled to sue for money had and received. *Humphreys* v. *Briant*,[2] 4 C. & P. 157.

(*h*) *Rocher* v. *Busher*,[3] 1 Starkie's C. 27. Even in an English port. *Robinson* v. *Lyall*, 7 Price, 292.

(*i*) *Story* v. *Atkins*, 2 Str. 719; B. N. P. 136, 137. *Harris* v. *Huntbach*, 1 Burr. 373. [*Kiddie* v. *Debrutx*, 1 Hayw. 420.]

(*k*) *Welsh* v. *Seaborn*,[4] 1 Starkie's C. 474. If a parent advance money to a child, it is supposed to be by way of gift, per Bayley, J. *Hick* v. *Keats*,[5] 4 B. & C. 71.

(*l*) *Cary* v. *Gerrish*, 4 Esp. C. 9. [See *Cushing* v. *Gore et al.* 15 Mass. Rep. 74.]

(*m*) *Calton* v. *Bragg*, 15 East, 223. But see *Trelawny* v. *Thomas*, 1 H. B. 303; and tit. Interest.

(*n*) *Lawton* v. *Newland*,[6] 2 Starkie's C. 73.

(*o*) It has been held that proof must be given of the receipt of some particular sum, and that in default the plaintiff must be nonsuited. *Bernasconi* v. *Anderson*,[7] M. & M. 183. *Harvey* v. *Archbold*, 5 D. & R. 504. But see below, and *Leeson* v. *Smith*,[8] 4 N. & M. 304.

(*p*) The action cannot be maintained if it be against equity and good conscience that the money should be recovered. *Davis* v. *Bryan*,[9] 6 B. & C. 651.

(A) (See *Jackson* v. *Mayo*, 11 Mass. 152. Evidence of bank notes and any other property received as

[1] Eng. Com. Law Reps. xv. 246. [2] *Id.* xix. 310. [3] *Id.* ii. 281. [4] *Id.* ii. 473. [5] *Id.* x. 277. [6] *Id.* iii. 251. [7] *Id.* xxii. 285. [8] *Id.* xxx. 372. [9] *Id.* xiii. 290.

*It must be proved that the money came into the hands of the defendant. And therefore the action will not lie to recover stock (*q*). The action is not maintainable against one of two grantors of an annuity, (upon failure of the annuity-deed for want of a memorial), who was a mere surety, and had received no part of the consideration (*r*). But a debt may be transferred to a third person by mutual arrangement between the parties, on a sufficient consideration. If *A.* be the creditor of *B.* for money had and received, and *A.* himself is indebted to *C.* in the same amount, and by mutual agreement *A.*'s debt is cancelled, and *C.* is to be the creditor of *B.*, the money in *B.*'s hands is had and received to the use of *C.* (*s*). A bill of *exchange payable to the order of the drawer, is evidence in an action by the drawer against the acceptor of money had and received by the latter *81

Actual receipt of the money.

(*q*) *Nightingale* v. *Devismes*, 5 Burr. 2589. Nor against the finder of bank notes, although if they be not produced at the trial it may be presumed that their value in money has been received. *Noyes* v. *Price*, 16 G. 3; Roscoe on Evidence, 300; Select Ca. 242; Chitty on Bills, 426, 5th ed.; *Longchamp* v. *Kenny*, Doug. 138. Where the defendant, captain of the plaintiff's ship, drew at Rio a bill on the plaintiff's agent in London, for disbursements, and the bill was paid in London by the agent; it was held by the Court of C. P. that there was not sufficient evidence of the actual receipt of the money by the defendant. *Scott* v. *Millar*,[1] 3 Bing. N. C. 811. *Qu?*

(*r*) *Stratton* v. *Rastall*, 2 T. R. 366. Though he has given a receipt for the money, Ib. And see *Scholey* v. *Daniel*, 2 B. & P. 540. In an action for debt for penalties against the surveyors under the stat. 13 Geo. 3, c. 78, s. 48, by the succeeding surveyors, for not paying over monies in their hands, with a count also for money had and received, it was held that as it appeared that the monies collected had only come to the hands of one of the defendants, the count for money had and received could not be supported against the two, as there must be evidence of something done by each touching the receipt of the money. *Heudebourch* v. *Langton*,[2] 3 C. & P. 566. A member in a banking firm forges a power of attorney to transfer stock belonging to trustees, and after the transfer makes entries of the crediting the trustees with supposed dividends upon the stock, on the ground of which cheques are drawn by the trustees on the firm, and paid. Though the circumstances afford *primâ facie* evidence against the firm of the receipt of such dividends, the amount is not money had and received by the firm to the use of the trustees; for the transfer being a nullity, they are entitled to receive the dividends at the Bank of England; but they may recover damages for the false representation that such dividends had been received. *Hume* v. *Bolland*, 2 Tyr. 575.

(*s*) *Wilson* v. *Coupland*, 5 B. & A. 228. For the debt may be considered as a loan by *C.* to *B.*, or as so much money had and received by *B.* to the use of *C.*, and as so much due on an account stated. See *Israel* v. *Douglas*, 1 H. B. 239. Ld. Ellenborough's observations in *Wade* v. *Wilson*, 1 East, 195. *Surtees* v. *Hubbard*, 4 Esp. C. 203; *supra*, 75, 79. It is essential to such an agreement that *A.*'s debt is extinguished. *Cuzon* v. *Chadley*,[3] 3 B. & C. 591. *Wharton* v. *Walker*,[4] 4 B. &. C. 163. And the debt transferred must be a wrong demand. *Blackledge* v. *Hurman*, 1 Mo. & R. 344. *Wharton* v. *Walker*,[4] 4 B. & C. 163. The expenses of a conveyance on the sale of an estate were to be paid equally by the vendor and vendee, and it was afterwards agreed that if the vendor would pay the whole of the expense of another transaction, the vendor should be discharged of his moiety of the expense of the conveyance; it was held that the transaction was the same as if the vendor had paid the vendee a sum of money, the vendee taking upon himself the vendor's share of the expenses of the conveyance, and that an attorney who had for a consideration undertaken to effect the conveyance, and not to apply for further remuneration, if the vendor objected to pay any expenses, was entitled to recover against the vendee the amount of such expenses as money had and received to his use. *Noy* v. *Reynolds*,[5] 1 Add. & Ell. 159. Such an arrangement of transfer is binding, although before its completion the intermediate debtor to the one and creditor to the other party becomes bankrupt. *Crowfoot* v. *Gurney*, 9 Doug. 372. Note, that in that case the debt due to the middle party was not ascertained at the time of the agreement, but had been ascertained previous to the bankruptcy. But see on this latter point *Fairlie* v. *Denton*,[6] 8 B. & C. 395. So the taking credit from a third person is in some instances equivalent to a receipt of money. *A.* on the 18th paid notes of the Dartmouth bank into the Totnes bank, to receive interest from that time. The Dartmouth bank continued to pay on their notes till the evening of the 19th, when the bank failed. On the morning of the 19th, according to the course of dealing between the two banks, the Dartmouth *gave credit* to the Totnes bank for the amount of the notes, and it was held that *A.* was entitled to recover, for the giving credit was equivalent to payment. *Gillard* v. *Wise*,[7] 5 B. & C. 134. See 2 Ad. & Ell. 36.[8] *Spratt* v. *Hobhouse*,[9] 4 Bing. 173, where, per Best, C. J., the principle in all the cases is that if a thing be received as money, it may be treated as such in an action for money had and received.

money, will support this action. *Mann* v. *Waite*, 17 Mass. 560. *Witherup* v. *Hill*, 9 S. & R. 11. Under the statute of Anne against gaming, this action lies for money lost at gaming, though the winner was paid in goods. *Hook* v. *Boleter*, 3 Har. & M'Hen. 348. Assumpsit for money had and received may be maintained by the indorsee of a promissory note against any previous party to the note. *Ellsworth* v. *Brewer*, 11 Pick. 316.)

[1] Eng. Com. Law Reps. xxxii. 334. [2] *Id.* xiv. 453. [3] *Id.* x. 191. [4] *Id.* x. 302. [5] *Id.* xxviii. 58. [6] *Id.* xv. 246. [7] *Id.* xi. 177. [8] *Id.* xxix. 22. [9] *Id.* xiii. 395.

to the use of the drawer (*t*). The receipt of provincial notes by the defendant, which he has received as money, is evidence of a receipt of money by him (*u*) (A); and it may be laid down as a general rule, that if a thing be received as money, it may be treated and recovered as such (*x*) (B).

Upon a count for money had and received by the defendant to the use of the plaintiff, the latter may prove the receipt of money by the defendant and his deceased partner, and also the receipt of money by the defendant himself to the use of the plaintiff; for every partner is liable for the whole, and the proving that another person, together with the defendant received the money, does not negative the allegation that the defendant himself received it, and therefore there is no variance (*y*).

Money received by the defendant's authorized agent, is money received by the defendant. But where money is received by the mutual agent of both plaintiff and defendant, it cannot be recovered by the former as received by the latter to his use (*z*).

Where money was put into a banking-house, for the purpose of taking up a particular bill then lying there for payment, although the banker's clerk said at the time that he could not give up the bill, but took the money, it was held to be money had and received to the use of the owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor, who had paid the money (*a*) (C). But where *A.* sent bills to *B.*, his banker, directing him to pay part of the produce to *C.*, and *B.* refused to act upon the order, but received the produce of the bills, it was held that *C.* could not maintain an action against *B.* for so much money had and received to his use, since, as between the plaintiff and defendant, there was no privity, either express or implied (*b*).

And where money has been received, with directions to pay it to another in discharge of a bill, but the order is revoked before payment, and the receiver is directed to hold it for another purpose, the holder of the bill cannot maintain this action (*c*).

A banker who takes credit with the underwriter for a loss due to the principal, whereupon the name of the underwriter is proved from the

(*t*) *Thomson* v. *Morgan*, 3 Camp. 101. And see BILLS OF EXCHANGE.

(*u*) *Pickard* v. *Banks*, 13 East, 20. *Fox* v. *Cutworth*, cited 4 Bing. 179. And even in a criminal case, on an indictment for obtaining money by means of a false token, the receipt of a bank-note of the same amount has been held to be evidence to the jury of the receipt of the money at the Bank.

(*x*) Per Best, J. in *Spratt* v. *Hobhouse*, 4 Bing. 179. An agent for the sale of goods, refusing to account after a reasonable time, may be presumed to have sold them. *Hunter* v. *Welsh*,[1] 1 Starkie's C. 224. But where a defendant, sued for the proceeds of a bill, admitted that he had paid it into his banker's, and the banker's clerk was called to prove that credit was given to the defendant for the bill, the evidence was held to be insufficient without the production of the bill. *Atkinson* v. *Owen*,[2] 2 Ad. & Ell. 35; 4 N. & M. 123.

(*y*) *Richards* v. *Heather*, 1 B. & A. 29, in which the doctrine laid down in *Spalding* v. *Mure and others*, 6 T. R. 363, was overruled.

(*z*) Goods were consigned to *A.* and *B.*, in return for goods sent out by the plaintiff, with orders to sell and hold the proceeds to the order of the defendant, who had a lien on the goods; it was held that the plaintiff could not recover the surplus from the defendant. *Tenant* v. *Mackintosh*, 4 B. & A. 594.

(*a*) *De Bernales* v. *Fuller*, 14 East, 590, in the note.

(*b*) *Williams* v. *Everett*, 14 East, 582.

(*c*) *Stewart* v. *Fry*,[3] 7 Taunt. 339; 1 Moore, 74.

(A) (*Mason* v. *Waite*, 17 Mass. R. 560. *Phillips* v. *Blake*, 1 Metc. 156. Contra *Filgo* v. *Penny*, 2 Murph. 182.)

(B) (*Ainslie* v. *Wilson*, 7 Cow. 662. *Arms* v. *Ashley*, 4 Pick. 74.)

(C) (But if there be no privity between the parties there must be *mala fides*, an unjust receipt of the money, or at least a receipt of it without a valuable consideration. *Rapelye* v. *Emory*, 2 Dall. 54. *Winter* v. *Bank of New York*, 2 Caines, 337. *Hall* v. *Marston*, 17 Mass. R. 579. *Eagle Bank* v. *Smith*, 5 Conn. 71. *Graham* v. *Bank of U. States*, 5 Ohio, 266.)

[1]Eng. Com. Law Reps. ii. 365. [2]*Id.* xxix. 22. [3]*Id.* ii. 129.

policy, is *estopped from objecting that he has not received the money (*d*). Where an agent refuses to account for property delivered to him *to be sold*, and the contrary does not appear, a presumption arises that he has sold it, and received the value. And the same presumption may be made against a wrong-doer who has wrongfully possessed himself of property which he refuses to produce or account for (*e*). But where goods distrained by the plaintiff were redelivered by him to the defendant, on a promise by the latter to pay the rent, it was held that the action for money had and received was not maintainable; for, as the goods were not delivered to be sold, no presumption as to the receipt of money could arise (*f*).

The plaintiff can recover no more than the net sum received, without interest (*g*).

The plaintiff must not only prove the receipt of the money, but also an undertaking, *express* or *implied*, on the part of the defendant, to pay it to him. To the use of the plaintiff.

In numerous instances the undertaking is merely of the latter description. The action for money had and received resembles a bill in equity (*h*); and whenever the defendant has received money to which the plaintiff is in justice and equity entitled the law implies a debt, and gives this action *quasi ex contractu*.

The plaintiff must, therefore, prove an undertaking on the part of the defendant to pay the money; or a *legal* (*i*), or at least an *equitable* title in himself to demand it (A).

(*d*) *Andrew* v. *Robinson*, 3 Camp. 122.

(*e*) *Longchamp* v. *Kenney*, Doug. 137. The defendant got possession of a masquerade ticket given to the plaintiff to dispose of, and to account to the owner for the proceeds; and on being required by the owner to pay the produce, said, Well if I have it, what then? go to the person who received it of you; let him pay it. The defendant on the trial did not produce the ticket, and it was held that there was presumptive evidence of the receipt of money.

(*f*) *Leary* v. *Goodson*, 4 T. R. 687.

(*g*) *Walker* v. *Constable*, 1 B. & P. 306. *Tappenden* v. *Randall*, 2 B. & P. 447.

(*h*) Per Ld. Mansfield, Cowp. 793. It has been held that assignees of a bankrupt may recover against his trustees in trust to permit the trader to receive the proceeds for his life, such proceeds as were received after notice of the bankruptcy. *Allen* v. *Impett*,[1] 8 Taunt. 263.

(*i*) The plaintiff is not always entitled to recover in this form of action, even although he can show a legal or equitable title to money received, without showing some *privity* with the defendant, created either by the fact of receiving the money or by the circumstances. See *Baron* v. *Husband*,[2] 4 B. & Ad. 611. *Wharton* v. *Walker*,[3] 4 B. & C. 163. *Scott* v. *Parker*, 3 Mer. 652. *Wedlake* v. *Hurley*, 1 C. & J. 83. *Sims* v. *Britain*,[4] 4 B. & Ad. 375. *A. B.* and others, being owners of a ship in the East India Company's service, *B.* the managing owner employs *C.* as his agent, to receive and pay monies on account of the ship; *C.* receives a sum from the East India Company on account of the ship, on a receipt signed by *B.* as managing owner, and by another owner, and placed the money to *B.*'s credit; held that there was no privity between *C.* and the part owners, and that the action was not maintainable against *C.* *Ib.* The action does not lie against a sheriff for not paying rent due on an execution against the tenant. *Green* v. *Austin*, 3 Camp. 260. Where the plaintiff and defendant each paid *A.*, a witness, his expenses, the loser, after paying the winner his taxed costs, cannot recover from *A.* for money had and received. *Crompton* v. *Hutton*, 3 Taunt. 230. *Benson* v. *Schneider*, 1 Moore, 76. And see *Williams* v. *Everett*, 14 East; *supra*, 81. A bank bill was remitted to *A.*, with an indorsement, "pay to the order of *B.* (the defendant), under provision for my note in favour of *C.*" (the plaintiff); *B.* received the proceeds, but refused to pay them over to *C.*; held, in an action for money had and received by *C.*, that the action was not maintainable, without something having been done by the remitter of the bill amounting to privity or assent. *Wedlake* v. *Hurley*, 1 C. & J. 83. The clerk to an attorney, in the absence of the latter, receives a payment on account of a client of the attorney, and gives a receipt in his master's name; the attorney never returns; the client cannot recover from the clerk; for there was no privity of contract. *Stephens* v. *Badcock*,[5] 3 B. & Ad. 354. But where an assignee under a bankrupt's commission was insane, it was held that his brother, who received money due to the estate, was liable to a new assignee. *Stead* v. *Thornton*, 3 B. & Ad. 357. A party, after improperly allowing the debtor to be discharged without paying the full debt, paid out of his own monies 100*l*., which was agreed to be re-

(A) (If one purchase a foreign bill of exchange, which he loses before it is presented, and the seller refuse to give a second bill, the purchaser may recover back the purchase money. *Murray* v. *Carrott*, 3 Call, 373.)

[1]Eng. Com. Law Reps. iv. 97. [2]*Id.* xxiv. 123. [3]*Id.* x. 302. [4]*Id.* xxiv. 78. [5]*Id.* xxiii. 93.

*The mere bearer of money from one person to another cannot be sued (*k*).

The assignees under a joint commission against *A.* and *B.* cannot recover money paid by *B.* before his own, but after *A.*'s bankruptcy, either as money had or received to the use of the bankrupts, before the bankruptcy, or to the use of the assignees since (*l*).

Where money has been paid into the hands of a *trustee* for a specific purpose, it cannot be recovered so long as the trust subsists, except according to the terms of the trust. Thus, money deposited by litigating parties in the hands of a trustee, in trust for the party entitled, cannot be sued for except by the party entitled (*m*). A holder of money to be paid over to the party entitled according to the decision of a referee, cannot be recovered by the party entitled, previously to notice to such holder of the decision of the referee (*n*). Where money has been deposited with an attorney to conduct a particular suit, it cannot be recovered till the specific purpose be proved to be at an end (*o*).

Money obtained by fraud.

The plaintiff is entitled to recover where he can show that the defendant has received money belonging to him under any fraud, false colour or pretence (A), as, that he has received the rents of the plaintiff's estate (*p*), under pretence of title, or as an intruder into the plaintiff's office (*q*); and the title to the office may be tried in such an action (*r*). But in such case the plaintiff cannot maintain the action unless he has a legal title to the profits so received by possession of the office; and therefore the nominee of a perpetual curacy cannot maintain an action for money had and received against an intruder before he has been licensed (*s*), although it would be otherwise in the case of a donative (*t*). So the action will not lie to recover mere *gratuitous donations* to an intruder, such as are given by strangers for showing a church (*u*).

So the plaintiff may recover in any case where the defendant has by

turned to him as soon as the residue of the debt was recovered; held, that as soon as received it became money had and received to the use of the person so paying it, and that he need not declare as on a contract depending on the contingency. *Platts* v. *Lean*,[1] 3 C. & P. 561. Per Lord Mansfield, *Moses* v. *Macfarlane*, Burr. 1008; and per Ld. Ellenborough, (4 M. & S. 478): the action is maintainable wherever the money of one man has, without consideration, got into the pocket of another.

(*k*) *Coles* v. *Wright*, 4 Taunt. 198; and see *Buller* v. *Harrison*, Cowp. 566. *Cox* v. *Prentice*, 3 M. & S. 344. *Edwards* v. *Hodding*,[2] 5 Taunt. 815. *Horsefall* v. *Handley*,[3] 8 Taunt. 136. But an agent who pays over money after notice that the right is disputed, is liable. *Edwards* v. *Hodding*,[2] 5 Taunt. 181.

(*l*) *Smith* v. *Goddard*, 3 B. & P. 465. But being joint assignees of both, they may recover for money had and received to the use of either. See tit. BANKRUPT.

(*m*) *Kerr* v. *Osborne*, 9 East, 378. And money so deposited can be recovered from the stakeholder only, and not from the principal debtor. *Ib.*

(*n*) *Wilkinson* v. *Godfrey*,[4] 9 Ad. & Ell. 536. And it was held that his changing the cheque which he held, into money, did not render him liable.

(*o*) *Case* v. *Roberts*,[5] Holt's C. 500.

(*p*) For in such case an action of account will lie; and whenever an account will lie, an action of *indebitatus assumpsit* will lie. *Aris* v. *Stukely*, 2 Mod. 260; 1 Salk. 9.

(*q*) *Aris* v. *Stukely*, 2 Mod. 260; T. Jon. 126; 1 Lev. 245; 2 Show. 21.

(*r*) *Ibid.* and 2 Vent. 170; 7 Mod. 147.

(*s*) *Powell* v. *Milbank*, 1 T. R. 399, n. *R.* v. *Bishop of Chester*, 1 T. R. 403.

(*t*) *Powell* v. *Milbank*, 1 T. R. 399, n.; *R.* v. *Bishop of Chester*, 1 T. R. 403. For there the title accrues upon mere nomination.

(*u*) *Boyter* v. *Dodsworth*, 6 T. R. 681. [See 8 Taunt. 265. 2 Moore, 247.][6]

(A) (If one overreaches another by false allegations, or fraudulent concealments, the law will compel him to pay over the money obtained by such means, to the party to whom in equity and good conscience it belongs. *Bliss* v. *Thompson*, 4 Mass. R. 488. So special *assumpsit* lies to recover damages on a warranty express or implied on a fraudulent sale of property. *Kimball* v. *Cunningham*, 4 Mass. R. 502.)

[1]Eng. Com. Law Reps. xiv. 450. [2]*Id.* i. 277. [3]*Id.* iv. 46. [4]*Id.* xxxvi. 195. [5]*Id.* iii. 172. [6]*Id.* iv. 98.

fraud or deceit received money belonging to the plaintiff (A); for he may waive the *tort, and rely upon the contract which the law implies for him; as where the plaintiff's clerk having received bills from customers for the plaintiff, pays them over to the defendant to effect illegal insurances (*x*). Where *A.* under false pretences procured a bill of exchange from *B.*, and *A.*'s assignees received the amount, it was held that *B.* might recover against the assignees for money had and received (*y*). Waiver of tort. *84 Fraud.

In the case of *Aris* v. *Stukely* (*z*), it was said by the Court, that *indebitatus assumpsit* would lie for rent received by one who pretended a title, because an action of account would lie. But this, it should seem, must be understood of rent received from a lawful tenant, where an ejectment cannot be brought; for it seems that an action of account does not lie against a disseisor, or other wrong-doer (*a*). And it has been held, that an action of assumpsit for rents received would not lie against a defendant who claimed title to the premises (*b*).

But it was held that a woman might recover against a man who, having a wife alive, pretended to marry her, and received the profits of her estates (*c*).

Where a creditor of a bankrupt received, in common with the rest of the creditors, a composition of 8*s.* in the pound, and then recovered the whole amount from the acceptor of a bill which he held as a security for the debt, it was held that the bankrupt was entitled to recover the amount as money had and received to his use (*d*).

(*x*) *Clarke* v. *Shee*, Cowp. 197. *Lightly* v. *Clouston*, 1 Taunt. 112. *Eades* v. *Vandeput*, 5 East, 39, n. See B. N. P. 130; *Kitchen* v. *Campbell*, 3 Wils. 304, where goods were sold under an execution after an act of bankruptcy committed. *Read* v. *James*,[1] 1 Starkie's C. 134; B. N. P. 131. *Thomas* v. *Whip*, B. N. P. 133, where Parker, Ch. J. said he knew of two cases only where the plaintiff had not such election; the one was in case of money won at play, and the other in case of money paid by a bankrupt (though on a valuable consideration, after an act of bankruptcy committed); for you cannot confirm the act in part, and impeach it for the rest. So in general where goods have been wrongfully taken and distrained, and converted into money, the plaintiff may waive the tort, and recover the clear amount of the money produced by the sale of the goods. See *Feltham* v. *Terry*, B. N. P. 131; Cowp. 419; *Aris* v. *Stukely*, 2 Mod. 260; T. Jo. 126; 2 Show. 21; *Howard* v. *Wood*, 2 Lev. 245; 1 Ld. Ray. 703. The sheriffs seized and sold under an execution a pony claimed by a third party, who it appeared had originally purchased it whilst under coverture, and had, since her husband's death, kept and paid for its feed; and it was held, that as against a mere wrongdoer, she had a sufficient possessory title, and might waive the tort, and sue for the amount produced by the sale. *Oughton* v. *Seppings*,[2] 1 B. & Ad. 241. See further *Manifold* v. *Morris*,[3] 5 Bing. N. C. 420.

(*y*) *Harrison* v. *Walker*, Peake's C. 111. See *Willis* v. *Freeman*, 12 East, 656. So *semble*, where a legatee obtains payment from an executor by fraud. *Crockford* v. *Winter*, 1 Camp. 124. So where the defendant, being a married man, married the plaintiff, and received the rents of her land. 1 Salk. 28. And see *Abbots* v. *Barry*,[4] 2 B. & B. 369; 5 B. Moore, 98. *Hogan* v. *Shee*, 2 Esp. C. 522. *Bristow* v. *Eastman*, Peake, 223; 1 Esp. C. 172.

(*z*) 2 Mod. 260.

(*a*) Bac. Ab. Accompt, [B.]

(*b*) By Wilson, J. in *Cunningham* v. *Lawrents*, 1 Bac. Ab. 260, 5th edit. in the note; and he nonsuited the plaintiff. And see Use and Occupation; and *infra*, 85, n. (*o*).

(*c*) *Hassen* v. *Wallis*, 1 Salk. 28.

(*d*) *Stock* v. *Mawson*, 1 B. & P. 286. There was a clause in the deed by which the creditors agreed to release all debts and to *give up* all securities, &c.; and it was the clear intention of the parties that all should share *equally*; and it was a fraud on the other creditors to receive more than they did. Where the creditors, by an instrument not under seal, agreed to receive a composition of 12*s.* in the pound, payable by instalments, and the agreement did not contain any stipulation for delivering up collateral securities, it was held that a creditor might avail himself of a collateral security, (a bill drawn by the insolvent and accepted by a third person); *Thomas* v. *Courtnay*, 1 B. & A. 1; for an undertaking to deliver up securities was not to be

(A) (When a tort may be waived and assumpsit maintained. *Whitwell et al.* v. *Vincent*, 4 Pick. 449. *Lamb* v. *Clark*, 5 Pick. 193. *Jones* v. *Hoar*, 5 Pick. 285. *Miller et al.* v. *Miller*, 7 Pick. 133.

An action for money had and received, lies against one who has tortiously taken the chattel of another, and manufactured it into a different article, and in that state has sold it and received the money for it. *Gilmore* v. *Wilbur*, 12 Pick. 120. But *assumpsit* will not lie to recover the *value* of a personal chattel, alleged to belong to the plaintiff, but in the possession of one and claimed by another. *Willet* v. *Willet*, 3 Watts, 277.

[1]Eng. Com. Law Reps. ii. 327. [2]*Id.* xx. 380. [3]*Id.* xxxv. 159. [4]*Id.* vi. 157.

*The defendant having obtained payment by a false representation of default in the plaintiff's agent in honouring a bill given for the amount, it is not necessary previous to the action to tender the bill; for the right accrues on the payment of the money upon the misrepresentation of facts (*e*).

Duress. So the plaintiff may show that he has been compelled by duress to pay money to the defendant; as that he was obliged to pay an exorbitant demand to retrieve his goods from pawn (*f*), or to procure his admission into a copyhold (*g*); or, being a publican, that it was paid to the justices of a borough, who unlawfully demanded it in order to procure a renewal of his license (*h*); or to the toll-keeper of a turnpike gate (*i*); or to a sheriff who exacts a larger fee than he is entitled to (*k*); for in such cases the parties are not on an equal footing, and the payment cannot be considered as voluntary (*l*). So it lies to recover money levied under a conviction which has been quashed (*m*); or money which has been paid to a revenue officer to procure the release of goods seized as forfeited (*n*), but which were not liable to be seized. The plaintiff cannot, however, substitute this form of action for the more appropriate ones of trespass or replevin, when they are the specific remedies provided by the law for the particular grievance (*o*). And therefore where the proprietor of cattle wrongfully

*86 *distrained, pays money in order to obtain the possession of them, he cannot recover it in an action for money had and received, but must proceed in replevin or trespass (*p*). So it is if a tenant, under threat of distress,

implied. So where a plaintiff has been induced by a fraud and deceit to purchase goods or an interest in land, to which the vendor has no title, in consequence of which he has lost the goods or lands, an action lies to recover the price. *Matthews* v. *Hollings*, Woodfall's Landlord and Tenant, 2d edit. 35; *Cripps* v. *Reed*, 6 T. R. 606; *infra*, tit. FAILURE OF CONSIDERATION.

(*e*) *Pope* v. *Wray*, 4 M. & W. 451.

(*f*) *Astley* v. *Reynolds*, Str. 915; B. N. P. 132. The court said that it was a payment by *compulsion*, for the plaintiff might have had such an immediate want of his goods, that an action of trover would not have answered his purpose; and the rule *volenti non fit injuria* holds only where the party has a freedom in exercising his will. *Fitzroy* v. *Gwyllim*, 1 T. R. 153. *Secus*, where there is no immediate and urgent necessity for the redemption of goods, or preservation of the person. *Fulham* v. *Down*, 6 Esp. C. 26, n.

(*g*) *Leake* v. *Lord Pigot*, Staff. Sum. Ass. 1799, Sel. N. P. 87.

(*h*) *Morgan* v. *Palmer*,[1] 2 B. & C. 729.

(*i*) *Fearnley* v. *Morley*,[2] 5 B. & C. 25. *Parsons* v. *Blundy*, Wightw. 22. See also *Shaw* v. *Woodcock*,[3] 7 B. & C. 73. *Athe* v. *Backhouse*, 3 M. & W. 646.

(*k*) *Dew* v. *Parsons*, 2 B. & A. 568.

(*l*) *Waterhouse* v. *Keen*,[4] 4 B. & C. 200. Notice of action ought to be given of such an action, where the statute requires it, *for anything done under that Act*. Ibid. Where the toll is imposed on *carriages drawn by horses*, and an exemption for persons repassing the same day with the same horses and carriage, or with the same horses *or* carriage, and the same carriage returns the same day drawn by *different* horses, no second toll is payable. *Williams* v. *Sangar*, 10 East, 56. *Waterhouse* v. *Keen*,[4] 4 B. & C. 200. *Jackson* v. *Curwen*,[5] 5 B. & C. 31. *Chambers* v. *Williams*, 5 B. & C. 36. When the toll is upon *horses* drawing the carriage, with a similar exemption, no second toll is payable if the same *horses* return with a different carriage. *Gray* v. *Shilling*,[6] 2 B. & B. 30; per Bayley, J. 5 B. & C. 34. *Norris* v. *Poate*,[7] 3 Bingh. 41. Where the toll is on *horses*, and the exemption is in respect of the same horses and carriage, a second toll is payable unless both *carriage and horses* be the same. *Loaring* v. *Stone*,[8] 2 B. & C. 515. An exemption of horses attending cattle returning from pasture, does not exempt a horse ridden by the owner to fetch cattle from pasture. *Harrison* v. *Brough*, 6 T. R. 706. See further as to the construction of Acts imposing tolls, &c., *Leeds and Liverpool Canal Company* v. *Hustler*,[9] 1 B. & C. 424. *R.* v. *Trustees of Bury and Stratton Roads*,[10] 4 B. & C. 363. *Phillips* v. *Hooper*, 2 Chitty, 112. *Major* v. *Oxham*,[11] 5 Taunt. 340. *Harrison* v. *James*,[12] 2 Chitty's C. T. M. 547.

(*m*) *Feltham* v. *Terry*, B. N. P. 131, cited Cowp. 419; 1 T. R. 387.

(*n*) *Irving* v. *Wilson*, 4 T. R. 485.

(*o*) Where the defendant claims title, an action of *assumpsit* for the rents will not lie against him, *supra*, 84, note (*b*); and *semble*, he ought to bring ejectment, or if ejectment cannot be brought, an action against the tenant who paid the rent in his own wrong. *Cunningham* v. *Laurents*, 1 Bac. Ab. 260, 5th ed. And in an action for use and occupation by a stranger, the title cannot be tried. *Morgan* v. *Ambrose*, Peake's Ev. 258. And see *Staplefield* v. *Yewd*, and *Sadler* v. *Evans*, B. N. P. 133.

(*p*) *Lindon* v. *Hooper*, Cowp. 414. In *Anscomb* v. *Shore*, 1 Camp. C. 285, Sir J. Mansfield, C. J. held, that

[1]Eng. Com. Law Reps. ix. 232. [2]*Id.* xi. 137. [3]*Id.* xiv. 14. [4]*Id.* x. 310. [5]*Id.* xi. 138. [6]*Id.* vi. 9. [7]*Id.* xi. 21. [8]*Id.* ix. 164. [9]*Id.* viii. 118. [10]*Id.* x. 357. [11]*Id.* i. 127. [12]*Id.* xviii. 414.

pays more rent than is due (*q*). But it was held by the Court of Common Pleas, in a subsequent case, that the action lies to recover money which has been obtained through fear of process by distress by an excess of authority, although it had been paid over to a third person, who was the proper officer to whom it should have been paid, in case the distress had been legally made (*r*).

So where money has been paid under a mistake to one who is not entitled to receive it, and who has no claim in conscience to retain it (*s*) (A); as where money is paid to the assignees of a bankrupt by a debtor to the bankrupt, without claiming a set-off due to him (*t*). And so it was held where the defendant, supposing himself to be the legal representative of a lessee for years, sold the term and delivered the lease to the plaintiff, who was afterwards ejected by the rightful administrator (*u*). But, although the party paid the money under a mistake, in fact, yet if he was guilty of negligence in doing so, where he might have known the fact, and ought to have known it, he cannot recover (B). As where the drawee of a bill of exchange, the signature of the drawer being forged, pays the amount (*x*). So where bankers paid the amount of a forged acceptance to an innocent holder for value (*y*). So *a fortiori*, if the party who pays by mistake

Mistake.

an action on the case would not lie for detaining cattle distrained damage-feasant after tender of amends, the tender not having been made till after the impounding.

(*q*) *Knibbs* v. *Hall*, 1 Esp. 84. *Lothian* v. *Henderson*, 3 B. & P. 529.

(*r*) *Snowden* v. *Davis*, 1 Taunt. 359. [9 Johns. 201. *Ripley* v. *Gelstone*.] Upon a distress made, the tenant, in consideration of forbearance, promised to pay the broker's charges; time was accordingly given, and the charges paid, but the amount thereof, as well as of the rent demanded, was at the time objected to; held that the payment was not voluntary, and that he might recover back such charges as were not usually allowed; the broker, as a public officer, cannot be permitted to exceed them. *Hills* v. *Street*,[1] 5 Bing. 237, and 2 M. & P. 96. A creditor, upon threats of proceeding to a bankruptcy, obtained from his debtor, before signing a composition deed, bills to the full amount of his debt, which he indorsed over to a third person, who, when they became due, enforced payment from the debtor by action; held, that it was not to be deemed a case of *par delictum*, but as of money obtained illegally and extorsively, and might be recovered back as money had and received by the defendant, through the medium of the person to whom by his order it was paid. *Smith* v. *Cuff*, 6 M. & S. 160.

(*s*) *Bonnell* v. *Foulkes*, 2 Sid. 4. *Cripps* v. *Reed*, 6 T. R. 606.

(*t*) *Bize* v. *Dickinson*, 1 T. R. 285. *Milnes* v. *Duncan*,[2] 6 B. & C. 671. *Hodgson* v. *Williams*, 6 Esp. C. 29. Vide *Cobdin* v. *Kenrick*, 4 T. R. 432, in *not.* and *infra*.

(*u*) *Cripps* v. *Reed*, 6 T. R. 606.

(*x*) *Price* v. *Neale*, 3 Burr. 1554; Abbott, L. C. J. in *Wilkinson* v. *Johnson*,[3] 3 B. & C. 428, observed, that the opinion of Lord Mansfield in this case appears to have been grounded, not on the delay, but on the general principle that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault and negligence than by his mistake that he pays on a forged signature. An *acceptor* of a bill of exchange is liable though the bill be forged. *Smith* v. *Chester*, 1 T. R. 654; *infra*, tit. Bill of Exchange. Where the drawee, without looking at the bill on its being presented for payment, desired the holder's clerk, who presented it, to call again on a subsequent day, Lord Kenyon held that he was not excluded from the defence of forgery of the drawer's signature, as he had not looked at the bill. But on proof that the defendant had in other instances paid bills so drawn, he being connected with the supposed drawer in business, Lord Kenyon held that he could not set up forgery as a defence. *Barber* v. *Gingell*, 3 Esp. C. 60.

(*y*) *Smith* v. *Mercer*, 1 Marsh. 453. Chambre, J., who tried the cause, thought that the plaintiffs were entitled to recover. Dallas and Heath, Js. were of opinion that they were not so entitled, on the ground of the fault or neglect of the plaintiffs, who ought to have known the signature of their customer. Gibbs, C. J. held, that the delay which had occurred (the forgery not having been discovered for a week) was sufficient for the decision of the cause; intimating, however, that he did not mean to dissent from the larger ground on which the case had been put by the two former Judges. See also *Hall* v. *Fuller*,[4] 5 B. & C. 759; *infra*, tit. Negligence.

(A) *Bond* v. *Hays*, 12 Mass. R. 34. *Lazell* v. *Miller*, 15 Mass. R. 207. *Dickens* v. *Jones*, 6 Yerg. 483. Where an administrator supposing an estate solvent pays a creditor of the estate more than his distributive share upon final settlement, the administrator may, in his individual character, recover back the excess in an action for money had and received. *Rogers* v. *Weaver*, 5 Ohio, 536.)

(B) (*Levy* v. *The Bank of the U. S.* 4 Dall. 234. S. C. 1 Binn. 27. See also, *The Salem Bank* v. *The Gloucester Bank*, 17 Mass. Rep. 1. See also, *Wetherill* v. *The Bank of Penns.* 1 Miles, 399.)

[1]Eng. Com. Law Reps. xv. 358. [2]*Id.* xiii. 293. [3]*Id.* x. 140. [4]*Id.* xii. 368.

occasions *delay and inconvenience to the holders of the bill (*z*). But if one party, under a mistake, induce another to act on the same mistake, so that negligence is as imputable to the one as to the other, the latter is, on the general principle, entitled to recover (*a*).

If *A.*, being indebted to *B.*, pay the amount to an attorney, who sues in *B.*'s name, but without any authority from *B.*, the latter may still recover against *A.*, but *A.* may recover against the attorney, although he was imposed on by a counterfeited warrant of attorney (*b*).

When money had been paid on account, and a dispute afterwards occurring, a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover as for money paid under a mistake of fact, in the hurry of business (*c*).

Mistake in law.

But money paid under a knowledge of all the facts, or where the party possesses full means of knowledge, cannot be recovered on the ground that the plaintiff mistook the law (*d*) (1) (A).

(*z*) See the cases last cited. *Wilkinson* v. *Johnson*,[1] 3 B. & C. 428; and see *Smith* v. *Chester*, 1 T. R. 654.

(*a*) *A.* paid to *B.* a navy bill, purporting to be of the value of 1,800*l.*, but which was in reality worth 800*l.* only, a figure having been forged, and it was held that *B.* was entitled to recover the difference from *A.* who was ignorant of the fraud. *Jones* v. *Ryde*,[2] 5 Taunt. 488; 1 Marsh. 157. So in *Bruce* v. *Bruce*, 5 Taunt. 495. So where the plaintiff in London, at the request of the defendant, the holder of a bill purporting to have been indorsed by *H.* at *M.* and dishonoured, paid the amount the same day for the honour of *H.* (whose name was forged), but gave notice to the defendant in time to enable him to give notice of the dishonour of the bill to the previous parties by that day's post. *Wilkinson* v. *Johnson*,[3] 3 B. & C. 428. And although the plaintiff in the above case had struck out the names of the indorsers subsequent to that of *H*, it was held that this having been done by mistake, did not alter the rights of the parties, but was capable of explanation by evidence. *Ib.* So where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor, the latter of whom kept an account with the defendants, were forged. *Fuller* v. *Smith*,[4] R. & M. 49.

(*b*) *Robson* v. *Eaton*, 1 T. R. 62.

(*c*) *Lucas* v. *Worswick*, 1 Mo. & R. 293. Where an estate is sold, which turns out to be of less value than the price given for it, the difference cannot, in the absence of fraud, be recovered. *Cox* v. *Prentice*, 3 M. & S. 349, per Le Blanc, J. But if the parties agree to abide by the weighing of any article, at particular scales, and in the weighing an error not noticed at the time takes place, from misreckoning a weight, in consequence of which the article is taken to be of greater than its real value, and the price is paid, money had and received is sustainable. Per Ld. Ellenborough, *Ib.*

(*d*) *Bilbie* v. *Lumley*, 2 East, 469. *Lowry* v. *Bourdieu*, Dougl. 467. *Chatfield* v. *Paxton*, cited 2 East, 470. *Davies* v. *Watson*,[5] 2 N. & M. 709; and see *The East India Company* v. *Tritton*,[6] 3 B. & C. 280; and *infra*, 88, note (*m*). Ld. Ellenborough, in the case of *Bilbie* v. *Lumley*, observed that in the case of *Chatfield* v. *Paxton*, 2 East, 471, note (*a*), it was so doubtful on what the case turned, that it was not reported. Ashurst, J. had in that case intimated that if money was paid without full knowledge of the facts, and under, what he termed, a blind suspicion of the case, and was found to have been paid unjustly, it might be recovered. Ld. Kenyon observed that the plaintiff had not paid the money under a *fair knowledge*, and that he had done so under a protest; but Grose and Lawrence, Js. seem to have doubted the sufficiency of these grounds; and Lord Ellenborough, in *Bilbie* v. *Lumley*, seems to intimate that the principle of decision in that case was not sufficiently clear to make it a precedent. It makes no difference that the party paid the money under a protest, declaring his intention to bring an action to recover it. *Brown* v. *M'Kinnally*, 1 Esp. C. 279; see also S. P. *Cartwright* v. *Rowley*, 2 Esp. C. 723. Upon the same principle, the giving a bill of exchange or promissory note for the amount of a debt, precludes the debtor from afterwards disputing the amount. *Nash* v. *Turner*, 2 Esp. C. 217. *Solomon* v. *Turner*,[7] 1 Starkie's C. 51. The same reasons also apply where the amount has been allowed in account. *Skyring* v. *Greenwood*,[8] 4 B. & C. 281. So if the vendor waive a contract for the sale of goods, he cannot afterwards insist on the contract because he waived the contract in ignorance of the law. *Gomery* v. *Bond*, 2 M. & S. 378; see also *Lothian* v. *Henderson*, 3 B. & P. 520. So if a drawer promise to pay a bill of exchange, with knowledge that time has been given to the acceptor. *Stevens* v. *Lynch*, 12 East, 38. See tit. Bills of Exchange. It has even been held that a plaintiff cannot recover in respect of a claim which he might have insisted on in a former action when he was defendant, in reduction of damages. *Kist* v. *Atkinson*, 2 Camp. 68.

(1) [See Evans' Pothier, *Appendix*, 386—407. *Elting* v. *Scott*, 1 Johns. 165. *Warder & al.* v. *Tucker*, 7 Mass. Rep. 449. *Garland* v. *Salem Bank*, 9 ib. 408. *Crain* v. *Colwell*, 8 Johns. 384. *Donaldson* v. *Means*, 4 Dallas, 109. Selw. N. P. (Wheaton's ed.) tit. Assumpsit.]

(A) (*Elliot* v. *Swartwout*, 10 Pet. 137. *Hubbard* v. *Martin*, 8 Yerg. 498. *Ladd* v. *Kenney*, 2 N. Hamp. 341. *Lee* v. *Stuart*, 2 Leigh. 76. *Sed quære. Elting* v. *Scott*, 2 John. Rep. 127. *Haven* v. *Foster*, 9 Pick.

[1]Eng. Com. Law Reps. x. 140. [2]*Id.* i. 166. [3]*Id.* x. 140. [4]*Id.* xxi. 379. [5]*Id.* xxviii. 377. [6]*Id.* x. 79. [7]*Id.* ii. 291. [8]*Id.* x. 335.

*Where the captain of a king's ship brought home in her public treasure, upon the public service, and also treasure of individuals for his own emolument, and received freight for both, and paid over one-third of it (according to the usual practice) to the admiral, and having afterwards discovered that the law would not have compelled him to pay the third, brought an action against the executrix of the admiral to recover it back; it was held, that he could not recover back the private freight, because the whole of that transaction was illegal; nor the public freight, because he had paid it under a full knowledge of the facts, although under ignorance of the law, and because it was not against conscience for the executrix to retain it (*e*) (1). Where money has been paid by mistake, which the law would not have compelled the plaintiff to pay, but which in equity and conscience he ought to have paid, he cannot recover it (*f*). As where he pays a debt otherwise barred by the Statute of Limitations, or a debt contracted during his infancy (*g*).

A plaintiff who has paid the whole of an attorney's bill cannot after taxation recover the sum deducted from the bill (*h*). Where a tenant omitted to deduct the property-tax out of his rent, it was held to be a voluntary payment, which he could not recover back (*i*).

Money received by an agent.

In case of the payment of money to a *known* agent, the general rule is that the action ought to be brought against the principal (*k*); and mere evidence of the receipt of money by the defendant as the agent of another is insufficient to support the action (*l*); and an agent, who having received money pays it over without notice to the contrary, is not liable, for it would be unjust that he should suffer for the mistake of another (*m*); and the

(*e*) Sir *C. Brisbane* v. *Dacres*,[1] 5 Taunt. 143; and see *Stevens* v. *Lynch*, 12 East, 38.

(*f*) 1 T. R. 286. (*g*) *Bize* v. *Dickinson*, 1 T. R. 286.

(*h*) *Gower* v. *Popkin*,[2] 2 Starkie's C. 85.

(*i*) *Denby* v. *Moore*, 1 B. & A. 123. [3 Moore, 278, S. P.] An unsuccessful party in a cause, who pays the witness a second time over (the winner having already paid) in the taxed costs, cannot recover it back. *Crompton* v. *Hutton*, 3 Taunt. 230. So it has been held that if a lessee be evicted, he cannot recover the rent which he has paid. See *Stainforth* v. *Staggs*, cited 1 Camp. 396, n. *King* v. *Martin*, cited 2 Camp. 268. But where the tenant, after payment of rent, was ejected by a third party establishing his title to the premises, and who subsequently recovered mesne profits during the time for which the rent had been paid, it was held that the tenant was entitled to recover it back from the party to whom it had been paid, as money had and received, he not having set up any title at the trial of the ejectment. *Newsome* v. *Graham*,[3] 10 B. & C. 234. See 1 Freeman, 479, note (*d*), 2d edit. After the death of a bankrupt tenant for life, his assignees were allowed to recover as money had and received the by-gone rents, from one who had received them under a fraudulent assignment. *Brown* v. *Day*, cited 3 Russ. & Myl. 124, 481.

(*k*) B. N. P. 133. *Sadler* v. *Evans*, 4 Burr. 1094. *Smith* v. *Bromley*, Doug. 696, n. *Horsfall* v. *Handley*,[4] 2 Moore, 5; 9 Taunt. 136. The action does not lie against an excise officer who has received duties after the repeal of the Act, but who has paid over the amount to his superior. *Greenway* v. *Hurd*, 4 T. R. 553. *Whitbread* v. *Brookesbank*, Cowp. 69. And see *Campbell* v. *Hall*, Cowp. 204; there the duties remained in the hands of the officer for the purpose of trying the question. So where a churchwarden has paid over burial fees to the treasurer of the trustees of a chapel. *Horsfall* v. *Handley*,[5] 8 Taunt. 136.

(*l*) As where the agent signs a receipt for his principals; *e. g.* "for *S. & W.*," *W. R. Edden* v. *Read*, 3 Camp. 399; and see *Stevens* v. *Badcock*,[6] 3 B. & Ad. 354.

(*m*) *B.*, a banker, being the agent of *A.*, who indorses a bill of exchange to him, receives the amount from the acceptor and pays it over to *A.* The acceptor cannot recover from *B.*, although it turn out that the bill was indorsed to *A.*, under a supposed authority, viz. a warrant of attorney, which did not warrant the transfer. *East India Company* v. *Tritton*,[7] 3 B. & C. 280. Note, that the acceptors had made all such

112. Ignorance of the law of a foreign government, is ignorance of fact, and in this respect, the laws of other states in the Union are foreign laws. Money paid by mistake through ignorance of the law of another of the United States, may be recovered back. Ib.)

(1) [Where a sheriff claimed as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it in ignorance of the law; it was held that the latter might maintain an action for money had and received, for the expenses paid above the legal fee, or might set-off the same in an action by the sheriff against him. *Dew* v. *Parsons*, 2 B. & A. 562. This was held not to be a *voluntary* payment. See *Hall* v. *Shultz*, 4 Johns. 240.]

[1]Eng. Com. Law Reps. i. 43. [2]*Id.* iii. 257. [3]*Id.* xxi. 63. [4]*Id.* iv. 46. [5]*Id.* iv. 46. [6]*Id.* xxiii. 93. [7]*Id.* x. 79.

*party who made the mistake has his remedy against the principal. It is otherwise in special cases: as where the agent has, previous to the payment, received notice not to pay it over (*n*); or where he has received the money *malâ fide* (*o*). To make this defence available, it must appear that the money was paid to the agent expressly for the use of the person to whom he had so paid it over (*p*); and that he has paid it over, or done that which is equivalent to such payment (*q*).

Where an agent receives money for his principal under a claim of right, as for tithe, the right of a principal cannot be tried in an action against the agent, if he can show the least colour of right in the principal; as for instance, his having been some time in possession (*r*).

Where money is deposited with an agent of the party, his authority is in general revocable; and after countermand, the principal is entitled to recover it. Thus the authority of a stakeholder may be revoked *before* the decision has taken place (*s*), and the stake recovered.

*90 *Where the drawer of a bill paid the amount to an indorser, to take it up when due, but the bill not having been presented in due time, the drawer directed the indorser not to pay the amount, and offered to indemnify him; and notwithstanding this, the indorser afterwards paid the bill, it was held that he paid it in his own wrong, and that the drawer might recover the amount (*t*).

A trustee, such as the provisional assignee of a bankrupt, is not liable for money received by an agent appointed with due care, who has failed (*u*).

inquiries as they deemed to be necessary, and that the defendant was not privy to the facts. *Semble*, that an indorser does not warrant the genuineness of previous indorsements. If *A.* give a letter of attorney to *B.* to receive money from *C.*, and bring an action against *C.*, *C.* cannot, except in mitigation of damages, show that he has paid money to *B.* since the action brought, for the bringing the action is a revocation of the authority. B. N. P. 153. Ca. K. B. 408. So if *A.* receive quit-rents for *W.*, and after notice to *A.* not to pay the money over to *W.*, because it is not due, he afterwards pays it over, the action lies. *Sadler* v. *Evans*, B. N. P. 133.

(*n*) *Sadler* v. *Evans*, B. N. P. 133.

(*o*) As where a gaoler illegally receives rent from a prisoner for a room in the prison. *Miller* v. *Aris*, B. R. Midd. Sitt. after M. 41 G. 3, *cor.* Lord Kenyon. So where a sum of money has been paid by the putative father to a parish officer, for the purpose of indemnifying the parish against a bastard child. *Townson* v. *Wilson*, 1 Camp. 396. *Watkins* v. *Hewlett*, 1 B. & B. 1. *Clark* v. *Johnson*,[1] 3 Bing. 424. *Stainforth* v. *Staggs*, 1 Camp. 398, n. & 564. *King* v. *Martin*, cited 2 Camp. C. 268. S. P. ruled by Hullock, B. Lanc. Spring Ass. 1826. So if money be paid to a bailiff, who exceeds his authority, under terror of process, see 1 Taunt. 359.

(*p*) *Snowden* v. *Davis*, 1 Taunt. 359; where money was paid by the plaintiff to a bailiff, who exceeded his authority, in order to redeem his goods, and not that it might be paid over to any one in particular.

(*q*) If things at the time of the notice remain unaltered as between the agent and his principal, if no advance has been made, bills accepted or new credit given by the agent, in consequence of the payment, he is still liable, although the money has been passed in account, or a *rest* made. *Buller* v. *Harrison*, Cowp. 566. *Cox* v. *Prentice*, 3 M. & S. 344. And although he has paid it over, yet if the defendant has induced the plaintiff to suppose that the money had not in fact been paid over before notice, he cannot avail himself of such payment. *Edwards* v. *Hodding*,[2] 5 Taunt. 815. *Secus*, if the situation of the agent has been altered. The agents of the plaintiff in England were directed by him to pay, through the defendants, money to be placed to his credit in India, which was done, and an entry made in the defendant's books to the credit of their correspondents, to whom they sent advice to account for it to the plaintiff: before the letter of advice reached their correspondents, the latter failed, having drawn on the defendants, between the date of such letter and the failure, bills, which the defendant had accepted to an amount exceeding the amount paid in by the plaintiff. It was held, that the defendants having only acted as directed, and the situation in which they stood towards their correspondents being altered, the plaintiff could not maintain *assumpsit* against them for the money so paid in. *M'Arthy* v. *Colvin*, 1 Perr. & Dav. 429.

(*r*) *Staplefield* v. *Yewd*, Tr. 27 G. 2, *cor.* Lee, C. J., B. N. P. 153; Cas. K. B. 409. [See *Potter* v. *Benniss*, 1 Johns. 514.]

(*s*) Although, as it seems, the wager be legal, for the situation of the stakeholder does not differ from that of an arbitrator, whose authority is countermandable. See *Eltham* v. *Kingsman*, 1 B. & A. 683, et vid. *infra*, 95. *Aliter*, where a legal wager has been determined against the plaintiff. *Brandon* v. *Hibbert*, 4 Camp. 37. *Bland* v. *Collett*, Ibid. 157. [See Mr. Howe's note to *Bland* v. *Collett*, 4 Camp. 157.]

(*t*) *Whitfield* v. *Savage*, 2 B. & P. 277.

(*u*) *Raw* v. *Cutten*,[3] 9 Bing. 96.

[1]Eng. Com. Law Reps. xiii. 33. [2]*Id.* i. 277. [3]*Id.* xxiii. 272.

Under this count the plaintiff may also show that he has paid money to the defendant upon a consideration which has failed (A). As, for a bill of exchange upon a banker who breaks before it can be tendered to him (*x*). Or for goods which have not been delivered (*y*); or money paid as a deposit on the purchase of an estate, where the vendor cannot make out a title (*z*). So he may recover the money paid as a consideration for an annuity where the deeds for securing it have been set aside for informality (*a*). Or where one of the several securities fails (*b*). Or where one, having purchased a lease from the defendant as the supposed representative of the lessee, is ousted by the real administrator (*c*). But where a personal representative assigned a mortgage-deed, which turned out to be a forgery, for a valuable consideration, but without any knowledge of the forgery, it was held that the purchaser was not entitled to recover the price (*d*).

Failure of consideration.

A. pays *B.* an annuity for the use of an invention, for which *B.* has obtained a patent, and it afterwards turns out that the patent was void, the invention having been in public use before. *A.* cannot recover the amount so paid (*e*); for he has had the use of it.

*So where an article, which the vendee has an opportunity of examining, is sold without fraud, the vendee cannot afterwards recover the price, upon discovering that the article was internally defective at the time of sale (*f*). *91

(*x*) B. N. P. 131. See also *Jones* v. *Ryde*,[1] 1 Marshall, 157, where *A.* paid to *B.* a navy bill purporting to be of the value of 1,800*l.*, but which was in reality worth 800*l.* only, a figure having been forged; it was held that *B.* was entitled to recover the difference from *A.* who was ignorant of the fraud. But where *A. & Co.*, bankers, paid the amount of a forged acceptance to an innocent holder for value, it was held that they could not recover the amount. *Smith* v. *Mercer*,[2] 1 Marshall, 453; *supra*, 86.

(*y*) Str. 407; B. N. P. 131.

(*z*) 8 T. R. 516; 3 B. & P. 181. See VENDOR AND VENDEE.

(*a*) *Shore* v. *Webb*, 1 T. R. 732. In such case the deeds should be produced, and their execution proved, and the setting them aside proved by the production of the rule of court. See *Hicks* v. *Hicks*, 3 East, 16.

(*b*) *Scurfield* v. *Gowland*, 6 East, 241. The defendant is entitled to deduct for payments made by him in respect of the annuity. *Hicks* v. *Hicks*, 3 East, 16; and see *Davis* v. *Bryan*,[3] 6 B. & C. 651.

(*c*) *Cripps* v. *Reed*, 6 T. R. 606. In such case the assignment should be produced and proved, and the ouster should be proved by evidence of the judgment in ejectment; and the writ of possession, and the revocation of the letters of administration, should be proved. Lord Kenyon observed that he did not wish to disturb the rule *caveat emptor*, adopted in *Bree* v. *Holbeach*, Doug. 654, and other cases; that where a regular conveyance was made, other covenants ought not to be added; and that, in general, a seller covenants for his own acts and those of his ancestors only; in which respect, the case of a mortgagor differed from it, as he covenants that at all events he has a good title; but that here the whole passed by parol, under a misapprehension by both parties that the defendant was the legal administrator of the lessee. In the case of *Bree* v. *Holbeach*, no action could have been maintained. Where a defendant in possession of premises which he formerly held under a tenant for life, who was dead, sold his interest, under a representation that it was a good lease for seven years, and was afterwards ejected, Lawrence, J. held, on the authority of *Cripps* v. *Reed*, that the price might be recovered. *Matthews* v. *Hollings*, Salop Summ. Ass. 1801; Woodfall's Landlord and Tenant, 2d edit. 35.

(*d*) Doug. 655.

(*e*) *Taylor* v. *Hare*, 1 N. R. 260. Note, that the Judges in this case laid considerable stress on the consideration that the parties acted under a mistake; but so they did in the case of *Cripps* v. *Reed;* the true distinction seems to be, that in *Taylor* v. *Hare*, the plaintiff did in fact derive benefit from the patent; and Heath, J. said, "We cannot take an account here of the profits; it might as well be said, that if a man lease land, and the lessee pay rent, and be afterwards evicted, he shall recover back the rent, though he has taken the fruits of the land. The defendant sold his patent-right, such as it was, and there was no express or implied warranty that the patent should stand, and there was no fraud."

(*f*) *Bluett* v. *Osborne*,[4] 1 Starkie's C. 384. But where the plaintiff, a stock-broker, sold for the defendant four Guatemala bonds, and paid him the amount, and after the bonds had been two days in the hands of the purchaser they were found not to be marketable, and the plaintiff took them back and reimbursed the purchaser, it was held that he was entitled to recover for the amount paid by him to the defendant. *Young* v. *Cole*, 3 Bing. N. C. 724.

(A) (*Watkins* v. *Otis*, 2 Pick. 88. *Shearman et al.* v. *Akins*, 4 Pick. 295. [In such case, the sum paid forms the measure of damages, the jury cannot give vindictive damages. *Neel* v. *Deans*, 1 Nott & M'Cord, 210.])

[1]Eng Com. Law Reps. i. 106. [2]*Id.* i. 312 [3]*Id.* xiii. 290. [4]*Id.* ii. 437.

A putative father giving a note for a fixed sum to the parish officers, who receive the amount, may recover back such part as remains unexpended on the death of the child, as money had and received to his use (*g*). A plaintiff who has paid money on a consideration not performed, may either affirm the agreement by a special action for non-performance, or disaffirm it by reason of the fraud, and bring an action for money had and received (*h*).

Rescinded contract.

Where money has been paid by the plaintiff to the defendant, upon a contract which is afterwards *rescinded*, either in consequence of the nature of the contract, or by consent (*i*), or by the act of the defendant, then, since the consideration fails, the plaintiff is entitled to recover the money (A). As, where the plaintiff paid ten guineas to the defendant for a chaise, on condition that it should be returned in case the plaintiff's wife did not approve of it, paying 3*s.* 6*d.* per day. In the mean time the plaintiff's wife disapproving of it, the chaise was sent back to the defendant after three days, and left on his premises without his consent, and the 3*s.* 6*d.* per day was tendered, which the defendant refused to receive; and it was held that the plaintiff was entitled to recover the ten guineas (*k*). And in *Giles* v. *Edwards* (*l*), where the defendant by his neglect prevented the plaintiff from carrying a special agreement between them, for the sale of cord-wood to the plaintiff, into execution, it was held that the plaintiff might recover the sum which he had paid under the contract, as money had and received to his use. So, it was held in *Dutch* v. *Warren* (*m*),

*92 where the defendant *had refused to transfer to the plaintiff five shares in the Welsh Copper Mines, according to his agreement, under which the plaintiff had paid him the price.

Contract still open.

Where, however, the terms of the special contract are still open, this action does not lie. As, where money is paid as the price of a horse warranted sound, which turns out to be unsound (*n*); for an action for

(*g*) *Watkins* v. *Hewlitt*, 1 B. & B. 1. See *Townson* v. *Wilson*, 1 Camp. 396. *Clarke* v. *Johnson*,[1] 3 Bing. 424. S. P. cor. Hullock, B. Lanc. Sp. Ass. 1826. In the case of *Chappel* v. *Poles*, 2 M. & W. 867, the money was held to be recoverable although the defendants (the overseers who had received the money) had paid it over to their successors. It seems that the whole sum was to be considered as money had and received to the plaintiff's use, the contract being illegal and void.

(*h*) B. N. P. 132.

(*i*) The plaintiff agreed to let to the defendant land on building leases, and to advance him ——*l.*, to be repaid by a certain day, and the defendant engaged to build houses thereon, and to convey them as a security: after some of the houses had been built, and part only of the money agreed to be lent had been advanced, the plaintiff requested the defendant not to proceed further with the buildings, which was assented to, and the agreement rescinded by mutual consent; held, that the day for repayment being passed, the plaintiff might recover the money advanced on the common counts, and was not bound to declare on the special agreement. *James* v. *Cotton*,[2] 7 Bing. 266, and 5 M. & P. 26; and see *Oxendale* v. *Wetherell*,[3] 9 B. & C. 386.

(*k*) *Towers* v. *Barrett*, 1 T. R. 133. Sale of an article by *A.* to *B.*, with liberty to return it in a month, *B.* allowing 10*l.* out of the price paid, and in case *B.* kept the article beyond the month he was to pay 10*l.* more to *A.*; *B.* returning the article within the month is entitled to recover the price, deducting the 10*l.* *Hurst* v. *Orbell*,[4] 8 Ad. & Ell. 107.

(*l*) 7 T. R. 181.

(*m*) Cited 2 Burr. 1010. Subscriptions advanced under a scheme for establishing a tontine to directors, who abandon the scheme, *Nockles* v. *Crosby*,[5] 3 B. & C. 814; or for the purchase of shares in a joint-stock company, *Kempson* v. *Saunders*, 4 Bing. 5; may be recovered without any deduction for expenses.

(*n*) *Power* v. *Wells*, Doug. 24, n.; Cowp. 818. *Weston* v. *Downes*, 1 Doug. 23. *Payne* v. *Whale*, 7 East, 274; 1 T. R. 133. [*Byers* v. *Bostwick*, 2 Rep. Conn. Ct. 75 Acc.]

(A) (Where a plaintiff sues to recover back money paid upon a contract which has failed, he must show that he has done all in his power to restore the defendant to the same situation in which he was when the contract was made, or that the defendant has been the cause of the failure of the contract. If, from circumstances beyond the plaintiff's control, he be prevented from placing the defendant in his original position, and the plaintiff yet be injured, he cannot have the action for money had and received. His remedy is upon the special contract to recover damages. *Reed* v. *M'Grew*, 5 Ohio, 386. See also *Marshall* v. *Sprott*, Addis, 361.)

[1]Eng. Com. Law Reps. xiii. 33. [2]*Id.* xx. 126. [3]*Id.* xvii. 401. [4]*Id.* xxv. 341. [5]*Id.* x. 237.

money had and received is not a proper form of action to try the warranty. So, in the case of *Cooke* v. *Munstone*, above cited (*o*), it was held that the money which had been paid for the delivery of the soil could not be recovered, whilst the contract for the soil remained still open. And in general it seems that money paid upon a contract cannot be recovered back after part execution of the contract, and where the parties cannot be placed in *statu quo* (*p*). If money be paid which is due in honour and conscience, it cannot be recovered, although payment could not have been compelled (*q*).

Recovered by legal process.

It is a general rule, that money recovered by means of legal process cannot be recovered, although it be afterwards discovered that it was not due (*r*) (A). But the action lies against an overseer of the poor, to recover

(*o*) 1 N. R. 151. See also *Hull* v. *Heightman*, 2 East. 145; *supra*, 56.

(*p*) *Hunt* v. *Silk*, 5 East, 449. *Giles* v. *Edwards*, 7 T. R. 181. Where an infant has paid money to the defendant as a premium for a lease, and has taken possession of the premises, he cannot, after an avoidance of the lease on coming of age, recover back the money. *Holmes* v, *Blogg*,[1] 8 Taunt. 508. The purchaser of a moiety of his partner's share of a vessel had entered upon and derived the full profits of the vessel, and also deposited the title-deeds with a third person, as a security for money advanced to him; held that the vendor could not recover as for money had and received. *Beed* v. *Blandford*, 2 Y. & J. 278. An original contributor to a foreign loan paid a deposit to the contractor upon scrip receipts, and transferred them to the defendant in error, and the contractor, the plaintiff, afterwards, from time to time, extended the period of paying up the instalments to stated periods, on certain terms; held that the defendant, omitting to comply with the terms of such indulgence, could not afterwards insist upon the contractor accepting the instalments with interest, or returning the deposit, so as to maintain *assumpsit* for money had and received. *Rothschild* v. *Hennings*, 4 M. & Ry. 411; S. C. 12 Moore, 559. The plaintiff put money into the hands of the defendant to be paid to *J.*, with the qualification that it was not to be paid over until, &c.; before which the plaintiff demanded that it should be paid back; held that he was entitled to recover it back or not, according as the jury were satisfied that *J.* looked to the plaintiff or defendant for payment of that sum. *Owen* v. *Bowen*, 4 C. & P. 93.

(*q*) *Farmer* v. *Arundell*, 2 Bl. R. 824.

(*r*) *Marriott* v. *Hampton*, 7 T. R. 269. See *Moses* v. *Macfarlane*, Burr. 1006; B. N. P. 130. *Thorp* v. *How*, Ibid. See also *Brown* v. *M'Kinnally*, 1 Esp. C. 279. There the money was paid under a protest that it was paid without prejudice, but Ld. Kenyon, C. J. held, that it was to be regarded as a voluntary payment. And see *Hamlet* v. *Richardson*,[2] 9 Bing. 644. See also *Barbone* v. *Brent*, 1 Vern. 176; where the defendant demurred to a bill, which stated that the plaintiff having paid the defendant for goods but lost the receipt, the latter recovered in an action, and the demurrer was allowed. In that case North, Ld. Keeper, said, that if *A.* having paid money in part satisfaction, afterwards is compelled by an action to pay the whole value, the party who paid the money may recover it at law. The assignee of a bankrupt cannot recover from the plaintiffs, in an action against the bankrupt, money deposited in lieu of bail, and paid over by order of court to the plaintiffs, on default of depositing a further sum in lieu of bail. *Reynolds* v. *Wedd*,[3] 4 Bing. N. C. 694. 6 Dowl. P. C. 728. [Mr. Day's note to *Marriott* v. *Hampton*, 2 Esp. C. 546.]

(A) *Assumpsit* for money had and received lies to recover back money paid on an execution issued on a satisfied judgment. *Wisner* v. *Bulkley*, 15 Wend. 321. So to recover back money paid under a judgment subsequently reversed. *Sturgis* v. *Allis*, 10 Wend. 354. *Clark* v. *Pinney*, 6 Cow. 299.

But it cannot be sustained for money even improperly recovered by suit at law. *Walker* v. *Ames*, 2 Cow. 428. *White* v. *Ward*, 9 John. R. 232. See also *Battey* v. *Britton*, 13 John. R. 187. Nor can money be thus recovered after payment of a judgment in an inferior court, on the ground that the money was not due and had been unconscientiously obtained. *Cobb* v. *Curtiss*, 8 John. R. 470. This action does not lie to recover back money received under a judgment in a foreign attachment laid in a foreign country, however erroneous the decision may be. *Rapelye* v. *Emory*, 2 Dall. 231. S. C. 1 Yeates, 533. But see *Wright* v. *Towers*, 1 Browne, App. 1. *Assumpsit* will not lie to recover back money which has been ordered to be refunded, on the reversal of the judgment of an inferior court. *Duncan* v. *Kirkpatrick*, 13 S. & R. 292. *Secus*, if there had been no order of restitution. Ibid.

Where *A.* gave *B.* a promissory note payable on demand, which *B.* transferred to *C.* after *A.* had paid it, and *C.* sued *A.* and recovered the amount—it was held that *A.* could not recover of *B.* the amount of the note, in an action for money had and received, but that he should have defended the action brought by *C.* *Loomis* v. *Pulver*, 9 Johns. 244. S. P. *White* v. *Ward*, *et al.* 9 Johns. 232. *Le Guen* v. *Gouverneur et al.* 1 Johns. Cas. 436. *Bentley* v. *Morse*, 14 Johns. 468. But if a plaintiff recover by means of the defendant's inability or neglect to produce an existing receipt for the money sued for, and afterwards promise the defendant that he will refund the money, on the production of the receipt—such promise is valid, and will support an action. 14 Johns. *ubi sup.*

[1]Eng. Com. Law Reps. iv. 189. [2]*Id.* xxiii. 407. [3]*Id.* xxxiii. 498.

money in his hands levied under a conviction which has since been quashed (*s*). So it lies to recover money paid under a compromise of an action; the compromise having failed, and another action having been
*93 brought (*t*). *And where the defendant, knowing that he had no real claim, arrested the plaintiff, a foreigner, at Falmouth, on his arrival from abroad, for 10,000*l.*, and under the compulsion of a colourable legal process extorted from him 500*l.* as in part payment, the court held that the action was maintainable to recover the money so paid (*u*).

Where the holder of a bill of exchange, being a trustee for the plaintiff, sued the drawer, and after his bankruptcy his assignees recovered against the sheriff, in the name of the bankrupt, for an escape, damages to the amount of the bill; it was held that the plaintiff might recover the damages from the assignees, allowing them the costs and expenses (*x*).

Illegal consideration.

It seems to be a general rule, that where money has been paid by the plaintiff to the defendant, on a consideration which is illegal in itself (*y*), as being prohibited by some statute, but where the plaintiff does not stand in *pari delicto* with the defendant, and cannot be considered as *particeps criminis*, the money may be recovered. And therefore, where a statute is made for the protection of persons standing in the plaintiff's situation, the party injured may, even after the transaction prohibited by the statute has been finished and completed, recover the money so paid. Here the law acts in futherance of the provisions of the statute; hence a debtor may recover from a creditor all the usurious interest which he has paid beyond legal interest (*z*).

Action by one not particeps.

So the plaintiff may recover the premiums for illegal insurances of numbers in a lottery after the chances have terminated in his favour, since the contract is not criminal, but merely void (*a*). Or money given by the

(*s*) *Feltham* v. *Terry*, cited in *Birch* v. *Wright*, 1 T. R. 187; and B. N. P. 131.

(*t*) *Cobden* v. *Kendrick*, 4 T. R. 432.

(*u*) *Duke de Cadaval* v. *Collins*,[1] 4 Ad. & Ell. 858. Where a certificated bankrupt, on being arrested on a *ca. sa.*, for a debt proveable on the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the plaintiff that he should apply to the Court to have the money returned, it was held, that he was not precluded from maintaining the action. *Payne* v. *Chapman*,[2] 4 Ad. & Ell. 364.

(*x*) *Randoll* v. *Bell*, 1 M. & S. 714, Ld. Ellenborough *dissentiente: qu.* therefore.

(*y*) See further on this subject, tit. VENDOR AND VENDEE.

(*z*) Per Ld. Mansfield, in *Smith* v. *Bromley*, Doug. 696, (n); B. N. P. 133. *Lowry* v. *Bourdieu*, Doug. 471. The authority of *Tomkyns* v. *Barnet*, Skinn. 411, and Salk. 22, has frequently been denied. In *Clarke* v. *Shee*, Cowp. 199, Ld. Mansfield said that it had been denied a thousand times. And see *Alsop* v. *Milton*, Sel. N. P. 89, 4th edit; *Shore* v. *Webb*, 1 T. R. 732; *Scurfield* v. *Gowland*, 6 East, 241.

(*a*) By the statute 14 Geo. 3, c. 76. *Jacques* v. *Golightly*, 2 Bl. R. 1073. *Jacques* v. *Withy*, 1 H. B. 65; S. P. *Clarke* v. *Shee*, Cowp. 199. *A.*, who buys a horse from *B.* on a Sunday, not knowing that *B.* was a horse-dealer, may recover the price, for he was *particeps criminis*, and the consideration has failed. *Bloxsome* v. *Williams*,[3] 3 B. & C. 232; and see *Drury* v. *Defontaine*, 1 Taunt. 134. But note, that the horse was of the value of 10*l.*, and there was no memorandum in writing; and the horse was not delivered or the money paid till the Tuesday after; and therefore, as there was no complete contract of sale on the Sunday, the case was not within the stat. 29 C. 2, c. 7, s. 2; *Qu.* per Bayley, J. whether the statute is not confined to manual labour, and other work visibly laborious, and the keeping of open shops? A horse-dealer cannot maintain an action upon a contract for the sale and warrant of a horse, made by him on a Sunday; *Fennel* v. *Riddler*[4]

Where *A.* extended an execution on *B.*'s real estate and became tenant in common thereof with *C.*, and afterwards obtained a judgment against *C.* for a share of the rents and profits accruing after the extent, upon the subsequent reversal of *A.*'s judgment against *B.*, *C.* in an action for money had and received, recovered back the rents and profits paid by him to *A.*, though the judgment of *A.* against *C.* remained unreversed. *Lazell* v. *Miller*, 15 Mass. Rep. 207.

So money paid on a judgment, which was afterwards reversed, may be recovered back, in Maryland, in an action for money had and received, unless it was equitably due when the judgment was rendered. *Green* v. *Stone*, 1 Har. & J. 405.]

[1]Eng. Com. Law Reps. xxxi. 206. [2]*Id.* xxxi. 89. [3]*Id.* x. 60. [4]*Id.* xi. 261.

plaintiff, as a friend of a bankrupt, to the defendant, a creditor, to induce him to sign *the bankrupt's certificate, which he actually did (*b*). So, *94
where the defendant, having brought an action against the plaintiff, on the ground of an alleged usurious transaction between the plaintiff and *A. B.*, procured money from the plaintiff to compromise the action, it was held that the plaintiff might recover the money, on the ground that the prohibition and penalties of the stat. 18 Eliz. 2, c. 5, s. 4, solely attached upon, and were confined to, the informer or plaintiff in the penal action, and did not attach upon or extend to the person compounded with; and the distinction was taken as laid down by Lord Mansfield in the case of *Smith* v. *Bromley* (*c*), that if the act itself be immoral, or a violation of the general laws of public policy, the party paying the money shall not be allowed to recover it; but that in the case of other laws which are calculated for the protection of the subject against oppression, extortion and deceit, if such laws be violated, and the defendant take advantage of the plaintiff's situation or condition, then the plaintiff shall recover (*d*).

Where money is paid by the plaintiff to the defendant upon an *illegal* *agreement*, to which both are parties, and equally culpable, it may be recovered whilst the agreement remains *executory*, but not afterwards (A). *A.*, in consideration of 210*l.*, gave *B.* a bond for the payment of an annuity of 100 guineas until the hop duties should amount to a certain sum, and it was held that *B.*, who brought his action before the event happened, was entitled to recover, on the ground that the contract still remained executory (*e*). So it was held where a sum of money had been paid to procure a place in the customs (*f*). So, where a prisoner in custody in Newgate, for clipping coin, gave a sum of money to a solicitor to procure his discharge (*g*).

Action by a particeps criminis.

Where, however, money is paid by the plaintiff to the defendant, upon an agreement grossly immoral, it seems that it cannot be recovered,

5 B. & C. 408; although the contract was made by an agent, and was entered into at the request of the party who takes the objection. *Smith* v. *Sparrow*,[1] 4 Bing. 84. Where goods having been bought on a Sunday, the buyer afterwards, whilst the goods were in his possession, promised to pay for them, it was held, that the seller was entitled to recover on a *quantum meruit*. *Williams* v. *Paul*,[2] 6 Bing. 653. The hiring of a servant by a farmer on a Sunday is good, *R.* v. *Whitnash*,[3] 7 B. & C. 596; and see *Begbie* v. *Levi*, 1 C. & J. 180. The object of the Act was to prevent parties from carrying on their *trade* and ordinary *occupations* and *callings* on a Sunday.

(*b*) *Smith* v. *Bromley*, Doug. 696. *Cockshott* v. *Bennett*, 2 T. R. 763. *Jackson* v. *Lomas*, 4 T. R. 166; 3 T. R. 551. *Leicester* v. *Rose*, 4 East, 472; B. N. P. 133. The stat. 5 G. 2, c. 30, s. 11, formerly, and now the stat. 6 G. 4, c. 16, s. 125, *vacates* all securities given by the bankrupt, or any person on his behalf, as the consideration for signing his certificate. See *Nerot* v. *Wallace*, 3 T. R. 25. A creditor executing a composition deed, takes bills from the debtor to the full amount; the debtor may recover the surplus. *Turner* v. *Hoole*,[4] 1 D. & R. 27.

(*c*) Doug. 670, n.

(*d*) *Williams* v. *Hedley*, 8 East, 378. *Browning* v. *Morris*, Cowp. 790.

(*e*) *Tappenden and others* v. *Randall*, 2 B. & P. 467. In this case the Court considered the distinction between executed and executory contracts as completely established. See Sir J. Mansfield's observations in *Aubert* v. *Walsh*, 3 Taunt. 281. *Bush* v. *Walsh*, 4 Taunt. 960. *Webb* v. *Bishop*, B. N. P. 16, 132. It seems, however, that the Courts do not consider wagers on the amount of duties to be illegal or immoral, but refuse to enforce them, on account of the public inconvenience which might otherwise result. *Shirley* v. *Sunbury*, 2 B. & P. 130.

(*f*) *Walker* v. *Chapman*, cited by Buller, J. in *Lowry* v. *Bourdieu*, Doug. 471.

(*g*) *Wilkinson* v. *Kitchen*, 1 Ld. Raym. 89. But see *Norman* v. *Cole*, 3 Esp. 253, where Lord Eldon is reported to have held, that a sum of money placed in the hands of the defendant, in order to procure a pardon for one who was under sentence of death in Newgate, could not be recovered.

(A) (But money paid in consideration of the composition of a felony cannot be recovered back. *Worcester* v. *Eaton*, 16 Mass. 368. Assumpsit for money lent or money had and received will not lie to recover the price of a note sold, which was given for a gaming consideration. *Herd* v. *Vincent*, 1 Tenn. 869.)

[1]Eng. Com. Law Reps. xiii. 351. [2]*Id.* xix. 192. [3]*Id.* xiv. 100. [4]*Id.* xvi. 418.

although the agreement remain *executory:* for in such case it is contrary to sound policy to yield the plaintiff any assistance. As where the money is paid as a consideration for the murder of a third person (*h*). It is however to be observed, that the distinction between *malum in se* and *malum prohibitum* has frequently been disapproved of (*i*); and if the doctrine is to prevail that the party ought to be allowed a *locus pœnitentiæ*, is it not
*95 reasonable that he *should be allowed and induced to repent of his intention to perpetrate a great and heinous crime, as well as of his intention to commit a more trivial offence?

Money in hands of stakeholder, &c.

In cases of illegal transactions, money may always be stopped whilst it is *in transitu* to the person who is to receive it (*k*).

Where the money has been paid to a mere depositary or stakeholder, the plaintiff may recover it at any time before it is paid over, although the agreement *be illegal* and no longer *executory*. As, where a wager is deposited with a stakeholder on the event of a battle to be fought by the parties, and the battle be fought, either party may recover his deposit before it be paid over (*l*) (1) (A). So, where the plaintiff, in order to avoid a prosecution for a misdemeanor, paid a sum of money to the defendant for the use of the poor, it was held that after notice not to pay the money over he might recover it (*m*).

Of an agent.

It is a general rule that an agent shall not be allowed to set up the title of a third person against his principal (*n*).

Where the defendant, a broker, had received from the underwriters the amount of an illegal insurance, it was held that he could not set up the illegality of the transaction as a defence in an action by the assured (*o*). For having received money to the use of another, he cannot in conscience retain it, and no one is entitled to it but the plaintiff. So, where the defendants, who were carriers, received for the plaintiffs the price of a quantity of counterfeit halfpence, it was held that the plaintiff was entitled to recover, and the illegality of the transaction was considered as unimportant to the decision of the question (*p*), since the plaintiff sought but to recover his own. But it is otherwise where the money has not been actually paid, but

(*h*) Per Heath, J. *Tappenden* v. *Randall*, 2 B. & P. 471.

(*i*) *Aubert* v. *Maze*, 2 B. & P. 371. *Cannan* v. *Bryce*,[1] 3 B. & A. 179.

(*k*) Per Ld. Ellenborough, C. J. in *Edgar* v. *Fowler*, 3 East, 222. See the cases cited below. A premium is *in transitu* if not actually paid by the broker to the underwriter, although the former has given credit for it to the latter. *Ibid.*

(*l*) *Cotton* v. *Thurland*, 5 T. R. 405. *Eltham* v. *Kingsman*, 1 B. & A. 683. And see *Howson* v. *Hancock*, 8 T. R. 575. *Smith* v. *Bickmore*, 4 Taunt. 474. *Aubert* v. *Walsh*, 3 Taunt. 277. *Farmer* v. *Russell*, 1 B. & P. 296. Vide *etiam*, *Bate* v. *Cartwright*, 7 Price, 540, which was the case of a wager on a foot-race. A stakeholder having paid over the money deposited, after the wager had been decided against the plaintiff, who claimed the whole as winner; it was held that the plaintiff might recover back his own deposit in an action for money had and received, against the stakeholder; the Court distinguishing between actions by one party to an illegal contract against the other, and those against the stakeholder paying over without authority, and in opposition to his desire. *Hastelow* v. *Jackson*, 8 B. & C. 221, and 2 M. & Ry. 209; and see *Hodson* v. *Terril*, 1 C. & M. 797. Vide *infra*, tit. WAGER.

(*m*) *Taylor* v. *Lendey*, 9 East, 49.

(*n*) *White* v. *Bartlett*,[2] 9 Bing. 378. *Nicholson* v. *Knowles*, 5 Mad. 47. *Crosskey* v. *Mills*, 1 C. M. & R. 298. An agent receiving money to be paid over to a third person, is accountable to his principal until he has entered into some binding engagement to hold the money to the use of such third person. See *Williams* v. *Everett*, 14 East, 582; *supra*, 81. *Wedlake* v. *Hurley*, 1 C. & J. 83. *Baron* v. *Husband*,[3] 4 B. & Ad. 612; and tit. APPROPRIATION.

(*o*) *Tenant* v. *Elliott*, 1 B. & P. 3. The case was distinguished from that of a stakeholder.

(*p*) *Farmer* v. *Russell*, 1 B. & P. 296.

(1) [This doctrine was adopted by the Sup. Court of New York, in the case of *Vischer* v. *Yates*, 11 Johns. 23. But in the Supreme Court of Errors, the decision was reversed by a great majority. 12 Johns. 1.]

(A) (*Perkins* v. *Hyde*, 6 Yerg. 228. *Hickman* v. *Littlepage*, 2 Dana, 344.)

[1]Eng. Com. Law Reps. v. 255. [2]*Id.* xxiii. 312. [3]*Id.* xxiv. 123.

credit only has been given. An underwriter on an illegal insurance cannot recover the premium from the broker, though the broker has given the underwriter credit for it in their account; no money having been actually received by the broker (*q*).

Illegal contract.—

In the case of *Booth* v. *Hodgson* (*r*), *A.*, *B.* and *C.* being partners in underwriting insurances, which were underwritten in the name of *A.* alone; *C.*, one of the partners, and *D.*, as the brokers of *A.*, *B.* and *C.*, received *premiums of insurance to their use, and it was held that *B.* was not entitled to recover the amount of those premiums from *C.* and *D.* as money had and received to his use. Here it is to be observed, that the party could not recover except through the medium of the illegal transaction, and the case differs from that of money paid to a mere agent of the plaintiff, where the illegality of the transaction is out of question.

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Receipt by an agent.

In the case of *Sullivan* v. *Greaves* (*s*), the plaintiff and one *Bristow*, being partners in an insurance underwritten by the plaintiff in his own name, a loss happened, and the plaintiff paid the whole to the defendant, a broker; *Bristow* afterwards paid his moiety of the loss to the broker, and then the plaintiff brought his action against the broker to recover half of what he had paid; and Lord Kenyon held, that since the plaintiff came to enforce an illegal contract, he could not recover (*t*). This case may seem at first view to be inconsistent with that of *Tenant* v. *Elliott* (*u*); but it appears to be distinguishable from it; for there the ground of the decision was, that the agent of the plaintiff having received money for his own use, the illegality was out of the question; it was the plaintiff's own money; but in the latter case the plaintiff sought to recover money which he had paid under an executed illegal agreement; *before Bristow's* payment of the money, the plaintiff, for the reason just stated, was not entitled to recover any part of it; and when *Bristow* paid the money he did not actually pay it to the plaintiff's use, as in the case of *Tenant* v. *Elliott*, but in discharge of his own share in an illegal contract; and the law will not raise an implied assumpsit in favour of a *particeps criminis*.

Illegal executed consideration.

Money paid over to a party cannot be recovered after the event has happened; for where the parties are in *pari delicto*, *potior est conditio possidentis* (*x*). And therefore a plaintiff cannot recover from the underwriter the premium of a re-assurance void by statute (*y*) *after capture* (*z*). So, where an insurance was made on a ship belonging to a British subject, without interest (*a*), it was held that the assured could not recover the premium after the ship *had arrived safe* (*b*). And in such cases it is pre-

(*q*) *Edgar* v. *Fowler*, 3 East, 222.

(*r*) 6 T. R. 405.

(*s*) Park on Ins. 8.

(*t*) Lord Kenyon afterwards mentioned the case to the other Judges of the Court of K. B., who approved of it; and the doctrine was recognized and approved of by the Court of C. P. in the case of *Mitchell and others* v. *Cockburn*, 2 H. B. 379.

(*u*) 1 B. & P. 3, and *supra*, 95. See Mr. Selwyn's quære, 1 Selw. N. P. 4th ed. 90.

(*x*) There is no case to be found where money has been paid by one of two parties to another, on an illegal contract, both being *particeps criminis;* an action has been maintained to recover it back again. Per Lord Kenyon, in *Howson* v. *Hancock*, 8 T. R. 577. The case of *Lacaussade* v. *White*, 7 T. R. 535, where money paid on an illegal wager was allowed to be drawn after the event had taken place, has been considered as completely overruled by *Howson* v. *Hancock*, 8 T. R. 575, where the contrary was decided. See *Vandyck* v. *Hewitt*, 1 East, 96; *Williams* v. *Headly*, 8 East, 382; *Aubert* v. *Walsh*, 3 Taunt. 284; *Morck* v. *Abel*, 3 B. & P. 35; *Thistlewood* v. *Craycroft*, 1 M. & S. 500; *Stokes* v. *Twitchen*,[1] 8 Taunt. 492; *Bayntun* v. *Cattle*, 1 Mo. & R. 265.

(*y*) 19 Geo. 2, c. 37.

(*z*) *André* v. *Fletcher*, 3 T. R. 266. *Webb* v. *Bishop*, B. N. P. 132.

(*a*) Which is illegal by 19 Geo. 2, c. 37.

(*b*) *Lowry* v. *Bourdieu*, Doug. 467. See also *Lubbock* v. *Potts*, 7 East, 449.

[1] Eng. Com. Law Reps. iv. 183.

sumed that all parties know the law, and the municipal laws of this country are as binding in that respect upon foreigners as upon natives (*c*).

Where, however, an insurance has been effected in ignorance of particu-
*97 lar *facts which avoid the policy, it has been held that the premium may be recovered (*d*).

So, where money had been paid by an illegal insurer of lottery tickets, in consequence of having insured the defendant's tickets, it was held that the plaintiff could not recover, because the contract was executed; and the distinction was taken between that case and that of a plaintiff who seeks to recover premiums paid for such illegal insurances (*e*).

Notice of action. In some instances this form of action cannot be maintained, even though the plaintiff be entitled to receive the money, without proof of notice of action (*f*), according to the special provision of some statute.

Account stated. The count, upon *an account stated*, is supported by evidence of an acknowledgment on the part of the defendant of money due (*g*) to the plaintiff (*h*), upon an account between them (*i*). A qualified acknow-

(*c*) *André* v. *Fletcher*, 3 T. R. 266. *Morck* v. *Abel*, 3 B. & P. 35. *Vandyck* v. *Hewitt*, 1 East, 96; where the money was paid on an illegal insurance to cover a trading with the enemy, and the plaintiff declared on the policy as well as on the money counts.

(*d*) *Hentig* v. *Staniforth*,[1] 1 Starkie's C. 254; 5 M. & S. 122. *Owen* v. *Bruce*, 12 East, 225, [and Mr. Day's notes to that case.]

(*e*) *Browning* v. *Morris*, Cowp. 790.

(*f*) Thus the action does not lie against an excise officer in respect of duties received after the repeal of the Act which imposed them, without notice, according to the 23 G. 3, c. 70, s. 30. For this act protects them in all cases where intending to act within the statute they exceed it. *Greenway* v. *Hurd*, 4 T. R. 555. See also, *Wallace* v. *Smith*, 5 East, 114. But where the defendants made an excessive charge on a distress for arrears of taxes, it was held that the defendants in an action of *assumpsit* were not entitled to notice, for the act was not done *colore officii*. *Umphelby* v. *Maclean*, 1 B. & A. 42; and *supra*, 66, note (*t*), Ind. tit. Notice.

(*g*) *Tucker* v. *Barrow*,[2] 7 B. & C. 623. A mere acknowledgment of a debt being due, and a promise to pay it, but no amount specified, is insufficient to entitle the plaintiff even to nominal damages on an account stated. *Bernasconi* v. *Argyle*,[3] 1 M. & M. 183, and 3 C. & P. 29.[4] Unless the amount be proved *aliunde*. *Dickson* v. *Doveridge*,[5] 2 C. & P. 109. *Leeson* v. *Smith*,[6] 4 N. & M. 304. The plaintiff sued as executrix, and proved that the defendant being applied to by her for payment of interest, stated, that she would bring her some on the following Sunday; it was held, that although there was an admission that something was due, yet that as it did not appear what the nature of the debt was, nor whether it was due to the plaintiff as executrix, or in her own right, nor if it was one for which *assumpsit* would lie, the plaintiff was not entitled to recover even nominal damages. *Green* v. *Davies*,[7] 4 B. & C. 235; and see *Teal* v. *Auty*,[8] 2 B. & B. 101. The plaintiff must show some precise sum, per Tindal, C. J., *Kirton* v. *Wood*, 1 Moo. & R. 253. Where at a meeting of the plaintiff and defendant to settle an account, the clerk of the former made the entries into one book which the defendant copied into another, but no admission was made as to the correctness of the items; and the defendant admitted that the balance against him, as stated by the clerk, was correct; but added, that as he had done many things, there would not be much, if anything, between them; held, that the plaintiff's book would not bind the defendant so as to require its production, or its absence to be accounted for; held also, that the defendant's admission was evidence of something due on the account stated. *Rigby* v. *Jeffrys*, 7 Dowl. (P. C.) 561. Where the declaration contained counts, on an instrument in the form of a promissory note, payable at "nine years after date, provided *D. M.* did not return to England, or his death be certified in the mean time," with common counts for money lent, and upon an account stated; and the only evidence was of handwriting, and that *D. M.* had never been heard of for 25 years; held that the plaintiff, failing to prove the consideration stated in those counts to have been given for the promise, could not recover upon the latter counts; the instrument not raising any presumption of money lent; on the contrary, the contingency on which it is payable raising rather a different presumption. *Morgan* v. *Jones*, 1 Cr. & J. 162; and 1 Tyrw. 21.

(*h*) Where a plaintiff could not prove his title as indorsee of a bill by evidence of an indorsement, it was held that letters written by the defendant in answer to applications, in which the defendant did not admit any liability to the plaintiff or to any particular holder, but only a liability on the bill to the holder, were not sufficient evidence of title to recover. *Jardine* v. *Payne*,[9] 1 B. & Ad. 663.

(*i*) *A.* agrees with *B.* to purchase a house, and take the fixtures at a valuation; an inventory and valuation are made, and the gross amount stated at the foot; *A.* takes possession and enjoys, and pays part of the amount. In an action for goods sold and delivered, and on an account stated, *B.* is entitled to recover the remainder on the account stated. *Salmon* v. *Watson*,[10] 4 Moore, 73. Upon a verbal agreement for the sale of growing turnips, part of them being drawn, the purchaser promised to pay the amount before he drew any

[1]Eng. Com Law. Reps. ii. 378. [2]*Id.* xiv. 103. [3]*Id.* xxii. 285. [4]*Id.* xiv. 175. [5]*Id.* xii. 49. [6]*Id.* xxx. 372. [7]*Id.* x. 319. [8]*Id.* vi. 32. [9]*Id.* xx. 463. [10]*Id.* xvi. 363.

ledgment is not *sufficient (*k*); neither is a casual acknowledgment, made to a mere stranger (*l*); nor one made after action brought, without proof of previous dealings (*m*). Where accounts are submitted to an arbitrator, not by bond, his award is evidence on this count (*n*). A promissory note given by the defendant to the plaintiff is evidence under this count, even where the note cannot be given in evidence under a special count, because of variance (*o*). It is unnecessary to prove the items of which the account consists, but sufficient to prove the account stated (*p*); for the stating of the account is the consideration of the promise (*q*); and therefore an action upon this count cannot be maintained against an infant (*r*); for since an infant cannot state an account, the consideration fails.

It is sufficient, although the account be stated of that which is due to the plaintiff only, without making deduction for any counter-claim by the defendant (*s*). An acknowledgment of a single item in an account is sufficient to support the count (*t*). It is also sufficient that the account be *stated with the wife of the plaintiff (*u*). An entry in a bankrupt's ex- *99
amination of a sum due to *A.* is evidence of an account stated between them, and sufficient to take case out of Statute of Limitations (*x*).

An account alters the nature of the debt (*y*); and therefore, if a tenant,

more, but which he did not do; held that that sum was recoverable on the account stated. *Pinchon* v. *Chilcott*,[1] 3 C. & P. 236. Where the defendant, an incoming tenant, agreed to pay the plaintiff, the offgoing tenant, for all crops sown before a certain day, and the defendant, in answer to a demand of 40*l.* tendered 17*l.*; held that it did not amount to an acknowledgment of debt to support an account stated, but was to be considered as a mere offer to purchase peace. *Wayman* v. *Hilliard*,[2] 7 Bing. 101.

(*k*) *Evans* v. *Verity*,[3] R. & M. 239. As where the defendant said, "I would have paid you, if you had not removed the grates." And see *Wayman* v. *Hilliard*,[2] 4 M. & P. 629; 7 Bing. 101, S. C.; and *supra*, note (*i*).

(*l*) *Buchan* v. *Smith*,[4] 1 Ad. & Ell. 488.

(*m*) *Allen* v. *Cook*, 2 Dowl. P. C. 546. The offer of a *cognovit* after action brought, is not evidence of an account stated. *Spencer* v. *Parry*,[5] 3 Ad. & Ell. 331.

(*n*) *Keen* v. *Batshore*, 1 Esp. C. 194.

(*o*) See tit. Bills of Exchange. In *Leaper* v. *Tatton*, 16 East, 420, Bayley, J. held, that an acknowledgment by the defendant of his having accepted a bill of exchange, and that he had not paid it, created a debt, and was evidence on the account stated: although the defendant, when he acknowledged the acceptance, said that he had been liable, but was not liable then, because the bill was out of date. See the observations of Wood, B. in *Partridge & Ux* v. *Court*, 5 Price, 412. Where a memorandum had been given to the plaintiff on a receipt stamped, in the terms "received of *E. A.* 150*l.*, which we promise to pay," &c., and was not receivable in evidence for want of a promissory note stamp, and there was no count for goods sold, which had been the consideration, but the defendant had acknowledged that he owed the testatrix 150*l.*, without referring to the note; held, that the plaintiff might recover on the count for an account stated. *Ashby* v. *Ashby*, 3 M. & P. 186. A plaintiff may recover on an I. O. U. upon the account stated, although it may have been given as the consideration of an agreement not declared upon. *Payne* v. *Jenkins*,[6] 4 C. & P. 324. A promissory note not duly stamped is not evidence by way of admission. *Green* v. *Davies*,[7] 4 B. & C. 235. Neither is a note payable upon a contingency. *Morgan* v. *Jones*, 1 C. & J. 162. Where a promissory note by the defendant to the plaintiff is admissible, it is evidence of an account stated at the time of the date, and shows that the cause of action did not accrue till the time of payment, *Whattey* v. *Williams*, 1 M. & W. 533.

(*p*) *Bartlett* v. *Emery*, Hil. 2 G. 2, B. R. 1 T. R. 42, n.

(*q*) B. N. P. 129. *May* v. *King*, Ca. K. B. 537, where the evidence was, that the parties had come to an account, and that 5*l.* was due on the balance; and held, that the plaintiff was entitled to recover on that account. Per Buller, J. *Truman* v. *Hurst*, 1 T. R. 40.

(*r*) *Truman* v. *Hurst*, 1 T. R. 40. In *Ingledew* v. *Douglas*,[8] 2 Starkie, C. 36, Lord Ellenborough held, that an account stated by an infant was not evidence after he had attained his age, even to show that he had had the necessaries mentioned in the account.

(*s*) *Stuart* v. *Rowland*, 1 Show. 215.

(*t*) *Highmore* v. *Primrose*, 5 M. & S. 65.

(*u*) 1 Show. 215; B. N. P. 129.

(*x*) *Eicke* v. *Nokes*, 1 M. & R. 359. As amounting to an absolute admission of an existing debt. Per Tindal, L. C. J.; see *Knowles* v. *Mitchell*, 13 East, 249; *Brigstock* v. *Smith*, 1 C. & M. 483; *Kennett* v. *Milbank*,[9] 8 Bing. 38. But where a party examined before Commissioners of Bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy, but not that it was a subsisting debt, it was held to be insufficient.

(*y*) Vent. 268; Allen, 73; 2 Lev. 110.

[1] Eng. Com. Law Reps. xiv. 283. [2] *Id.* xx. 62. [3] *Id.* xxi. 427. [4] *Id.* xxviii. 125. [5] *Id.* xxx. 107. [6] *Id.* xix. 404. [7] *Id.* x. 319. [8] *Id.* ii. 233. [9] *Id.* xxi. 213.

being in arrear of rent, settle an account with his landlord, and promise to pay him, *assumpsit* lies (*z*). And it seems to be immaterial in which way the debt arose, if there be an account stated, and an express undertaking to pay the balance (*a*). The action lies, even althongh the items of account were secured by a specialty (*b*).

Thus, after an account has been liquidated between two partners, *assumpsit* will lie for the balance upon an account stated, and a promise to pay, although the partnership deed contains a covenant between the parties to account at certain times (*c*); for if a partnership be dissolved, and an account settled, it is a good consideration for a promise to pay (*d*). But in general, so long as any partnership concerns remain unadjusted, no action can be maintained by one partner against another (*e*).

Although it appear that there was a memorandum of agreement for the sale of growing trees, but neither stamped nor signed, an admission of the sum due, after the trees have been cut and carried away, is evidence on this count (*f*).

*100 *Where the plaintiff had sold a ship to the defendant who became the sole registered owner, and afterwards, by way of security to the plaintiff for advances for the ship, executed a bond conditioned for making a bill of sale to the plaintiff, which he failed to do, and subsequently sold the ship to a third person; and, on being applied to by the plaintiff, promised to render to him an account of the produce of the sale and disbursements; it was held to be evidence that he had sold the ship on account of the plaintiff, and an admission of his liability to pay over the balance in his hands (*g*).

The plaintiff may recover on an account stated by the defendant with the plaintiff's wife; but not on an account stated by the defendant's wife, unless her agency be proved (*h*).

Parties. Where an account was stated between the defendant and his wife with the plaintiff, of an account due from the wife whilst sole, to the plaintiff, for goods sold, it was held that the action could not be maintained against

(*z*) Roll. Ab. 9; Bro. Account, 81; Ray. 211; 2 Keb. 813.

(*a*) In *Foster* v. *Allanson*, 2 T. R. 479, where the partnership had been dissolved, and an account stated, which the defendant *promised to pay*, Buller, J. distinguished the case from that of *Drue* v. *Thorne*, Alleyn, 72, on the ground of the express promise. In that case a feme sole being indebted to the plaintiff for goods, married, and she and her husband stated an account with the plaintiff, which the husband promised to pay, and it was held that the wife must be joined.

(*b*) *Moravia* v. *Levy*, 2 T. R. 483. (*c*) *Moravia* v. *Levy*, 2 T. R. 483, (*n*).

(*d*) *Foster* v. *Allanson*, 2 T. R. 479. And a judgment in that action might be pleaded in bar of an action on the covenant, per Buller, J. 2 T. R. 403; and see *Brierly* v. *Cripps*,[1] 7 C. & P. 709. It seems, however, that as between partners such an action cannot be maintained but on a final balance. *Fromont* v. *Copeland*,[2] 2 Bing. 170. *Goddard* v. *Hodges*, 1 C. & M. 37; and see tit. Partners; and *Wilson* v. *Cutting*,[3] 10 Bing. 436. It has been questioned whether an express promise be not necessary. But see *Clark* v. *Glennie*,[4] 3 Starkie's C. 10. *Henley* v. *Soper*,[5] 2 M. & R. 166; 8 B. & C. 20, S. C.; *Rackstraw* v. *Imber*,[6] Holt's C. 368; and the cases above referred to, and tit. Partners. [See 14 Mass. Rep. 99, 15 ib. 121.]

(*e*) *Foster* v. *Allanson*, 2 T. R. 479. *Robson* v. *Curtis*,[7] 1 Starkie's N. P. C. 78. Plaintiff and defendant agree to buy goods on their joint account, the defendant agreeing to furnish the plaintiff with half the amount in time for payment, the plaintiff having paid the whole, may recover the moiety, although an account is still to be taken between them as partners, on the disposal of the whole stock. *Venning* v. *Leekie*, 13 East, 7. Where *A.* a partner with *B.* & *C.*, supplied his own money to *B.* for the benefit of the firm, on a promise by *B.* to repay him out of proceeds already received for goods of the firm; it was held that *A.* might recover the amount from *B.* as money had and received to his use. *Coffer* v. *Brian*,[8] 3 Bing. 54. [See 15 Johns. 403; 12 Mass. Rep. 34.]

(*f*) *Teal* v. *Auty*,[9] 2 B. & B. 99. *Knowles* v. *Mitchell*, 13 East, 249; *secus*, if no precise sum be admitted. *Ibid.* So on an agreement for purchase of furniture and fixtures, the inventory containing a mixed valuation of goods and *fixtures*, the plaintiff may recover the value on this count. *Salmon* v. *Watson*,[10] 4 Moore, 73. But not on the count for goods sold and delivered, *semble*, Ibid. And see *Lee* v. *Risdon*,[11] 7 Taunt. 188.

(*g*) *Prouting* v. *Hammond*,[12] 1 Gow's C. 41. (*h*) B. N. P. 129.

[1]Eng. Com. Law Reps. xxxii. 701. [2]*Id.* ix. 366. [3]*Id.* xxv. 187. [4]*Id.* xiv. 147. [5]*Id.* xv. 147. [6]*Id.* iii. 132. [7]*Id.* ii. 303. [8]*Id.* xi. 25. [9]*Id.* vi. 32. [10]*Id.* xvi. 363. [11]*Id.* ii. 69. [12]*Id.* v. 432.

the husband alone (*i*). So, the plaintiff cannot recover against the defendant upon an account stated by him partly as administrator, and partly in his own private capacity (*k*).

Where the defendant dealt with *B.*, and then with *B.* and *C.*, his partner, and an account was settled between the defendant and *B.* and *C.*, which included both the accounts, it was held that *B.* and *C.* might maintain an action on this account (*l*).

And the plaintiff may recover on an account stated with the defendant, including debts due from the defendant alone, and from the defendant and a deceased partner jointly (*m*).

An account stated is not so conclusive in its effect as to exclude evidence of errors which have crept into the account (*n*). The accounting with the plaintiff in a particular character, is an admission of the character (*o*).

Variance. A variance in evidence between the amount of the balance proved and that averred in the declaration, is now held to be immaterial (*p*).

It seems that under this count, one account only is admissible (*q*).

Interest is not recoverable in the absence of a contract, express or implied, for the payment of interest on the balance (*r*).

Breach. An omission to prove the whole breach, as alleged in the declaration, is not material. The plaintiff in an action upon a policy of insurance may allege a total loss, and recover for a partial or average loss (*s*).

Where the breach alleged that the defendant had treated the estate contrary *to good husbandry and the custom of the country, it was held to be supported by showing that the defendant had treated it contrary to the prevalent course of good husbandry in that neighbourhood; as by tilling half his farm at once, when no other farmer tilled more than one third; and that it was not necessary to prove any precise definite custom or usage in respect to the quantity tilled (*t*). *101

In an action against the defendant, as wharfinger, for not procuring a sufferance for goods, in consequence whereof the goods were seized as forfeited to the king, it appeared that it was the defendant's duty, as wharfinger, to obtain a sufferance from the custom-house for the shipping of the goods, which he had not done, and in consequence of which the right of seizure had attached. It was also proved that the goods had been seized by a custom-house officer, and sold in the usual manner. It was objected that the record of a sentence of condemnation ought to be proved, but it was held that the proof was sufficient (*u*).

Proof by defendant on non-assumpsit. Previous to the late rules, the defendant, by the plea of *non-assumpsit*, might have put the plaintiff to the proof of his whole case, and in answer he might in general have adduced any evidence which disproved the case set up by the plaintiff, and showed that at the time when the action was

(*i*) *Drue* v. *Thorne*, Alleyn, 72. But Buller, J. in *Foster* v. *Allanson*, 2 T. R. 483, intimated that it would have been otherwise if the defendant had expressly promised to pay.

(*k*) *Herrenden* v. *Palmer*, Hob. 88.

(*l*) *Moore* v. *Hill*, Sitt. Guildhall after Easter, 1795; Peake's Ev. 257, 3d edit. *Qu.* whether there was not an express promise in this case to transfer the credit to the new firm, and pay the consolidated account? And see *Gough* v. *Davis*, 4 Price, 214; *David* v. *Ellis*,[1] 5 B. & C. 196.

(*m*) *Richards* v. *Heather*, 1 B. & A. 29.

(*n*) Formerly it was considered to be more conclusive. See Ld. Mansfield's observations in *Truman* v. *Hurst*, 1 T. R. 42. But see *Roper* v. *Holland*,[2] 3 Ad. & Ell. 22. S. C. 4 N. & M. 668.

(*o*) *Peacock* v. *Harris*, 10 East, 104. (*p*) *Thompson* v. *Spencer*, B. N. P. 129.

(*q*) Per Littledale, J. *Kennedy* v. *Withers*,[3] 3 B. & Ad. 769.

(*r*) *Nichol* v. *Thompson*, 1 Camp. 52. *Dawes* v. *Pinner*, 486, n. *Moore* v. *Voughton*,[4] 1 Starkie's C. 487. See tit. INTEREST.

(*s*) *Gardiner* v. *Crousdale*, Burr. 905: and see the cases, 5 Will. Saund. 205; Bl. 198.

(*t*) 4 East, 154. (*u*) *Baker* v. *Liscoe*, 7 T. R. 171.

[1]Eng. Com. Law Reps. xi. 201. [2]*Id.* xxx. 37. [3]*Id.* xxiii. 182. [4]*Id.* ii. 479.

brought the plaintiff had no cause of action, or at least no right to maintain this form of action (A).

The evidence admissible under the plea of *non assumpsit* is much limited by the following rules of Hil. T., 4 W. 4.

Defence under the new rules.

1. In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact (*v*) of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law (*w*).

*102 **Ex. gr.* in an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the

(*v*) And, therefore, in the case of an express contract the plea does not operate as a denial of the alleged consideration. Where the declaration alleged, that in consideration of receiving a horse and 2*l.*, the defendant agreed to sell a horse on warranty to the plaintiff; it was held that the plaintiff, on *non assumpsit* pleaded, was not bound to prove the delivery of the horse and 2*l.* *Smith* v. *Parsons*,[1] 8 C. & P. 199. And where the plaintiff alleged that, as author, he had a right to the music and poetry of an opera, and that in consideration of the premises, and that the plaintiff would sell him such right, the defendant undertook to buy it; Tindal, C. J., held, that under a similar plea it was not competent to the defendant to contend, either that the plaintiff was not the author, or had not the right, or did not sell it to the defendant. *De Pinna* v. *Polhill*,[2] 8 C. & P. 78. And in *Passenger* v. *Brookes*,[3] 1 Bing. N. C. 587, it was held, that the defendant could not prove want of consideration as a defence under this plea. But see the observations of Parke, B. on this case in *Bennion* v. *Davison*, 3 M. & W. 19. In *assumpsit* on a guarantee for goods supplied to A., the plea admits the supply, and the fact need not be proved, except to show the amount of damages. *Taylor* v. *Hilary*,[4] 7 C. & P. 30. See *Gibson* v. *Harris*,[5] 8 C. & P. 379. But it is clear that the plea does not admit the truth of any immaterial averment in the declaration. When the declaration on a special agreement to carry goods safely in a vessel lying in a certain river, alleged that they were to be carried by the defendants as *owners* of the said vessel; it was held that this plea did not admit the *ownership*. *Bennion* v. *Davison*, 3 M. & W. 19.

(*w*) The defendant may, under the general issue, show that the action was brought on a partnership transaction between himself and the plaintiff. *Pearson* v. *Shelton*, 1 M. & W. 504. *Worrel* v. *Grayson*, 1 M. & W. 166. So in an action by one joint owner of a ship against another for contribution to recover a proportion of the damages paid by the plaintiff to a third party for the value of goods sent by the ship and lost, the defendant may show that the goods were lost, and damages incurred, through the plaintiff's own misconduct. *Gregory* v. *Hartnell*, 1 M. & W. 183. In an action for work and labour, he may show that the work was done under a special contract, on which nothing is due. *Jones* v. *Nanney*, 1 M. & W. 333. And see *Grounsell* v. *Lamb*, 1 M. & W. 352; *Dicken* v. *Neale*, 1 M. & W. 556. By the express provision of the statute 55 G. 3, c. 194, the plaintiff in an action on an apothecary's bill must, under this plea, prove his certificate, or that he was in practice before August 5, 1815. *Wagstaff* v. *Sharpe*, 3 M. & W. 521; and see tit. APOTHECARY. It has been held at Nisi Prius, that in an action for goods sold and delivered, the defendant under this plea could not prove that the goods were of no value. *Roffey* v. *Smith*,[6] 6 C. & P. 662. It seems, however, to be impossible to *imply* a contract to pay anything for that which is of no value. On a *quantum meruit* for service rendered, it has been held that the defendant, under the general issue, may show the worthlessness of the alleged service. The defendant, under the plea of *non assumpsit*, may show that the goods did not correspond with the warranty. *Dicken* v. *Neale*, 1 M. & W. 556. *Grounsell* v. *Lamb*, 1 M. & W. 352. See tit. VENDOR AND VENDEE.

(A) (Any matter which shows that the plaintiff never had any cause of action may be given in evidence under the general issue; *Champlin* v. *Butler*, 18 John. R. 169; *Wilt* v. *Ogden*, 13 Id. 56; as an illegal consideration; *Craig* v. *Missouri*, 4 Pet. 426; *Jones* v. *Pryor*, 1 Bibb. 614; or usury, *Cotton* v. *Lake*, 2 Mass. R. 540. The incapacity of the defendant to make a contract at the time of the alleged contract, because he was then an infant; *Wailing* v. *Toll*, 9 John. R. 141; *Stansbury* v. *Marks*, 4 Dall. 130; or *non compos*, *Mitchell* v. *Kingman*, 5 Pick. 431. A former judgment between the same parties for the same cause of action, *Young* v. *Black*, 7 Cranch, 565; *Kilheffer* v. *Herr*, 17 Serg. & R. 325; *Wright* v. *Butler*, 6 Wend. 289, may likewise be given in evidence, under the general issue; that the defendant is an insolvent debtor, and that his property has been assigned to trustees for the use of his creditors, may also be proved under the general issue. *Kennedy* v. *Ferris*, 5 Serg. & R. 394. *Aliter*, where the claim in suit has been previously assigned under a voluntary assignment. *Hopkins* v. *Banks*, 7 Cow. 650. On the plea of *non assumpsit*, everything, even a general release, may be given in evidence, which shows that the plaintiff has no right to recover, notwithstanding that no notice has been given of special matter. *Dawson* v. *Tibbs*, 4 Yeates, 349, or payment. *Drake* v. *Drake*, 11 John. R. 531; *Coe* v. *Givan*, 1 Blackf. 367. So in New York. *Eddy* v. *Smith*, 13 Wend. 488. But the defendant cannot give evidence of damages sustained by a breach of the contract for which the note was given, on which the action was brought. *Cheongwo* v. *William Jones*, 3 Wash. C. C. R. 359.)

[1]Eng. Com. Law Reps. xxxiv. 351. [2]*Id.* xxxiv. 298. [3]*Id.* xxvii. 498. [4]Id. xxxii. 425. [5]*Id.* xxxiv. 437. [6]*Id.* xxv. 585.

subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk of the loss, or of the alleged compliance with warranties. Bills of exchange, bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

In every species of *assumpsit*, all matters in confession or avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

Denial of the contract.

Subject to these rules, which regulate the form of the plea by which the defence to the action is properly to be raised, the defendant may insist that the agreement was under hand and seal, for then the form of action is mistaken (*x*). That the action has not been brought by the proper parties, the promise having been made to the plaintiffs jointly with others (*y*) (1); or that the defendant was a partner with the plaintiff (*z*): That the plaintiff who sues as a feme sole was married when the contract was made (*a*): That one of the defendants did not promise jointly with the rest (2): That the action was commenced before the cause of action arose (*b*).

He may controvert the promise in fact by showing that none such was ever made; or if in fact made, may avoid it in point of law, by proof that it was obtained by duress, or whilst the party was in a state of intoxication, *or by proof of infancy (*c*), coverture (*d*), lunacy (*e*), illegality (*f*) or fraud (*g*). *103

(*x*) Gilb. Law of Ev. 183; Cro. J. 506, 508; Hutt. 34; *infra*, 78. (*y*). Where the plaintiff had contracted by deed to perform certain works, and for extra works at prices to be fixed by a third party, who fraudulently awarded that nothing was due in respect thereof; held that the plaintiff could not reject the deed upon the ground of fraud, and recover in assumpsit, as on a simple contract; the defendant having paid into court a sum upon certain counts, held that it could only be applied to the sums which were recoverable under those counts on which it was paid in. *Churchill* v. *Day*, 3 M. & Ry. 71.

(*y*) Gilb. Law of Ev. 189; Tri. per Pais, 187; B. N. P. 152; on the ground of variance.

(*z*) *Cheap* v. *Cromond*,[1] 4 B. & A. 663. See *Waugh* v. *Carver*, 2 H. B. 235. Such evidence would, it seems, be admissible under the general issue. *Worrel* v. *Grayson*, 1 M. & W. 166. *Pearson* v. *Shelton*, 1 M. & W. 504.

(*a*) 3 Camp. 438. (*b*) Ld. Raym. 1249.

(*c*) Gilb. Law of Ev. 186; 2 Lev. 144; Tri. per Pais, 308; Ld. Raym. 389; Salk. 279; B. N. P. 152. Vide *infra*, tit. Infant.

(*d*) Gilb. Law of Ev. 183. *Cowley* v. *Robertson and Mary his wife*, 3 Camp. 438; where it was proved in bar, that when the goods were supplied to the defendant *Mary*, she was the wife of one *Gilley*, who was still living. Vide *infra*, Husband and Wife.

(*e*) Gilb. C. P. 65. It is a good defence that the defendant at the time of the contract was of unsound mind, and that the plaintiff took advantage of the circumstance to impose upon him. *Browne* v. *Joddrell*, M. & M. 105. *Long* v. *Baker*. 1b. 106. *Sentance* v. *Poole*,[2] 3 C. & P. 1. But lunacy is no defence to an implied promise for necessaries. *Baxter* v. *Lord Portsmouth*,[3] 5 B. & C. 170.

(*f*) The defence must be specially pleaded. Lord Lyndhurst, in *Colbourne* v. *Patmore*, observes, "I know of no case in which a person who has committed an act deemed by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of a crime." Vide *supra* and *infra*, tit. Vendor and Vendee. *Bensley* v. *Bignold*,[4] 5 B. & A. 635. *Stephens* v. *Robinson*, 2 C. & J. 209. A promise to indemnify the plaintiff, in consideration of the plaintiff having published a libel and defended an action brought against him, is void. *Shackell* v. *Rosier*,[5] 2 Bing. N. C. 634.

(1) [*Baker* v. *Jewell*, 6 Mass. Rep. 462. 7 Mod. 360. (Leach's ed.) 2 Stra. 1146, 820. 2 Show. 446. 2 T. R. 282. 1 Taunt. 7. 7 T. R. 254, *acc.*]

(2) [East, 48. So in actions *ex quasi contractu*. 2 N. R. 454. 12 East, 452.]

[1]Eng. Com. Law Reps. vi. 556. [2]*Id.* xiv. 179. [3]*Id.* xi. 190. [4]*Id.* vii. 121. [5]*Id.* xxix. 438.

Discharge from the contract.

Or that a condition precedent was not performed (*h*); or he may show that the promise has been discharged by the plaintiff before breach (*i*), or by a subsequent contract inconsistent with the former. Thus if *A.* promise to marry *B.* within three months, and it is afterwards agreed that he shall marry her in half a year, this will discharge the former promise; for by taking the latter promise of a longer time, the parties must be supposed to intend to discharge the former, for otherwise the latter could have no intent at all (*k*).

Or that it had been discharged by accord and satisfaction (*l*); or by a *104 *release (*m*); or that it has been merged in some higher security (*n*); or has

Money expended for the purposes of an unlicensed theatre cannot be recovered against one at whose request the money was expended, and who participated in the profits. *De Begnis* v. *Armistead*,[1] 10 Bing. 107. The proprietor of a newspaper cannot, before the filing of the affidavit required by the statute, recover on a contract for the printing of the paper. *Houston* v. *Mills*, 1 M. & R. 325. And see *Poplett* v. *Stockdale*, R. & M. 337. *Coates* v. *Hatton*,[2] 3 Starkie's C 61. So as to money lent for the purpose of playing at an illegal game. *M'Kinnell* v. *Robinson*, 3 M. & W. 434. See also *Cannan* v. *Bryce*,[3] 3 B. & A. 179, as to money advanced for settling illegal stock-jobbing transactions. Money advanced to an agent to be expended in illegal disbursements, as (*semble*) paying the travelling expenses of voters, cannot be recovered. *Bayntum* v. *Cattle*, 1 M. & R. 265. A broker cannot, unless duly licensed according to the stat. 6 Anne, c. 16, maintain an action for work and labour for buying and selling stock. *Cope* v. *Rowlands*, 2 M. & M. 149.

(*g*) *Campbell* v. *Fleming*,[4] 1 Ad. & Ell. 40. As in consideration of puffing at an auction. *Icely* v. *Grew*,[5] 6 C. & P. 671. And see *Hill* v. *Grey*,[6] 1 Starkie's C. 534. *Boxwell* v. *Christie*, Cowp. 395. *Crowder* v. *Austen*,[7] 3 Bing. 368. *Wheeler* v. *Collier*,[8] M. & M. 126; and *infra*, tit. Fraud, and Vendor and Vendee. This defence must be specially pleaded.

(*h*) *Supra*, but he cannot show that the condition was not performed with intent to insist on the promise. *Williams* v. *Carnardine*,[9] 4 B. & Ad. 621.

(*i*) And this may be proved by parol agreement; but after a breach, it cannot be discharged by any new agreement, without a deed, unless it operate in satisfaction. B. N. P. 152; 2 Lev. 144; 1 Mod. 259; Ca. K. B. 518.

(*k*) Gilb. Law of Ev. 198; Tri. per Pais, 402. But a second promise to marry in a fortnight would not discharge the former. Ibid.

(*l*) Salk. 140; B. N. P. 152, Ld. Ray. 566. See tit. Accord and Satisfaction, *supra*, 15. A debtor, being unable to meet the demands of his creditors, they signed an agreement, which was assented to by the debtor, to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon. The debtor appeared to have been always willing to perform his part of the engagement; held, that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for which to each creditor was the forbearance of the rest; and as there appeared no failure of performance on the part of the debtor. *Good* v. *Cheeseman*,[10] 2 B. & Ad. 328.

(*m*) B. N. P. 152; Doug. 107.

(*n*) Vide *Pudsey's Case*, cited 2 Leon, 110; 3 East, 258. *Hosier* v. *Lord Arundell*, 3 B. & P. 7. *Partridge* v. *Court*, 5 Price, 412. Where the contract is under seal, *assumpsit* does not lie, for the law will not raise an *assumpsit* where the party resorts to a higher security; therefore, if the obligor of a bond, without some new consideration, as forbearance, promise to pay the money, *assumpsit* will not lie. *Toussaint* v. *Martinnant*, 2 T. R. 100. There the surety took a bond from the principal. So where a sum is due for freight and demurrage under a specialty contract, the plaintiff cannot recover in *indebitatus assumpsit*. *Atty* v. *Parish*, 1 N. R. 104. But a freighter may recover against ship owners for negligence, although the captain (one of the ship owners) has entered into a charter-party under seal with the plaintiff. *Leslie* v. *Wilson*,[11] 3 B. & B. 171. For ship owners are chargeable upon their general liability in respect of the duties which belong to them as such, and which are not inconsistent with the charter-party. The only exception to the rule is an action of *debt* for *rent*, and that rests on the consideration that by the demise an interest in the land passes. 1 N. B. 104. And vide Hardr. 332; *Warren* v. *Consett*, 8 Mod. 107: Com. Dig. tit. Pleader, [O.] 15; *Kemp* v. *Goodall*, 1 Salk. 277. Hence in an action for rent due under a demise by deed, *nil debet* is a good plea. *Ib.* Where the obligor of a *respondentia* bond, by indorsement upon it agreed to pay the money to *any assignee*, it was held that an assignee might maintain *indebitatus assumpsit*. *Fenner* v. *Mears*, 2 Bl. 1269. But this has been doubted by Lord Kenyon, in *Johnson* v. *Collins*, 1 East, 104; and Bayley, J. *White* v. *Parkins*, 12 East, 582. But where there is a subsequent parol agreement not inconsistent with the deed, and founded on a sufficient consideration, *assumpsit* lies. See *Leslie De la Torre*, cited 12 East, 583; *White* v. *Parkins*, 12 East, 578. A guarantee by the deed of a third person is no merger. *White* v. *Cuyler*, 1 Esp. C. 200; 6 T. R. 176.

[1]Eng. Com. Law Reps. xxv. 47. [2]*Id.* xiv. 163. [3]*Id.* v. 255. [4]*Id.* xxviii. 29. [5]*Id.* xxv. 590. [6]*Id.* ii. 459. [7]*Id.* xiii. 11. [8]*Id.* xxii. 266. [9]*Id.* xxiv. 126. [10]*Id.* xxii. 89. [11]*Id.* vii. 395.

been rescinded (*o*); waived (*p*); or suspended (*q*); or that the recovery would occasion circuity.

That the performance became impossible, by the act of God; as that a *horse hired by the defendant for a journey, died on the journey without the defendant's fault (*r*). *105

He may show that no consideration existed; or that it has wholly failed through the negligence of the plaintiff (*s*); or was insufficient in law (*t*); or

(*o*) Where the defendant hired a carriage of the plaintiff for a certain time, and before it had expired sent it back; held that if the plaintiff sold it within that time, it would have been a *rescinding* of the contract, and he could not be entitled to the stipulated hire. *Wright* v. *Melville*,[1] 3 C. & P. 542. See further, *Garrard* v. *Woolner*.

(*p*) The seller of goods, on the buyer's refusing to accept them, requested him to sell them, which the buyer agreed to do, but could not; this amounts to a waiver by the seller. *Gomery* v. *Bond*, 9 M. & S. 378.

(*q*) Stock having been transferred to another name under a forged power of attorney, whilst it was doubtful whether the Bank of England was by law liable to make good the loss, the stock owners entered into a contract with the Bank, whereby the latter agreed to replace the stock and pay the intermediate dividends, and the former agreed, in the first instance, and before they claimed the stock, adversely to tender a proof on the estate of the party who had fraudulently transferred it, and had received one payment of such dividends, but had refused to tender the proof; held, that the Bank were entitled to avail themselves of the agreement, as a suspension of the plaintiff's right to sue, until they had performed their part of the stipulation. *Stracey* v. *Bank of England*,[2] 6 Bing. 754; and see *Longridge* v. *Dorville*,[3] 5 B. & A. 117. Action by the drawer against the acceptor of two bills, the latter, upon an arrangement, assigned certain property as a security for certain sums then due, as well as for future demands, with a power of sale after six months' notice; held that it could only be considered a collateral security, and did not suspend the personal remedy. *Emes* v. *Widdowson*,[4] 4 C. & P. 151. Upon an agreement with their general creditors, the defendants surrendered all their stock to trustees, and agreed to execute a conveyance of all their estate, the trustees entered on the management and paid dividends to the amount of 10*s.* in the pound; the defendants afterwards being called upon to execute the conveyance, required that it should contain a general release from the creditors, and deeming the one inserted insufficient, refused to execute; but all the creditors had not then executed it; and before an adjourned meeting was held to obtain such execution, the plaintiff commenced his action; held that the agreement, purporting to contemplate a *suspension* of the right of action by the creditors until a final meeting and execution of the instrument by the creditors, and refusal by the defendants, the creditors were not remitted to their former rights, and the action was therefore premature. *Tutlock* v. *Smith*,[5] 6 Bing. 339.

(*r*) Gilb. Law of Ev. 187; Tri. per Pais, 399. *Secus*, where performance was impossible at the time of the promise. Com. Dig. Action on the Case on Assumpsit, [G.]; and see Com. Dig. Condition, [D.] 1. And a *plaintiff* cannot show that performance of the *consideration* became impossible by the act of God. *Ibid.* If the condition of a feoffment be impossible at the time of making, and precedent, the estate does not vest; if subsequent, the estate becomes absolute. If a condition subsequent on the feoffment be possible at the time of the feoffment, but afterwards become impossible, the estate is absolute, for it has vested; *secus*, in the case of an obligation, which is executory. Co. Litt. 206. A condition to create an estate is to be construed according to the intention of the parties; to destroy an estate, is to be construed strictly. 1 Ins. 219 b; 3 B. & C. 246.

(*s*) See tit. Goods sold and delivered.—Negligence.—Work and Labour. *Grimaldi* v. *White*, 4 Esp. C. 95. *Basten* v. *Butter*, 7 East, 479. *Farnsworth* v. *Garrard*, 1 Camp. 48. *Fisher* v. *Samuda*, Ibid. 190. *Lewis* v. *Cosgrave*, 2 Taunt. 2. The inference from these cases seems to be, that where a contract is made for a specific thing, at a specific price, and the contract be not performed, the party must either rescind the contract in *toto*, or pay the price; but that where there is no specific contract, and the plaintiff proceeds on a *quantum meruit*, he must recover according to the *value* of the work, or the article to the *defendant;* and consequently where there has been no beneficial service, he is not entitled to recover anything. In *Roffey* v. *Smith*,[6] 6 C. & P. 662, it was held that the defendant in an action of *indebitatus assumpsit*, was not at liberty, under the plea of *non assumpsit*, to show that the goods were of no value; *tamen qu.*, for in such a case the plea is to operate as a denial of the matters of fact, from which the contract may be implied by law. In the case of *Fowler* v. *Marksell*, York Summer Ass. 1836, Parke, B. admitted evidence of negligence in defence of an action of *indebitatus assumpsit* for work and labour under this plea. Where the action is on a special contract, the want of consideration is not, it seems, admissible under this plea. *Passenger* v. *Brookes*,[7] 1 Bing. N. C. 587; but see *Bennion* v. *Davison*, 3 M. & W. 179. In an action for contribution by one joint owner of a ship against another, to recover a portion of damages recovered by a third person against the plaintiff for the recovery of the value of goods sent by the ship, the defendant may show, under the general issue, that the goods were lost and damages incurred through the misconduct of the plaintiff. *Gregory* v. *Hartnall*, 1 M. & W. 183. Under the same issue, the defendant may show that the goods were not equal to the warranty. *Dicken* v. *Neale*, 1 M. & W. 556. *Grounsell* v. *Lambe*, 1 M. & W. 352; or that the work was done under a special contract, under which nothing is done. *Jones* v. *Nanny*, 1 M. & W. 333.

(*t*) The receiver of the wife's estate, by the direction of the husband, but without the wife's authority, accepted a bill for the husband's debt to the drawer, and being afterwards called upon by the husband and

[1]Eng. Com. Law Reps. xiv. 438. [2]*Id.* xix. 224. [3]*Id.* vii. 43. [4]*Id.* xix. 316. [5]*Id.* xix. 94. [6]*Id.* xxv. 585. [7]*Id.* xxvii. 498.

illegal (*u*); or lastly, he may prove that the promise has been performed, as by payment (*x*), or the delivery of the thing contracted for (*y*).

*106 Defence—damages. *The defendant cannot give evidence of any matter which arose after the commencement of the action, not even payment of the debt and costs, except for the purpose of diminishing the damages, which in such case would be merely nominal (*z*) (A). So for the same purpose he may give in evidence any other payment (*a*). The Statute of Limitations will be no bar under this issue, although it appear from the plaintiff's own showing, or even from the declaration itself, that the cause of action did not arise within the six years (*b*).

The fact that others who are not joined contracted jointly with the defendant, is available by plea in abatement only; if it be proved it shows no variance; for it is still true as alleged, that the defendant undertook and promised (*c*).

The evidence under the pleas of a tender of the money before action brought; the Statute of Limitations; a set-off; payment; infancy (*d*); coverture (*e*), will be afterwards considered.

ATTAINDER OF FELONY (*f*).

Is pleadable in bar against a demand accruing after the attainder (*g*). The proof is by the record of the judgment (*h*). For the effect of an

wife to pay over to them the rent received, when the bill became due having refused to pay it, unless the plaintiff would give him an indemnity for being reimbursed by the husband and wife, which was accordingly given; the bill not being ultimately paid, held, that to avoid circuity of action, the drawer could not maintain the action. *Carr* v. *Stephens*,[1] 9 B. & C. 758.

(*u*) *Supra*, 63. Every such defence must be specially pleaded; as that the work and labour were illegal. *Potts* v. *Sparrow*,[2] 1 Bing. N. C. 594; 3 Dowl. P. C. 630. *Marten* v. *Smith*,[3] 4 Bing. N. C. 436. So where a contract is made void by statute. *Barnett* v. *Glossop*, 3 Dowl. P. C. 625;[4] 1 Bing. N. C. 633. But it seems that the want of a sufficient memorandum of the contract may be objected under the general issue. *Johnson* v. *Dodgson*, 2 M. & W. 653. *Elliott* v. *Thomas*, 3 M. & W. 170.

(*x*) By a late rule of pleading, T. T. 1 Vict., it is ordered that payment shall not be allowed in any case to be given in evidence, in reduction of damages or debt, but shall be pleaded in bar.

(*y*) B. N. P. 152; Salk. 140; Ld. Ray. 566. Although it was once held that performance must be pleaded. *Ibid.*; and 1 Mod. 210. See tit. PAYMENT. So it is a defence that the amount has already been recovered in a former action; or that the plaintiff, in a former action where he was defendant, might have availed himself of his present claim in diminution of damages. *Hirst* v. *Atkinson*, 2 Camp. 63; see *Basten* v. *Butter*, 7 East, 479. A consignee is not liable for the delay of the vessel, if he cannot get his goods because another's goods prevent him; but where the delay is occasioned by his own default, it is no answer to the claim for demurrage that other consignees have already paid to a larger amount for the same period. *Dobson* v. *Droop*, 1 M. & M. 441. In an action on the charter-party for not taking a full cargo, which appeared to have arisen from waste of room in making the arrangements for stowage, which varied from that stipulated by the charter-party; but one of the plaintiffs and their broker, who managed the business, were present at the time, and allowed the expense to be incurred without making any objection; held that they were not entitled to recover. *Hovill* v. *Stephenson*,[5] 4 Carr. & P. C. 470.

(*z*) *Holland* v. *Jourdain*,[6] Holt's C. 6. After money has been paid without a rule of court, the defendant cannot try the merits, and the costs inevitably follow. Per Ld. Ellenborough. *Atkinson* v. *Thornton*, 1 Camp. C. 559, n.

(*a*) B. N. P. 153; 2 Lev. 81. But the payment of must be pleaded; see the new rule, *supra*, 105, note (*x*).

(*b*) B. N. P. 152; 1 Will. Saund. 283, n. (*z*); Ib. vol. 2, 63, (*a*); Salk. 278.

(*c*) 1 Will. Saund. 291, note (4); but see Gilb. L. Ev. 189; Vent. 52; and see B. N. P. 152.

(*d*) The evidence applicable to these will be considered under those respective titles.

(*e*) See HUSBAND AND WIFE.

(*f*) The stat. 54 Geo. 3, c. 145, takes away corruption of blood as a consequence of attainder, except in high and petit treason, murder.

(*g*) *Bullock* v. *Dodds*, 2 B. & A. 273. (*h*) *Vide* Vol. I. and Index, tit. JUDGMENT.

(A) (The defendant cannot prove payment after action brought, as an answer to an action on a note; but it may be given in evidence to reduce damages. *M'Millian* v. *Wallace*, 3 Stew. 185. *Pemigewasset Bank* v. *Brackett*, 4 N. Hamp. 557. *Moore* v. *M'Nairy*, 1 Dev. 319.)

[1]Eng. Com. Law Reps. xvii. 491. [2]*Id.* xxvii. 502. [3]*Id.* xxxiii. 402. [4]*Id.* xxvii. 522. [5]*Id.* xix. 477. [6]*Id.* iii. 5.

attainder as to competency, see title INFAMOUS WITNESS; and see also tit. CERTIFICATE.

ATTORNEY (A).

Proof that the plaintiff is an attorney.

IN an action by an attorney for slandering him in his profession, he may prove that he is an attorney by means of an examined copy of the Roll of

(A) (The office of attorney is in some of our states, preserved partially or entirely, distinct from that of barrister or counsellor, in others not, but everywhere the functions of attorney or counsellor draw after them distinct rights and liabilities, whether exercised by the same or different individuals. *Retainer.* In an action by an attorney for his costs, though he need not prove the original employment, yet he must show some recognition of him by his client, as attorney, in the progress of the suit. Evidence, that he acted as attorney, and that he was considered as such by the attorney of the opposite party, is sufficient. *Hotchkiss* v. *Le Roy*, 9 Johns. 142. *Talby* v. *Reynolds*, 1 Pike's Ark. Rep. 99. It is not the practice of Pennsylvania, to file warrants of attorney; and where an attorney, without authority, professing to act as the attorney of the defendant, entered an amicable action in 1797, on which judgment was signed in 1798, against the defendant, the court on a motion to set aside the judgment, said, that nothing could then be done, but to let the judgment stand as a security, and permit the defendant to contest the demand in point of law. *Coxe* v. *Nicholls*, 2 Yeates' R. 547. An attorney, who enters an appearance in a suit without authority, is answerable in damages for the injury, which he may thereby have occasioned to the parties. *Field* v. *Gibbs et al.*, 1 Peters' C. C. R. 155. But where an attorney appears for a party, the court will look no farther, and will proceed, as if he had sufficient authority, leaving the party to his action against him. *Jackson* v. *Stewart*, 6 Johns. 34. *M'Cullough* v. *Guetner*, 1 Binn. 214. *Coit* v. *Sheldon*, 1 Tyler, 304. *Aliter* in Ohio. *Crichfield* v. *Porter*, 3 Ham. 518. *Reinholdt* v. *Alberti*, 1 Binn. 469. If an attorney appear for a defendant, (whether process has been served or not), without his authority, and confess judgment, or let it go by default, the judgment is regular, and will not be set aside: but the attorney is liable to an action. *Denton* v. *Noyes*, 6 Johns. 296. In this case the court permitted the defendant to plead to the merits, the judgment standing as a security, and directed proceedings to be staid in the mean while. See also *Smith* v. *Bowditch*, 7 Pick. 137. In *Hall et al.* v. *Williams et al.*, 6 Pick. 232, it was held, that if an attorney appears for a defendant, against whom judgment is rendered without any notice of the suit, he will not be estopped by the record to object, that the attorney appeared without authority, in order to avoid the judgment. See also *Aldrick* v. *Kinney*, 4 Conn. R. 380. *Robson* v. *Eaton*, 1 T. R. 62. Notwithstanding the rule that the acts of an attorney who appears for a party are to be taken as his acts, yet the court will in every case interpose and grant relief, so far as it can be done without injury to the other party. *Campher* v. *Anawalt*, 2 Watts, 493. *Burke* v. ———, cited. *Ib.* See also *Campbell* v. *Kent*, 3 Penns. R. 75. *Kitchen* v. *Williamson*, 4 Wash. C. C. R. 84.

Authority. In Pennsylvania, the authority of an attorney is more extensive than in other countries, and it has not been considered that his authority ceases with the judgment. *Lynch* v. *The Commonwealth*, 16 Serg. & R. 368. He has authority to receive the amount of the judgment and discharge it. *Langdon* v. *Potter*, 13 Mass. R. 310. *Commissioners* v. *Rose*, 1 Desaus. 469. *Canterbury* v. *Commonwealth*, 1 Dana, 416. *Branch* v. *Barnbury*, 1 Call, 147. *Brackett* v. *Norton*, 4 Conn. R. 517. The general authority of the attorney does not cease with the entry of the judgment. He has at least the right to issue an execution, although he may not have the right to discharge such execution without receiving satisfaction. *Union Bank* v. *Gray*, 5 Peters, 113. But it has been held in New York, that the general authority of the plaintiff's attorney ceases with the judgment, or at least with the issuing of an execution within the year. *Jackson* v. *Bartlett*, 8 John. R. 361. See also *Richardson* v. *Talbot*, 2 Bibb. 382. And he cannot discharge the defendant from execution on a *ca. sa.* without satisfaction. *Kellogg* v. *Gilbert*, 10 Johns. R. 220; *contra*, *Scott* v. *Seiler*, 5 Watts, 235. Even in Pennsylvania he has no right to enter into an agreement, by which land is to be taken, instead of the money which has been recovered. *Huston* v. *Mitchell*, 14 Serg. & R. 307. The authority of the defendant's attorney is competent to restore an action after *non pros.*, though without the consent of his client. *Reinholdt* v. *Alberti*, *supra.* But he has no right to give up the security of his client, without receiving the money. *Tunkersby* v. *Anderson*, 4 Desaus. 45.

Liability. The court will always look into the dealings between attorney and client, and guard the latter from imposition. *Starr* v. *Vanderheyden*, 9 Johns. 253. *Bibb* v. *Smith*, 1 Dana, 580. *Smith* v. *Bowen*, 2 Wend. 245. Where two attornies are in partnership, and one does the business of a client unskilfully, both are liable to him in damages. *Warner* v. *Griswold*, 8 Wend. 665. An attorney at law is liable to his client for neglect in the management of a suit, even though it is done without fraud; but not for an error of judgment, except perhaps if it be very gross. *Breedlove* v. *Turner*, 9 Martin's R. 354. A judgment is not evidence against an attorney, who is sued for neglect in the management of the cause, wherein the judgment was obtained, of the facts stated in it. *Breedlove* v. *Turner*, 9 Martin's R. 354. To an action brought by *A.* against *B.*, an attorney at law for not instituting a suit against *C.* to recover an alleged debt, it is a good defence, that the debt was due to another person and not to *C.* *Jackson* v. *Tilghman*, 1 Miles, 31.

[Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is responsible for that loss. *Gilbert* v. *Williams*, 8 Mass. Rep. 57. He is not, however, answerable for every error or mistake, but shall be protected when he acts with good faith, and to the best of his skill and knowledge. *Ibid.* Though an attorney is liable for a debt lost by his negligence, he is not of course liable for the loss of the *evidence* of a debt—and in an action against him for such loss, he may show that the plaintiff had another remedy for the recovery of the debt, which he successfully pursued. *Huntingdon* v. *Rumrill*, 3 Day, 390. An attorney, who undertakes to collect a debt, is bound to sue out all process necessary to

Attornies (*i*), or by the book of admissions from the Master's Office (*k*). But it is sufficient to prove that he has acted as an attorney of the court of which he is alleged to be an attorney (*l*). It is not necessary to prove that he has taken out his certificate (*m*). And if the defendant's words assume
*107 *that the plaintiff is an attorney, it operates as an admission that he is so, and supersedes the necessity of other proof (*n*).

In an action by an attorney on his bill (*o*), he must prove (*p*) his

(*i*) 4 T. R. 366. When an attorney is admitted and takes the oath, he subscribes his name upon the roll. 2 Esp. C. 526.

(*k*) This contains the names copied from the original roll, and is admissible for the purpose of such proof upon an indictment for perjury. *R.* v. *Crossley*, 2 Esp. C. 526.

(*l*) *Berryman* v. *Wise*, 4 T. R. 366.

(*m*) *Jones* v. *Stevens*, 11 Price, 235. And the court were of opinion that although the plaintiff had, previously to the libel and the action, omitted to take out his certificate for one whole year, during which he continued to practise, he still so far retained his character of an attorney as to be entitled to recover in respect of a libel published against him in that capacity, although he could maintain no action for fees, and was subject to penalties under the stat. 37 G. 3, c. 90, (*tamen quære*). At all events it would be insufficient, as in that case, merely to show the omission to take out the certificate, without evidence to negative a readmission. *Pearce* v. *Whale*,[1] 5 B. & C. 38; where the point was ruled in an action by the plaintiff, as an attorney, for fees.

(*n*) P. C. Ib. Where the plaintiff alleged generally that he was an attorney, and declared for the words, "he is a pettifogging, blood-sucking attorney," proof of the words was held to be sufficient, without any evidence of attorneyship. *Armstrong* v. *Jordan*, *cor.* Hullock, B. Carlisle Summ. As. 1826.

(*o*) *Indebitatus assumpsit* lies for fees against a third person who has retained the plaintiff as an attorney. *Sands* v. *Trevilian*, Cro. Car. 194. *Ambrose* v. *Roe*, Skinn. 217. Though the business has been transacted in another Court. *Thursby* v. *Warren*, Cro. Car. 159. But a solicitor on the equity side of the Exchequer is not entitled to practice in Chancery; and it seems that a solicitor in Chancery cannot authorize a solicitor on the equity side of the Exchequer to practice there in his name. *Vincent* v. *Holt*, 4 Taunt. 452. But an attorney may recover the costs of a commission of bankrupt, though he be not a solicitor in Chancery. *Wilkinson* v. *Diggett*,[2] 1 B. & C. 158. Although an attorney may, it seems, practise in another court, in the name of, and with the consent of, an attorney of the latter court, he cannot do so in his own name. *Latham* v. *Hyde*, 1 C. & M. 28; 3 Tyr. 143. But see *Vincent* v. *Holt*, 4 Taunt. 452. Where several sued as attornies of the Palace Court, and it appeared that but one of them was an attorney of that court, it was held that they could not recover. *Arden* v. *Tucker*, 1 M. & R. 191;[3] 5 C. & P. 248.

(*p*) That is in an action of *indebitatus assumpsit*, which is the usual form, and when the general issue has been pleaded.

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the object, and if he neglect seasonably to sue out a *scire facias* against a bail, in a suit which he has commenced against a debtor, he is liable to the judgment creditor for the loss thereby occasioned. *Dearborn* v. *Dearborn*, 15 Mass. Rep. 316. In an action against an attorney for negligence, the amount of the debt in the first suit is not the criterion of damages; but the amount of damages sustained is a question of fact for the jury. *Semb. Ibid. Eccles* v. *Stephenson*, 3 Bibb, 517. When the evidence of a debt, which is then due, is left with an attorney, who gives a general receipt for it, it will be presumed that he received it for collection; and in action against him for his negligence, by which the debt was lost, it is incumbent on him to show that he received it specially and for some other purpose. *Executors of Smedes* v. *Elmendorf*, 3 Johns. 185. If an attorney be sued for neglect of duty in not having filed a declaration, it must be proved that he was engaged in the cause in season to have filed it. *Stephens* v. *White*, 2 Wash. 211. But in an action against an attorney for negligence, it is not necessary to aver or to prove that the plaintiff had paid or secured him a fee, it is sufficient if the attorney undertook to prosecute the suit for a compensation to be paid afterwards. *Eccles* v. *Stephenson*, *ubi sup.*]

Whether in an action by an attorney against his client, to recover his fees, the defendant can set up the plaintiff's negligence in conducting the suit in bar? *Qu.* Such a defence, however, must be pleaded, or notice given, that it is intended to be insisted on at the trial; the defendant cannot give it in evidence under the general issue. *Runyan* v. *Nichols*, 11 Johns. 547. But see *Brackett* v. *Norton*, 4 Conn. 517.

Compensation. An attorney may recover for his professional services, counsel fees, on a *quantum meruit*. *Gray* v. *Brockenridge*, 2 Penns. R. 75. Overruling, *Mooney* v. *Lloyd*, 5 Serg. & R. 452. *Foster* v. *Jack*, 4 Watts, 334. But fraudulent conduct on his part, in a case, will deprive him of all claim for compensation for his services therein. *Bredin* v. *Kingsland*, 4 Watts, 420. The claims which an attorney may have on his client for extra services, or for counsel fees, make no part of the attorney's lien upon the taxed costs, or of that which the court will protect against the interference of his client. *The People* v. *Hardenburg*, 8 John. R. 335. The court will support the attorney's lien to the same extent as the rights of an assignee. *Bradt* v. *Koon*, 4 Cowen, 416. In Louisiana, attorney's claims for professional services, are barred after the lapse of three years. *Howe's heirs* v. *Brent*, 6 Mart. N. S. 248. Where a client by misrepresentation, induced an attorney to undertake his case for a contingent fee, the attorney may treat the contract as a nullity, and recover upon an implied promise to pay him for services rendered. *Evans* v. *Bell*, 6 Dana, 479. The agreements which lawyers may make with their clients for fees, are not restricted by law, and where there is no special agreement, the law will allow compensation according to the value of the services. *Downing* v. *Major*, 2 Dana, 228.

[1]Eng. Com. Law Reps. xi. 138. [2]*Id.* viii. 50. [3]*Id.* xxiv. 303.

retainer (*q*) by the defendant; which may be proved by evidence that the defendant attended at the plaintiff's office, and gave directions from time to time whilst the business was going on. Undertaking to pay what is due is an admission of a retainer; and therefore in an action on the bill, the production of the Judge's order for taxation, the defendant's undertaking, and the master's *allocatur*, is sufficient evidence of the fact. He should next prove that the business was done as stated in the bill, which is usually proved by a clerk or other agent who was concerned in the management of the suit or business, without proving the bill item by item (*r*). *If the charge be not for business done in court, evidence must also be given of the reasonableness of the charges (*s*); but if it be for business done in court, he must (*t*) prove the delivery of a bill to the defendant (*u*) according to the stat. (*x*), or that he left one at his dwelling-house

Proofs in actions for costs.

Business done.

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(*q*) An attorney made an agreement with his client to conduct all his suits in consideration of the client giving to him exclusively the drawing of his leases, it was held, that the breach of this agreement would not enable the attorney to recover on his bill, he must either put an end to the agreement, or sue for a breach of it. *Parker* v. *Harcourt*, 5 Esp. C. 249. A declaration by the plaintiff's clerk on a taxation of costs, that the attorney undertook the cause gratis, is evidence for the defendant in an action by the attorney. *Ashford* v. *Price*, 3 Starkie's C. 135. *Quære*, whether an attorney can legally guarantee the petitioning creditor against the costs of the commission, on condition of being employed as solicitor to the commission. *Gillet* v. *Rippon*,[1] 1 M. & M. 406. And see *Murray* v. *Reeves*,[2] 8 B. & C. 421. An agreement to pay at a certain specified rate is not binding upon the client; at all events it is not conclusive. *Drax* v. *Scroope*,[3] 2 B. & Ad. 581. In order to entitle the attorney to proceed in the action for costs, after the debt has been settled without his intervention, he is bound to make out a clear case of collusion between the plaintiff and the defendant, to deprive him of such costs; where there was only a ground for suspicion, the Court stayed the proceedings, but without costs. *Nelson* v. *Wilson*,[4] 6 Bing. 568. Where the defendant alone employed the plaintiff in suing out a commission of bankrupt on the petition of a third person who never employed him in it, the defendant is alone liable to the plaintiff. *Pocock* v. *Russell*,[5] 4 C. & P. 14. Where the commission had not been proceeded in, nor anything received under it, held that the attorney was entitled to recover his charges against the creditor employing him. *Pocock* v. *Russell*,[5] 1 M. & M. 357. Where one attorney does business for another, the ordinary implication is that credit is given to the latter, and not to the client; although the business was known to have been done on behalf of the client. *Scrace* v. *Whittington*,[6] 2 B. & C. 11.

(*r*) *Phillips* v. *Roach*, 1 Esp. D. N. P. 10.

(*s*) It is not however unusual to give evidence of the reasonableness of the charges, although the bill be for business done in court; and I have known such evidence to be required.

(*t*) Such evidence is unnecessary, unless the plea deny the delivery. *Moore* v. *Dent*,[1] 1 M. & R. 462; *Robinson* v. *Roland*, 6 Dowl. 271; *Lane* v. *Glenny*,[7] 7 Ad. & Ell. 83.

(*u*) Where there were two defendants not partners, held to be sufficient to deliver the bill to the one who managed the business. *Finchett* v. *Howe*, 2 Camp. 277. Per Ld. Ellenborough, C. J. 1 Camp. 438; and *semble* that it would be insufficient to deliver it to the party who did not intermeddle. 2 Camp. 277. Where several parties have a joint interest in resisting a claim for tithes, though their individual interests be separate, and jointly retain an attorney, the delivery of the bill to the party who actually retains him is sufficient. And see further as to a joint retainer. *Hildeys* v. *Gregory*,[8] 1 C. & P. 627; *Oxenham* v. *Lemon*, 2 D. & R. 461. See *Snowden* v. *Shee*, 1 Camp. 437. Where a party in a cause changed his attorney *pendente lite*, and the second attorney obtained an order for the delivery to him of a bill signed by the first, it was held that such delivery was a delivery to the party charged, within the words and meaning of the statute. *Vincent* v. *Slaymaker*, 12 East, 372, by three of the judges; Ld. Ellenborough, C. J *dissentiente*. The showing and explaining the bill without a delivery is insufficient. *Crowder* v. *Shee*, 1 Camp. 437. Personal service is not necessary; a re-delivery to an agent appointed for the purpose is sufficient. *Finchett* v. *Howe*, 2 Camp. 277. As to the attorney of the party, *Warren* v. *Cunningham*,[9] Gow. 71. *Vincent* v. *Slaymaker*, 12 East, 372. Where a bill has been delivered containing taxable items, the unreasonableness of the charges cannot in strictness be disputed on the trial. *Anderson* v. *May*, 2 B. & P. 237. *Lee* v. *Wilson*,[10] 2 Chitty's R. 65. But it is not unusual to give such evidence.

(*x*) 2 G. 2, c. 23, s. 23; which enacts that no attorney or solicitor in any of the courts aforesaid (viz. any court of record in England, wherein attornies have been accustomably admitted and sworn,) shall commence or maintain any action, &c. for the recovery of any fees, charges, or disbursements at law, or in equity, until the expiration of one month, or more, after such attorney, &c. shall have delivered unto the party or parties to be charged therewith, or left for him, &c. at his, &c. dwelling-house or last place of abode, a bill of such fees, &c. written in a common legible hand, and in the English tongue (except law terms, and the names of writs), and in words at length, except terms and sums; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively. The month is to be reckoned exclusively of the days on which the bill is delivered and action brought. *Blunt* v. *Heslop*,[11] 8 Ad. & Ell. 577. This statute extends to business done at the quarter sessions. *Clark* v. *Donovan*, 5 T. R. 694: *Ex parte Williams*, 4 T. R. 496; *Silves-*

[1]Eng. Com. Law Reps. xxii. 342. [2]*Id.* xv. 254. [3]*Id.* xxii. 145. [4]*Id.* xix. 169. [5]*Id.* xix. 254. [6]*Id.* ix. 7. [7]*Id.* xxxiv. 41. [8]*Id.* xi. 500. [9]*Id.* v. 468. [10]*Id.* xviii. 250. [11]*Id.* xxxv. 461.

ter v. *Webster*,[1] 9 Bing. 388; although attornies be not admitted there contrary to the ruling of Buller, J. in *Stephenson* v. *Taylor*, York Summer Assiz. 1786. To a charge for a *dedimus potestatem*, *ex parte Prichett*, 1 N. R. 266; or warrant of attorney with a view to business in court, under the head of "fees at law." *Sandon* v. *Bourne*, 4 Camp. 68. But see *Burton* v. *Chatterton*,[2] 3 B. & A. 488; *Weld* v. *Crawford*,[3] 2 Starkie's C. 538; *Wilson* v. *Gutteridge*,[4] 3 B. & C. 157. For business done in the Insolvent Court. *Smith* v. *Wattleworth*,[5] 4 B. & C. 364. In the County Court. *Wardle* v. *Nicholson*,[6] 4 B. & Ad. 469; 1 N. & M. 356. In a criminal suit in the Great Session in Wales. *Lloyd* v. *Maund*, 6 Tidd. 330. For drawing an affidavit of debt and getting it sworn. *Winter* v. *Payne*, 6 T. R. 645. Obtaining the Chancellor's signature to a bankrupt's certificate. *Collins* v. *Nicholson*, 2 Taunt. 321. See *Ford* v. *Webb*,[7] 3 B. & B. 241. Attending at a lock-up house, procuring the defendant's release, and filling up a bail-bond. *Fearne* v. *Wilson*,[8] 6 B. & C. 87. Attesting a replevin bond. *Wardle* v. *Nicholson*,[9] 4 B. & Ad. 469, 1 N. & M. 356. Attending bail and endeavouring to arrange and procure *cognovits*. *Watt* v. *Collins*, 1 R. & M. 284. Charges for attending and advising steps in a suit which has been brought against his client are taxable, and bring the whole bill within the effect of the statute of 2 Geo. 2; the advance of money to the client to pay the costs of such suit does not vary the case. *Smith* v. *Taylor*,[10] 7 Bing. 259, and 5 M. & P. 66. (diss. Alderson, J.) To money paid by the attorney on a judgment against his client. *Crowder* v. *Shee*, 1 Camp. 437. It has even been held, that if any one of the items in the bill relate to business done in court, the plaintiff cannot recover as to items which are not within the statute, but which are connected with his professional capacity, unless he prove the delivery of a bill. *Winter* v. *Payne*, 6 T. R. 645. *Hill* v. *Humphreys*, 2 B. & P. 343. But although the bill contains items not specified according to the statute, he may recover in respect of a portion of his bill as to which the provisions of the statute have been complied with. *Waller* v. *Lacy*, 1 M. & G. 54. The bill ought to contain the whole charges, one containing only the items of the extra costs, and omitting the items of taxed costs received from the other side is not a compliance with the statute. *Ib.* But where no bill has been delivered, although the plaintiff cannot recover costs out of pocket, he may recover in respect of mere conveyancing business, per Lord Kenyon. *Miller* v. *Towers*, Peake's C. 102; and per Ld. Eldon, in 2 B. & P. 345. So where an attorney had not delivered any bill, but merely particulars of demand under a judge's order, held, that he was entitled to recover for monies paid to his client's use, having no reference to his business of an attorney, although the particulars contained some taxable items. *Mowbray* v. *Fleming*, 11 East, 285. *Weld* v. *Crawford*,[11] 2 Starkie's C. 538. An attorney cannot split his demand, and thereby exempt part of it from taxation; where therefore a second bill containing items not taxable, was found not to have been delivered a month before the action, it was held that he could not recover. *Thwaites* v. *Mackerson*,[12] 1 M. & M. 199; and 3 C. & P. 341. But an attorney may recover for money lent on a distinct occasion, and not being disbursements in the cause. *Heming* v. *Wilton*,[13] 1 M. & M. 529; and 4 Carr. & P. C. 318. Although his bill has been regularly delivered according to the statute. And see *Hill* v. *Humphries*, 2 B. & P. 343; *Benson* v. *Garcia*, Esp. C. 149. This rule seems however to be subject to the proviso, that the distinct and untaxable items have no reference to the plaintiff's professional character. An attorney not having delivered any bill before action brought, and delivered particulars containing some taxable items, it was held that he could not recover in respect of items not taxable, but which was due in respect of business done, as money paid to his client's use in his character of an attorney. *Wardle* v. *Nicholson*,[14] 4 B. & Ad. 469; 1 N. & M. 356. Business done by an attorney for assignees, the greater part of which relates to proceedings under the commission, is not within the 2 Geo. 2, c. 28, s. 23; charges also for attending to advise with the solicitor of a creditor as to opposing the bankrupt's discharge from custody, and a like charge as to opposing his discharge under the Insolvent Act, are not taxable charges within the Act; proceedings in bankruptcy are not proceedings in equity within the statute. *Crowder* v. *Davies*, 3 Y. & J. 433. The statute does *not* extend to mere charges for conveyancing. *Hill* v. *Humphreys*, 2 B. & P. 345; B. & P. 145. Nor to a charge for searching at the Judgment Office, whether issues had been copied or docketed, or satisfaction entered on the roll. *Fenton* v. *Corria*,[15] 1 R. & M. 262. Nor to business done in the House of Lords upon an appeal. *Williams* v. *Odell*, 4 Price. 479. Or in the Middlesex Court of Requests, *Becke* v. *Wells*, 1 C. & J. 75. Nor to business done under a commission of bankruptcy. *Crowder* v. *Davies*, 3 Y. & J. 433. *Hamilton* v. *Jones*, 4 M. & P. 869. Nor to a payment of debt and costs by an attorney, who has put in bail for the defendant, and paid such debt and costs without having them taxed, and without making any charge *for his own labour*. *Prothero* v. *Thomas*,[16] 6 Taunt. 196; *tamen qu.* for the statute uses the term *disbursement* as well as *fees:* and see *Crowder* v. *Shee*, 1 Camp. C. 437; nor to a charge for preparing an affidavit of a petitioning creditor's debt (which is not sworn), and bond to the Chancellor. *Barker* v. *Chatterton*, 5 B. & A. 686; in which case the court questioned the decision in *Sandon* v. *Bourne*, *supra; secus*, (*semble*) had the affidavit been sworn. *Ib.* Where the bill contained abbreviations of whose meaning there could be no doubt, it was held to be sufficient to enable the plaintiff to recover. *Frowd* v. *Stillard*,[17] 4 C. & P. 51; and see *Reynolds* v. *Caswell*, 4 Taunt. 193. Where the bill charged for attendances on particular days, and at the end a charge for "several attendances," the Judge directed the latter to be deducted. *Rowson* v. *Earl*,[18] 4 C. & P. 44. An item of costs charged to have been paid according to the *allocatur*, but not stated in detail, is not sufficiently described, but the plaintiff is not precluded by the misdescription from recovering the residue of the bill. *Drew* v. *Clifford*,[19] 1 R. & M. 280. See the statute 3 J. 1, c. 7, s. 1, and *Brooks* v. *Hague*, T. Ray. 245; *Clark* v. *Godfrey*, Str. 633; *Milner* v. *Crowdall*, 1 Show. 338. It seems that the name of the court need not be stated in the bill. *Frowd* v. *Stillard*,[20] 4 C. & P. 512; *Reynolds* v. *Caswell*, 4 Taunt. 193. Where attornies sue as partners, a bill signed in the name of the firm is sufficient. *Smith* v. *Jago*, 1 C. & J. 542. In *assumpsit* by the plaintiff, as attorney and agent for the defendant, a country client of the plaintiff, for work and materials, and for fees, &c.: held that the plaintiff was not the attorney of the defendant within the statute requiring the delivery of the bill a month before action, but the court would not limit the term "monies in the first count mentioned" to the fees. *Hill* v. *Weight*, 5 S. c. 662.

[1]Eng. Com. Law Reps. xxiii. 314. [2]*Id.* v. 352. [3]*Id.* iii. 465. [4]*Id.* x. 42. [5]*Id.* x. 358. [6]*Id.* xxiv. 106. [7]*Id.* vii. 426. [8]*Id.* xiii. 108. [9]*Id.* xxiv. 106. [10]*Id.* xxi. 125. [11]*Id.* iii. 465. [12]*Id.* xiv. 237. [13]*Id.* xxii. 376. [14]*Id.* xxiv. 106. [15]*Id.* xxi. 434. [16]*Id.* i. 355. [17]*Id.* xix. 268. [18]*Id.* xix. 266. [19]*Id.* xxi. 439. [20]*Id.* xix. 268.

(*y*) *or last place of abode (*z*), subscribed by him, one month (*a*) or *more *110
previous to the commencement of the suit. It is sufficient to show that the Delivery
bill was left at the defendant's last known apparent place of abode at the of a bill.
time when the bill was delivered (*b*), although the defendant prove that he had another known place of abode subsequently to the delivery of the bill. It must be proved that the bill was *left* with the client, and not taken back again (*c*). Where a bill was produced, with an indorsement upon it in the hand-writing of a deceased clerk of the plaintiff, whose duty it was to have delivered the bill, purporting that he had delivered a copy on a particular day, and the indorsement was proved to have existed at that date, it was held that the entry was evidence of the delivery of the bill (*d*). It is unnecesary for an executor or administrator to prove the delivery of a bill for business done by his testator or intestate (*e*); so where the defendant is also an attorney (*f*); or where the plaintiff sues as the assignee of an insolvent attorney (*g*): nor is such proof necessary where the attorney sets-off the amount of his bill; it should not, however, be produced at the trial by surprise, but be delivered time enough for the plaintiff to have it taxed before the trial (*h*). The bill may be proved by a duplicate, original, or copy, without notice to produce the one delivered (*i*), provided proof be given that it was signed by the plaintiff. A mistake in the date of the items, which does not mislead the plaintiff, will not vitiate the delivery (*k*).

It was held that an action might be maintained by a solicitor against an assignee for business done under a commission of bankruptcy, although the bill had not been taxed by a master in chancery, under the stat. 5 Geo. 2, c. 30, s. 45 (*l*).

*It is a general rule in such cases that the bill cannot be taxed at the *111
trial, for the defendant might have had it taxed previously, and his delay

(*y*) Leaving at the counting-house is not a good delivery. *Hill* v. *Humphreys*, 2 H. & P. 343.

(*z*) It is not sufficient to show that the bill was delivered at a particular place, without evidence that it was the defendant's place of abode; and that the defendant afterwards delivered it to his attorney's clerk. *Eicke* v. *Noakes*, M. & M. 305. But it is sufficient to show that it was left at the last known place of abode, and it is not sufficient for the defendant to show a change of abode without also showing a later *known place* of abode. *Wadeson* v. *Smith*, 1 Starkie's C. 324.

(*a*) A lunar month sufficient. *Hurd* v. *Leach*, 5 Esp. C. 168. By the uniformity of process Act, 2 W. 4, c. 39, s. 11, the issuing of the writ is for all purposes the commencement of the suit. *Alston* v. *Underhill*, 1 C. & M. 492, See tit. TIME.

(*b*) *Wadeson* v. *Smith*,[1] 1 Starkie's C. 354.

(*c*) *Brooks* v. *Mason*, 1 H. Bl. 290. The object of the statute is, that the defendant shall have due time to consider the charges. *Ib.* It is not sufficient that the client acquiesce in the reasonableness of the charges. *Crowder* v. *Shee*, 1 Camp. 437.

(*d*) *Campneys* v. *Peck*,[2] 1 Starkie's C. 404.

(*e*) 1 Barnard, K. B. 433; Andr. 276; 1 Tidd, 316. *Barrett* v. *Moss*,[3] 1 C. & P. 2.

(*f*) Although the business was done before the defendant became an attorney. *Ford* v. *Maxwell*, 2 H. B. 589; 12 G. 2; c. 13. *Bridges* v. *Francis*, Peake's C. 1; 1 Esp. C. 221. *Wildbore* v. *Bryan*, 8 Price, 677. And such a bill is not within the st. 3 J. 1, c. 7, s. 1. *Sandys* v. *Hornby*, 1 M. & Ry. 33. So agents are not within the statute. *Ib.* and *Jones* v. *Price*, *cor.* Lee, C. J. 1748, Scl. N. P. 163. *Hill* v. *Sydney*,[4] 7 Ad. & Ell. 956.

(*g*) *Lester* v. *Lazarus*, 2 C. M. & R. 665. So in case of a set-off it has been held to be sufficient to deliver it to the plaintiff in time to have it taxed before the trial. *Martin* v. *Winder*, Doug. 199, n.; but see *Bulman* v. *Burkett*, 1 Esp. C. 449. Where Lord Kenyon intimated that in such case a written notice is necessary, and see also *Murphy* v. *Cunningham*, *contra*.

(*h*) Dougl. 199; 1 Esp. C. 499; 1 Tidd, 318. *Bulman* v. *Birket*, 1 Esp. C. 449.

(*i*) *Anderson* v. *May*, 2 B. & P. 237. And see *Jory* v. *Orchard*, 2 B. & P. 39. *Philipson* v. *Chase*, 2 Camp. 110. *Colling* v. *Trewicke*,[5] 6 B. & C. 394. *Fyson* v. *Kemp*,[6] 8 C. & P. 72. Vide *supra*, Vol. I. and Ind. tit. INSTRUMENTARY PROOF; and *infra*, tit. NOTICE.

(*k*) *Williams* v. *Barber*, 4 Taunt. 806.

(*l*) *Turn* v. *Heys*,[7] 1 Starkie, 278. See *Arrowsmith* v. *Barford*, Ib. in note; 2 Camp. 277.

[1]Eng. Com. Law Reps. ii. 424. [2]*Id.* ii. 445. [3]*Id.* xi. 296. [4]*Id.* xxxiv. 263. [5]*Id.* xiii. 208. [6]*Id.* xxv. 287. [7]*Id.* ii. 390.

for the space of a month before the commencement of the action is evidence of his acquiescence (*m*). It is sufficient to give in evidence a Judge's order to tax the bill, the defendant undertaking to pay what should appear to be due on the master's *allocatur* thereon (*n*). The delivery of a former bill is conclusive evidence against any increase of charge in a subsequent bill, or any of the items contained in it, and is strong presumptive evidence against any additional items (*o*); but it will not estop the plaintiff from proving that in fact he had transacted other business for the defendant.

An admission by the defendant of the delivery of the bill to enable the attorney to prove it under the defendant's commission, does not afford such a presumption as to dispense with proof in an action of the delivery required by the statute, no such delivery being necessary to enable him to prove his bill under the commission (*p*).

The plaintiff must also prove that the action was not commenced till a month after the delivery of the bill, by the production of the writ, or by the Nisi Prius record (*q*).

The contract to conduct a suit is entire, and where the suit has ended within six years, the Statute of Limitations will not bar the demand for such business as was done more than six years ago (*r*).

Defence. The defendant may insist (under a proper plea) in bar of the action that the plaintiff, at the time the business was done, was disqualified from practising as an attorney, by having omitted to take out his certificate for one whole year (*s*).

It has been doubted whether the defendant can set up the plaintiff's negligence, however gross, as a defence to the action (*t*); there seems, however, to be no reason to except this case from the operation of the general rule now established, that a plaintiff shall not be allowed to recover in respect of services so negligently rendered that the employer has derived no benefit from them (*u*).

(*m*) *Williams* v. *Frith*, Doug. 197. *Hooper* v. *Till*, Ib. 198; Barnes, 124; 1 Tidd, 317. *Anderson* v. *May*, 2 B. & P. 237. But the bill may be taxed at any time before verdict or judgment. Sel. N. P. 166, cites *Shaw* v. *Pickering*, Doug. 198, in *not.*

(*n*) *Lee* v. *Jones*, 2 Camp. 496. As to taxation, where the attorney pays proctor's fees in Ecclesiastical Court. See *Franklin* v. *Featherstonhaugh*,[1] 1 A. & E. 475.

(*o*) *Loveridge* v. *Botham*, 1 B. & P. 49.

(*p*) *Eicke* v. *Nokes*,[2] 1 M. & M. 303.

(*q*) See WRIT.—COMMENCEMENT OF ACTION. *Webb* v. *Pricket*, 1 B. & P. 263.

(*r*) *Harris* v. *Osborne*, 2 C. & M. 629.

(*s*) Under the st. 37 G. 3, c. 90. But it would not be sufficient to show that he had merely neglected to take out his certificate, unless at the time a full year had elapsed. See *Prior* v. *Moore*, 2 M. & S. 605, where it was held that in such case the attorney might still sue by attachment of privilege.

(*t*) *Templer* v. *M'Lachlan*, 2 N. R. 146. *Pasmore* v. *Birnie*, 2 Starkie's C. 59.

(*u*) See *Farnsworth* v. *Garrard*, 1 Camp. 38; *Denew* v. *Daverell*, 3 Camp. 451; *Fisher* v. *Samuda*, 1 Camp. 490; *infra*, tit. WORK AND LABOUR. It is a good defence to show that the costs sought to be recovered have been incurred through want of proper caution on the part of the attorney. As that they have arisen from his neglect to enter into the recognizances, and give the notice necessary, in order to appeal against a claim of tithes. *Montriou* v. *Jefferys*,[4] 1 R. & M. 317; 1 C. & P. 113. *Hopkinson* v. *Smith*,[5] 1 Bing. 15. Where an attorney had incurred expenses which were useless for the object in view, although done *bonâ fide*, held that he was not entitled to recover them from his client. *Hill* v. *Featherstonhaugh*,[6] 7 Bing. 569. Entire items for useless work may be discarded by the jury. *Shaw* v. *Arden*, 228. And such evidence is admissible under the general issue. *Hill* v. *Allen*, 2 M. & W. 283. If other causes besides the defendant's negligence conduce to the loss of benefit, such negligence will not supply a defence to the action. *Dax* v. *Ward*,[7] 1 Starkie's C. 409. It is no defence to such an action that the plaintiff was instructed to put in a plea of abatement for *delay*, which he neglected to do. *Johnson* v. *Alston*, 1 Camp. 176. An attorney is entitled to recover in respect of preparing document, although its legality at the time was doubtful, and it turns out to be illegal. *Potts* v. *Sparrow*,[8] 6 C. & P. 749. An attorney cannot abandon his client's cause for want of being supplied with funds, unless he give reasonable notice to the client. *Hoby* v. *Built*,[9] 3 B. & Ad. 350. And per Lord Eldon, C., in *Cresswell* v. *Bryan*, 14 Ves. 271; see also 1 Sid. 31, Say. 173; *secus*, for reasonable cause and on reasonable notice. *Vansandau* v. *Brown*, 7 Bing. 402. Where he gave notice of giving up the papers, unless supplied with funds, and did so; held, that he was

[1]Eng. Com. Law Reps. xxviii. 125. [2]*Id.* xxii. 314. [3]*Id.* iii. 243. [4]*Id.* xxi. 449. [5]*Id.* viii. 225. [6]*Id.* xx. 244. [7]*Id.* ii. 447. [8]*Id.* xxv. 631. [9]*Id.* xxiii. 91.

*The defendant may also show in defence, that the plaintiff lives at a remote place from that where the business is conducted by his clerk (*x*). That by agreement the work was to be done gratis (*y*), or was not to exceed a certain sum (*z*). That the plaintiff has neglected to take out his certificate (*a*). But he may recover in respect of business done at a time when he was uncertificated, provided he take out his certificate before the end of a year after the expiration of the time to which the former certificate extended (*b*).

It is no defence, under the plea of *non assumpsit*, that one of the plaintiffs was not admitted an attorney of such court (*c*): nor that no bill of costs has been delivered (*d*); nor where the attorney acts as agent (*e*).

An attorney receiving an offer of compromise, if not communicated to his client, goes on at his own risk, and cannot charge his client with subsequent costs; but as it is his duty to communicate such offer, it will be presumed he did so unless the negative be shown (*f*).

Proof in actions against an attorney.

In an action against an attorney for misconduct, it must be proved that he is an attorney of the particular court, as alleged in the declaration (*g*). The retainer of the defendant by the plaintiff must also be proved.

With respect to the misconduct of the defendant, and proof of the loss which has resulted in consequence, it is to be observed, that it is not every neglect which will subject the party to such an action. An attorney is only bound to use reasonable care and skill in managing the business of his client; if he were liable further, no one would venture to act in that capacity (*h*). He is not liable, unless he has been guilty of *crassa negligentia* (*i*). This, however, is usually a question of fact to be decided by a jury (*k*).

justified, after such notice, in refusing to go on with the cause, and might recover for the business done. *Rowson* v. *Earle*, 1 Mood. & M. C. 438.

(*x*) *Taylor* v. *Glassbrooke*,[1] 3 Starkie's C. 75. *Hopkinson* v. *Smith*,[2] 1 Bing. 13.

(*y*) *Ashford* v. *Price*, 3 Starkie's C. 145. (*z*) *Jones* v. *Read*,[3] 5 Ad. & Ell. 529.

(*a*) *Pearce* v. *Whale*,[4] 5 B. & C. 38; *infra*, tit. PRESUMPTIONS.

(*b*) *Bowler* v. *Brown*,[5] 2 Ad. & Ell. 16.

(*c*) *Hill* v. *Sydney*, 7 B. & C. 956; under the statute, 2 G. 2, c. 23.

(*d*) *Lane* v. *Glenny*,[6] 7 Ad. & Ell. 83. (*e*) *Hill* v. *Sydney*, 7 B. & C. 956.

(*f*) *Sill* v. *Thomas*,[7] 8 C. & P. 762.

(*g*) As to this proof, see above, 106. It is said that a bill for business done in a particular court is not evidence that the party was an attorney of that court. *Green* v. *Jackson*, Peake's C. 236. *Sed qu.*

(*h*) Per Le Blanc, J. in the case of *Compton* v. *Chandless*, cited 3 Camp. 19.

(*i*) 4 Burr. 2060. Per Ld. Ellenborough, *Baikie* v. *Chandless*, 3 Camp. 17; *infra*, note (*a*).

(*k*) *Reece* v. *Rigby*,[8] 4 B. & A. 202; *Ireson* v. *Pearman*,[9] 4 B. & C. 709; where an attorney acts for both vendor and purchaser, it seems that a small defect in title is sufficient to render him responsible. It is the duty of an attorney to examine the original securities for money to be advanced by his client, unless he be expressly absolved by his client. *Wilson* v. *Tucker*,[10] 3 Starkie's C. 154. Although a party has undertaken to procure the attendance of a witness upon the trial, it is the duty of the attorney to ascertain that the witness is in attendance when the cause is called on. *Reece* v. *Rigby*,[8] 4 B. & A. 202. Although it be no part of an attorney's duty to know the legal operation of conveyances, yet it is his duty to take care that he does not draw wrong conclusions. And, therefore, where an attorney in stating a title to counsel on behalf of an intended purchaser, instead of stating the deeds, states his own conclusions, he does so at his peril. In such a case, where the attorney erroneously stated that *M.* was tenant in fee, whereas another was tenant for life, and the counsel in consequence gave an opinion in favour of the title, which he would not have done had he been correctly instructed; it was held that the jury were warranted in finding for the plaintiff. *Ireson* v. *Pearman*,[11] 3 B. & C. 799. In an action against an attorney for negligence in a former action brought by him for the plaintiff, against attorneys for negligence, in which he had been nonsuited for want of proper proof of a judgment as set out in the declaration, there being an ambiguity in stating such judgment, whether it was stated as a direct allegation of a judgment on record, or only as a consequence of that negligence; held that this was not to be considered as such gross negligence as would render the defendant liable; held also, that his liability would not be altered by his showing that he had consulted others, but must depend on the nature of the mistake, in a case where the law presumes him to have the requisite knowledge himself. *Godefroy* v. *Dalton*,[12] 6 Bing. 460. Where an attorney improperly assumes to himself

[1]Eng. Com. Law Reps. xix. 166. [2]*Id.* viii. 225. [3]*Id.* xxxi. 389. [4]*Id.* xi. 138. [5]*Id.* xxix. 47. [6]*Id.* xxxiv. 41. [7]*Id.* xxxiv. 624. [8]*Id.* vi. 401. [9]*Id.* x. 232. [10]*Id.* xiv. 174. [11]*Id.* x. 232. [12]*Id.* xix. 132.

Proof of negligence.

*Before the point had been fully settled that the grant of an annuity is void, unless the trusts of the annuity-deeds be recited in the memorial, it was held that such an omission did not amount to *primâ facie* evidence of gross negligence (*l*). It has been held that an action for negligence in conducting a suit against excise-officers, cannot be maintained if the seizure was lawful, since no damage can have been sustained (*m*).

Where a declaration against an attorney for suffering the defendant in a former suit to be superseded, alleged that she was justly indebted to the plaintiff, and it appeared that she was a married woman, the plaintiff was nonsuited (*n*).

In the case of *Russell* v. *Palmer* (*o*), the Court held that the action had been well conceived against the defendant for negligence in omitting to cause one *Stewart*, against whom the plaintiff had recovered a judgment, to be charged in execution within two terms next after judgment.

The evidence for the plaintiff in such cases must be regulated by the declaration which sets out the whole of the case. If he complain that he has lost the debt which was due to him from the former defendant, he must prove the existence of the debt; and if he has obtained judgment to recover it, he should prove the fact, if alleged, by an examined copy of the judgment-roll. If the former defendant has been arrested on mesne-process, the writ should be produced, or an examined copy, if it has been returned, and the actual time of commitment may be proved by the books of the prison. The grounds of the discharge will be shown by means of the *supersedeas*, or order for the discharge.

In such cases where the question is, whether the defendant has been guilty of gross negligence contrary to the known and usual practice, those who are conversant in the same kind of practice may be examined as witnesses on either side (*p*).

If the ground of action be negligence in completing a conveyance, where there is a defect in the memorial of an annuity, in consequence of which it is set aside, the plaintiff, to prove the defect, after having proved the retainer *of the defendant, his conduct of the business, and the execution of the deeds, which should be produced, should prove the rule of court ordering it to be set aside, and an examined copy of the affidavits used upon the motion. So, if the plaintiff has been evicted in consequence of a defect in title, arising from the negligence of the defendant, he should produce the deeds, and prove the execution of them and the payment of the money, and show that he has been evicted by proof of the judgment in ejectment, the execution of the writ of possession, producing the writ or an examined copy, if it has been returned.

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In an action against an attorney for negligence in omitting to take any step in defence, it is not necessary to show special damage, nor to show that the plaintiff had a good defence; it is for the attorney to show, if he can, that there was no defence (*q*).

the character of a receiver, and neglects the duty thereof, he will be responsible (in equity) for any rents lost by his neglect. *Wood* v. *Wood*, Russ. 558. So if he abandon a suit, and unnecessarily institute another, the Court will take care that the client does not suffer. *Ib.*

(*l*) 4 Burr. 2060. Per Ld. Ellenborough, *Bakie* v. *Chandless*, 3 Camp. 17.

(*m*) *Aitcheson* v. *Madock*, Peake's C. 162. See *Alexander* v. *Macauley*, 4 T. R. 611; also tit. SHERIFF.

(*n*) *Lee* v. *Ayrton*, Peake's C. 34. (*o*) 2 Wils. 325.

(*p*) 2 Wils. 238. In the case of *Pitt* v. *Yalden*, 4 Burr. 2060, Mansfield, L. C. J. said (alluding to the case of *Russell* v. *Palmer*), "L. C. J. Wilmot told me, that it came out upon the defendant's own evidence, and the verdict went upon that fact, that it was *lata culpa* or *crassa negligentia*, in Palmer the attorney; and that there appeared to be in reality no ground for the pretence of compromise, which had been made part of Mr. Palmer's excuse and defence."

(*q*) *Godefroy* v. *Jay*,[1] 7 Bing. 413; and see *Marzetti* v. *Williams*,[2] 1 B. & Ad. 415. It seems that an

[1]Eng. Com. Law Reps. xx. 183. [2]*Id.* xx. 412.

If an attorney sue out a writ in the name of a party, without any authority express or implied, and receive the debt and costs of the writ, such costs may be recovered back as money had and received (*r*).

Where an arrest is made under process, afterwards set aside for irregularity, the attorney in the suit, as well as the plaintiff, is liable in trespass (*s*).

An action of this nature sounds in damages, and the jury are not to give a verdict for the whole original debt, but only such damages as are commensurate with the loss which has probably resulted from the defendant's negligence (*t*). And therefore the plaintiff should be prepared with evidence to show the probability that he should have recovered the whole or part of the debt, if the defendant's negligence had not intervened; as by evidence of the circumstances of the party indebted to him. Damages.

The solicitor under a commission is not liable to the messenger whom he nominates; but it is otherwise where he agrees with the petitioning creditor to work the commission for a sum certain (*u*). An attorney cannot set-off against a demand of his client for money received on account of his client as damages, in an action for services barred by the Statute of Limitations (*x*).

An attorney is not personally liable to a witness whom he subpœnas (*y*) to give evidence for his client.

Competency of.—On grounds of policy, as has already been seen, an attorney is not allowed to disclose the secrets of his client; neither can he be permitted to give parol evidence of a deed, or prove a copy of one which has been entrusted to him by his client (*z*).

Admissions made by an attorney on the record, with a view to the trial of the action, as of the execution of a deed or agreement, are evidence against his client (*a*); but mere admissions in conversation are not admissible, for they are not warranted by a presumption that they were authorized by the client (*b*). So an admission, proved to be in the handwriting of the attorney on the record, consenting to a verdict for the plaintiff, will be sufficient evidence of the defendant's consent. An admission by the party's *115

attorney, where there is no defence, is not justified in omitting to put in a plea, but ought to plead the general issue, and watch that the plaintiff proves his case against his client. *Ib. Quære tamen.*

(*r*) *Dupen* v. *Keeling*,[1] 4 C. & P. 102. *Secus* if he had such authority, although the client had no cause of action.

(*s*) *Codrington* v. *Lloyd*,[2] 8 Ad. & Ell. 449.

(*t*) 2 Wils. 328.

(*u*) *Hartop* v. *Juckes*, 2 M. & S. 438. See 6 Geo. 4, c. 16, s. 14. He is personally liable on an agreement to withdraw the record, &c. tax costs, &c. and pay them. *Iveson* v. *Conington*,[3] 1 B. & C. 160; 2 D. & R. 307. See *Burrell* v. *Jones*,[4] 3 B. & A. 47. Where an attorney selects an officer to execute writs, he is personally liable to the party so employed. *Foster* v. *Blakelock*,[7] 5 B. & C. 328.

(*x*) *Waller* v. *Lacy*, 1 G. & M. 55.

(*y*) *Robins* v. *Bridge*, 3 M. & W. 115. The court will compel an attorney to pay the under-sheriff's fees on a commission of lunacy, credit having been given him in his professional character. *Ex parte Bodenham*, 8 Ad. & Ell. 959.

(*z*) Per Bayley, J. Leicester Lent Ass. 1809, Phillips, 140. And see *Copeland* v. *Watts*,[8] 1 Starkie's C. 95.

(*a*) *Young* v. *Wright*, 1 Camp. 139. *Goldie* v. *Shuttleworth*, 1 Camp. 70. *Milward* v. *Temple*, Ibid. Vide *supra*, tit. Admissions; and Index, tit. Admissions.

(*b*) *Parkins* v. *Hawkshaw*,[7] 2 Starkie's C. 239. But where it is proved that he is the attorney of the other party, proof of a proposal made by him on behalf of his client is admissible. *Gainsford* v. *Grammar*, 2 Camp. 9. If an attorney appear without authority, the appearance is good, and the remedy is by action. *Anon.* Salk. 86. An offer by the attorney of the father of the defendant, an infant, is not admissible, although the defendant afterwards employ the same attorney. *Brughart* v. *Angerstein*,[8] 6 C. & P. 690. An undertaking to appear for Messrs. *T.* & *M.*, joint owners of the sloop *A.*, given by the attorney on the record, is evidence of joint ownership. *Marshall* v. *Cliff*, 4 Camp. 133. See further as to admissions by an attorney, *Truslow* v. *Bruton*,[9] 9 Moore, 64.

[1]Eng. Com. Law Reps. xix. 295. [2]*Id.* xxxv. 433. [3]*Id.* viii. 50. [4]*Id.* v. 223. [5]*Id.* xi. 246. [6]*Id.* ii. 311. [7]*Id.* iii. 332. [8]*Id.* xxv. 600. [9]*Id.* xvii. 121.

attorney on record, in a letter written before the action, is not admissible without proof of authority (*c*).

ATTORNMENT. *See* 4 Anne, c. 16, s. 9.

AUGMENTATION.

A CURACY may be proved to have been augmented, by showing an order for the augmentation entered in a book, and signed by the governors of Queen Anne's Bounty, according to the stat. 1 Geo. 1, stat. 2, c. 10, s. 20, without proof that the money was laid out in land, and allotted by deed under the corporation seal of the governor, to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute and the stat. 9 Geo. 2, c. 36 (*d*).

AUTERFOITS ACQUIT. *Vide Supra*, Vol. I. and Index.

AUTHORITY (*e*).

As to the authority of an agent, *see* tit. AGENT.
Of a partner, *see* tit. PARTNER.
See also TRESPASS.—REPLEVIN.
As to proof of authority to receive money, *see* tit. PAYMENT.
To give notice to quit, *see* EJECTMENT.
See also tit. POWER.

AVOIDANCE.

PROOF of, when necessary to avoid a license. See *Roberts* v. *Davey*, 4 B. & Ad. 664.

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*AWARD (*f*).

IT has been seen that an award regularly made under a submission by the parties, operates conclusively as a judgment of a Court of competent jurisdiction (*g*).

Proof of submission.

In an action upon an award, it is necessary to prove the authority conferred by the parties on the arbitrator, and his making the award. The authority may be by parol. If it be by deed, it must be produced, and the

(*c*) *Wagstaff* v. *Wilson*,[1] 4 B. & Ad. 339. *Secus*, if the letter from defendant's attorney contains an undertaking to appear. *Marshall* v. *Cliff*, 4 Camp. 133. And see *Roberts* v. *Gresley*,[2] 3 C. & P. 380. *Peyton* v. *Governors of St. Thomas's Hospital*,[3] 3 C. & P. 363. *Wilmot* v. *Smith*,[4] 3 C. & P. 453.

(*d*) *Doe* d. *Graham* v. *Scott*, 11 East, 478.

(*e*) See Vin. Ab. tit. AUTHORITY; and *Vernon* v. *Crew*, Cro. C. 57.

(*f*) No precise form of words is necessary to constitute an award. *Lock* v. *Vulliamy*,[5] 5 B. & Ad. 600. In debt on bond conditioned for the due discharge and accounting by a clerk, to be ascertained by the inspection of *A.*, held that a paper in the handwriting of *A.* showing the deficiency was in the nature of an award, and required a stamp. *Jebb* v. *M'Kierman*.[6] 1 M. & M. 340. Where, on reference of an action in which several issues were joined, the arbitrator found for the defendant on some issues, but not going to the whole cause of action, and for the plaintiff on the others, but omitted to award damages; held, that the award was insufficient, as it was impossible to say how the verdict was to be entered. *Howard* v. *Duncan*, 7 Dowl. 91. But where one plea covered the whole cause of action, which the arbitrator found in favour of the defendant, held, that he had done right in awarding no damages on those issues which he found for the plaintiff. *Savage* v. *Ashwin*, 4 M. & W. 530. See further as to the sufficiency of an award, *Petch* v. *Conlan*, 7 Dowl. P. C. 426. *Petch* v. *Fountain*,[7] 5 Bing. N. C. 442. Where the award finds a certain sum to be due, but no express order to pay it, there being no contempt, the payment cannot be enforced by an attachment, but only by action on the award. *Seaward* v. *Howey*, 7 Dowl. 318.

(*g*) *Supra*, Vol. I. Index, tit. JUDGMENTS. *Doe* v. *Rosser*, 3 East, 11. *Herbert* v. *Cooke*, Willes, 36; *infra*, 86, n. (*c*). *Whitehead* v. *Tuttersall*,[8] 1 Ad. & Ell. 491. Where the parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, his decision was held to be final, although he recommended that the printed statute should be compared with the parliament roll; and the Court said, that if the statute was misprinted, the plaintiff (who sought to repudiate the arbitrator's decision) should have shown it. *Price* v. *Hollis*, 1 M. & S. 105.

[1]Eng. Com. Law Reps. xxiv. 70. [2]*Id.* xiv. 258. [3]*Id.* xiv. 349. [4]*Id.* xiv. 386. [5]*Id.* xxvii. 135. [6]*Id.* xxii. 330. [7]*Id.* xxxv. 169. [8]*Id.* xxviii. 127.

execution (*h*) by all (*i*) the parties to the reference must be proved. To prove the appointment of an umpire it is not sufficient to produce the joint award of the arbitrators and umpire in which the appointment is recited (*j*).

Where four parties agreed to refer the co-partnership accounts, and all matters in difference between them, and any two of them, and the arbitrator awarded that a separate debt was due from *A.*, one of the partners, to *B.* another partner, it was held, that in order to establish the existence of this debt it was necessary to prove the execution of the submission by *A.* and *B.*, and also by the two other partners (*k*). The appointment of an umpire out of two persons whom two arbitrators have chosen by lot is bad, and is not cured by an acquiescence of the parties before they knew the fact (*l*).

A variance as to the day to which the time for making the award was alleged to be enlarged, will not be material (*m*).

Where the original time for making the award has been enlarged, the plaintiff must show that it was duly enlarged, either in pursuance of authority given to the arbitrator by the terms of the submission, or by subsequent consent. If the enlargement has been made under a Judge's order, consent of the parties must be shown to warrant the order (*n*). An irregular enlarge-
*ment is waived by the subsequent appearance of the parties before the *117
arbitrator (*o*).

Where the submission is to *A.* and *B.*, and such third person as they shall appoint, in order to satisfy an allegation that *A.* and *B.* appointed *C.*, it is not sufficient to produce an award executed by the three, reciting that *A.* and *B.* did appoint *C.*, even although *C.* acted along with them in the arbitration (*p*) (A).

Where an award has been made on a reference by rule of court, to prove the order (in the same court) it is sufficient to produce the office-copy of the rule, making the order a rule of court (*q*).

Next, the execution of the award itself must be proved, by means of Of the
the attesting witness, if it has been subscribed by one, or proof of his award.
handwriting, and perhaps that of the arbitrator, if the witness be dead (*r*) (B).

(*h*) See tit. Deed. (*i*) *Farr* v. *Owen*,[1] 7 B. & C. 427.

(*j*) *Still & another* v. *Halford*, 4 Camp. 17. And see *Maule* v. *Stowell*, 15 East, 99. As to the appointment of an umpire, see *Bates* v. *Cooke*,[2] 9 B. & C. 471. *Soulsby* v. *Hodgson*, 3 Burr. 1474. Such appointment must be the result of the will and judgment of the two. *In re Cassell*, 7 B. & C. 626.

(*k*) *Antram* v. *Chace*, 15 East, 209. (*l*) *Greenwood* v. *Titterington*,[3] 9 Ad. & Ell. 699.

(*m*) *Swinford* v. *Burn*,[4] 1 Gow. 5. See 2 Saund. 290, a; *Gilbert* v. *Stanislus*, 3 Price, 54.

(*n*)[5] 5 B. & C. 390, on Motion for an Attachment. A direction by an arbitrator, "I direct that a rule of this court shall be applied for, by counsel's hand, to enlarge the time of making my award," is of itself a sufficient enlargement. *Hallett* v. *Hallett*, 5 M. & W. 25. An irregularity as to enlarging the time is waived by attending subsequent meetings before the arbitrator. *Ib.*

(*o*) *Re Hick*,[6] 8 Taunt. 694. *Lawrence* v. *Hodgson*, 1 Y. & J. 16. *Holden* v. *Glasscock*, 8 D. & R. 151.

(*p*) *Still* v. *Halford*, 4 Camp. 17.

(*q*) *Ibid.* But if the action be brought in another court, *semble*, the rule itself should be produced.

(*r*) Where the making and publishing of an award are sworn to, but without fixing the time, the Court will presume that it was made in due time. *Doe* v. *Stillwell*,[7] 8 Ad. & Ell. 645. See Private Writing, Proof of.—Attesting Witness.

(A) (Under a submission to several, all must join in the award, unless the terms of the submission make a different provision. *Towne* v. *Jaquith*, 6 Mass. R. 46. *Case of a Turnpike Road, &c.* 5 Binn. 484–5. *Crofoot* v. *Allen*, 2 Wend. 494. In debt for the penalty of an arbitration bond an award must be shown conforming substantially to the submission prescribed in the condition, which cannot be changed or added to by parol. But when the action is on the award, and not for the penalty of the bond, if the declaration shows that the award is in conformity with and justified by the terms of submission (parol or written), it is sufficient. *Shockey's Ad'r* v. *Glassford*, 6 Dana, 9.)

(B) (An award must show that the arbitrators met at the time and place specified in the submission, or

[1]Eng. Com. Law Reps. xiv. 71. [2]*Id.* xvii. 407. [3]*Id.* xxxvi. 247. [4]*Id.* v. 438. [5]*Id.* xi. 259. [6]*Id.* iv. 249. [7]*Id.* xxxv. 480.

Where a parish had continued to repair a road within it, notwithstanding an award made by commissioners under an inclosure Act sixteen years ago, which awarded that the highway was in a different parish, it was held that upon an indictment against the first parish for not repairing the road, it was incumbent on them to prove that the previous notices to the parishes to be affected by the award had been given as required by the Act (*s*); for the repairs subsequent to the award raised a presumption that notice had not been given. But in the absence of such a presumption, a presumption arises in such a case that the commissioners have done their duty (*t*). The plaintiff is entitled to recover interest from the time of demanding the sum awarded, as a liquidated sum (*u*). Notice of the award need not be proved, for the parties are bound to take notice of the award (*v*). An indorsement (unstamped) on an award is a sufficient authority to a third person to demand the sum awarded (*x*).

The defendant may insist that one or more of the parties to the award were minors or married women, and that they were not bound by the submission, and consequently that there was no mutuality (*y*) (A).

The authority of an arbitrator is revocable, and the defendant may show that the authority was in fact revoked previous to his making the award (*z*) (B).

(*s*) *R.* v. *Haslingfield*, 2 M. & S. 558.

(*t*) According to the general rule. See Lord Ellenborough's observations, 2 M. & S. 561; *Williams* v. *East India Company*, 3 East, 192; and tit. PRESUMPTION. As to awards under inclosure Acts, see *Doe* d. *Sweeting* v. *Hellard*,[1] 9 B. & C. 789; *Revell* v. *Jodrell*, 4 T. R. 424; *Townley* v. *Gibson*, 2 T. R. 701; *Doe* v. *Davidson*, 2 M. & S. 175.

(*u*) *Johnson* v. *Durant*,[2] 4 C. & P. 327.

(*v*) 2 Saund. 62; unless such notice be made necessary by the special terms of the contract or award.

(*x*) *Langman* v. *Holmes*, 2 W. Bl. 991.

(*y*) A submission, stated to be an order by the Vice-Chancellor in a suit pending before him, by consent of the attornies in the suit, where some of the parties were minors, without any averment (in a declaration on the award) to show that the next friends of the infants took the obligation on themselves, is not binding, for it is not *mutual*. *Biddell* v. *Dowse*,[3] 6 B. & C. 255; 1 Ch. Ca. 279.

(*z*) As by the death of one of the parties, unless the case be provided for by the terms of the rule or submission. See *Potts* v. *Ward*,[4] 1 Marsh. 366; *Cooper* v. *Johnstone*, 2 B. & A. 394; *Edmunds* v. *Cox*,[5] 2 Chitty's C. T. M. 432. And see *In re Hare*, 6 Bing. N. C. 158. *Secus*, where the arbitrator was merely to settle the amount of a verdict previously taken. *Bower* v. *Taylor*,[6] cited 7 Taunt. 574. Where a stranger to the suit became party to a rule by which the parties were bound to pay to him or his executors the sum awarded, it was held that his executors were entitled to an attachment, notwithstanding his death before the award made. *Rogers* v. *Staunton*,[7] 7 Taunt. 576. A party may, after submission even by deed, revoke his act previous to the award made. *Milne* v. *Grutrix*, 7 East, 608. So a party may revoke a submission by rule of *Nisi Prius* before it is made a rule of court. *Clapham* v. *Higham*,[8] 1 Bing. 87; 2 B. & A. 395; though he would be guilty of a contempt in revoking it after it had been made a rule of court. *Ibid.* But if a Judge's order direct a reference, and that either party wilfully preventing, &c. should pay such costs as the Court should think fit, though the party may revoke his own submission, he cannot revoke the latter part of the order. *Asten* v. *George*, 2 B. & A. 399. An intervening bankruptcy of one of the parties held to be no revocation. *Andrews* v. *Palmer*,[9] B. & A. 250. In an action of covenant for not performing an award, a plea that the defendant by deed revoked the authority, is good, without expressly alleging notice to the arbitrators: for the allegation imports notice. *Marsh* v. *Bulteel*,[10] 5 B. & A. 507; and see *Vynior's Case*, 8 Co. 162. It seems, that where power is given to an arbitrator to examine the parties, he may examine those also who ought to have been made parties. See *Lloyd* v. *Archbowle*, 2 Taunt. 324; *Campbell* v. *Twem-*

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it is bad. *Strum* v. *Cunningham*, 3 Ohio Rep. 287. But arbitrators may correct or amend their award, before it has been delivered to the parties. *Eveleth* v. *Chase et al.* 17 Mass. R. 458.)

(A) (An executor or administrator has authority to submit to referees or arbitrators a demand in favour of or against the estate he represents, and the award will be binding. *Coffin* v. *Cottle*, 4 Pick. 454. *Bean* v. *Furnam et al.* 6 Pick. 269.)

(B) (Proof that arbitrators, before making an award, resigned their authority, and that such resignation was accepted by the parties, is admissible in bar of an action on an award. *Relyea* v. *Ramsay*, 2 Wend. 602. A submission may be revoked at any time before the award; and a revocation may be presumed, from the fact that suit was brought after the submission, and before any binding award was entered. *Peters' Ad'rs* v. *Craig*, 6 Dana, 307.)

[1]Eng. Com. Law Reps. xvii. 501. [2]*Id.* xix. 406. [3]*Id.* xiii. 164. [4]*Id.* iv. 341. [5]*Id.* xviii. 390. [6]*Id.* ii. 222. [7]*Id.* ii. 223. [8]*Id.* viii. 257. [9]*Id.* vi. 417. [10]*Id.* vii. 175.

*But he cannot go into any collateral evidence to impeach the award (*a*); as by showing that the arbitrator acted corruptly or erroneously (*b*) (A), or as it seems by mistake (*c*). But he may take any objection which is apparent on the proceedings: as that the award is bad for excess of authority in the whole or in part (*d*). So he may show, either by special plea or under the general issue, in an action on the award, that the submission was obtained by fraud (*e*); or he may object that the award is not final or certain (*f*). Proof in defence.

It is no defence to an action on the submission, that the defendant revoked the authority before the award made (*g*).

An award made under bonds of submission, that certain premises should be delivered up to the lessor of the plaintiff in ejectment, was held to be *conclusive as to his right (*h*). And in general, an award made under competent authority is binding and conclusive upon the parties (*i*). And before the new rule it was evidence under the general issue in assumpsit (B). *119

But an award, although under a submission of all matters in difference, will not be conclusive upon any matter which was not at all contested

low, 1 Price, 81. And although the arbitrator may have examined a witness not legally competent, the Court will not set aside the award. *Laird* v. *Dixon*, K. B. Mich. T. 1827. Note, that the verdict had been entered on the arbitrator's certificate at the assizes, and the ground of motion was, that the arbitrator, in an action against one of the members of a joint-stock company, had admitted the evidence of other members of the company for the defendant. On motion for an attachment, the Court will not notice objections not appearing on face of award. *Macarthur* v. *Campbell*,[1] 2 Ad. & Ell. 52. The ordering a sum of money to be paid on a Sunday does not vitiate an award. *Hobdell* v. *Miller*, 6 Bing. N. C. 292.

(*a*) *In re Cargey*,[2] 2 D. & R. 222. For the plaintiff would be unprepared at the trial. The plea in that case was *nil debet*. The remedy in case of partiality or corruption is by application to the Court, or by an action against the arbitrators. *Ibid.*; and see *Swinford* v. *Burn*,[3] 1 Gow. 5. Where evidence had been taken at a meeting irregularly convened, and at which the parties did not attend, but it was afterwards struck out, and the arbitration proceeded, the Court refused to set the award aside. *Kingwell* v. *Elliott*, 7 Dowl. 423.

(*b*) This at all events cannot be done where application might have been made to the Court to set the award aside on that ground. *Braddick* v. *Thompson*, 8 East, 344. *Wills* v. *Maccarmick*, 2 Wils. 148.

(*c*) *Ashton* v. *Poynter*, 1 C. M. & R. 738. *Johnson* v. *Durrant*,[4] 2 B. & Ad. 931.

(*d*) *Bonner* v. *Liddell*,[5] 1 B. & B. 80. As where, according to an agreement for a lease, the term was to be for 63 years; but there was to be no payment of rent for the first three years, and the arbitrator authorised to direct a lease to be executed according to the agreement, awarded the execution of a lease for 63 years, to commence from the payment of rent.

(*e*) *Sackett* v. *Owen*,[6] 2 Chitty's R. 39.

(*f*) *Wills* v. *Maccarmick*, 2 Wils. 148. Vide *supra*, p. 118, note (*b*). See further, *Ross* v. *Boards*,[7] 8 Ad. & Ell. 290; *Wykes* v. *Shipton*,[8] 8 Ad. & Ell. 246, n; *Brown* v. *Croydon Canal Co.*,[9] 9 Ad. & Ell. 522; *Taylor* v. *Shuttlewarth*, 6 Bing. N. C. 277; *Seccombe* v. *Babb*, 6 M. & W. 129; *Gisborn* v. *Hart*, 5 M. & W. 50.

(*g*) *Brown* v. *Tanner*, 1 M. & Y. 464. For a revocation of authority is a breach of an agreement to perform an award. See *Grazebrook* v. *Davis*,[10] 5 B. & C. 534. And see *Doe* v. *Horner*,[11] 8 Ad. & Ell. 235.

(*h*) *Doe* v. *Rosser*, 3 East, 11.

(*i*) *Campbell* v. *Twemlow*, 1 Price, 81; 6 Ves. 282; 9 Ves. 364; 14 Ves. 271; 1 Swanst. 55. *Price* v. *Hollis*, 1 M. & S. 105. Where an action of debt, to which the general issue and a set-off were pleaded, was referred, "the costs of the reference and of the award to abide the event," and the arbitrator found that the plaintiff had no cause of action, and not entitled to recover in the action, but the award was silent as to the set-off; held that the award was final, and the defendant entitled to recover the costs; the *event*, being taken to *mean* the event as to the action, and not as to the determination of particular issues, which the arbitrator was not distinctly required to do. *Duckworth* v. *Harrison*, 4 M. & W. 432; and 7 Dowl. 71.

(A) (If arbitrators act corruptly, or exceed their authority, or if there be gross errors and mistakes in the award, and an action be brought upon it, the defendant may plead any of these matters in bar of the action. So if arbitrators take into consideration matters not submitted, or omit to take into consideration those which are submitted, the award will not be binding, and an action upon it may be avoided by pleading such matters in bar. *Bean* v. *Farnam et al.* 6 Pick. 269.

A promise by a party in whose favour an award is made, to correct any mistakes which may have been made by the arbitrators, is void for want of consideration. *Efner* v. *Shaw*. 2 Wend. 567.)

(B) (*Homes* v. *Avery*, 12 Mass. Rep. 134.)

[1]Eng. Com. Law Reps. xxix. 27. [2]*Id.* xvi. 80. [3]*Id.* v. 438. [4]*Id.* xxii. 211. [5]*Id.* v. 20. [6]*Id.* xviii. 246. [7]*Id.* xxxv. 390. [8]*Id.* xxxv. 385. [9]*Id.* xxxvi. 188. [10]*Id.* xii. 306. [11]*Id.* xxxv. 382.

before the arbitrator (*k*) (A). And the arbitrator may be examined in order to prove that no evidence was given upon a particular subject (*l*). An award made upon a parol submission, is evidence under a count on the original demand (*m*), or on the account stated (*n*). An arbitrator may demand a compensation for his trouble, and the plaintiff may compel contribution from the parties (*o*). An agreement by parties to refer all disputes that shall occur, does not oust the jurisdiction of the courts of law or equity (*p*) (C).

Property awarded to be delivered up on payment of a sum specified, in satisfaction, does not vest on tender of the money, which is refused, and therefore the party entitled to the property cannot maintain trover, but must bring an action on the award (*q*).

BAIL (*r*).

The bail of a party are incompetent, from interest, to give evidence for him (*s*). Where the testimony of one or both the bail is necessary, the party, on application to the Court, may substitute another in his place, and so render him competent (*t*).

BAIL-BOND.

Bail-bond. The plaintiff in an action on a bail-bond, whether he be the sheriff, or his assignee, under the plea of *non est factum*, need prove the execution only (*u*), in the ordinary way. If the defendant plead that the bond was taken for ease and favour, and the plaintiff reply that it was taken for the security of his prisoner, and issue be joined thereon, slight evidence will, it
*120 is said, *maintain the replication (*x*). Upon a plea of *comperuit ad diem*, the appearance, being matter of record, is tried by the record (*y*).

When the defendant pleaded that there was no assignment of the bond by the sheriff or under-sheriff, it was held that the seal (of office) to the assignment was sufficient whoever had signed it (*z*).

(*k*) *Ravee* v. *Farmer*, 4 T. R. 146. *Marten* v. *Thornton*, 4 Esp. C. 180. But see *Dunn* v. *Murray*,[1] 9 B. & C. 780: Lord Ellenborough's observations in *Smith* v. *Johnson*, 15 East, 213; *Seddon* v. *Tutop*, 6 T. R. 610.

(*l*) *Martin* v. *Thornton*, 4 Esp. C. 180, *cor.* Ld. Alvanley. But in *Johnson* v. *Durant*,[2] 4 C. & P. 237, it is said that he cannot be asked under what impression he made his award.

(*m*) *Kingston* v. *Phelps*, Peake's C. 227. (*n*) *Ibid.*

(*o*) *Swinford* v. *Burn*,[3] 1 Gow, 5.

(*p*) *Thompson* v. *Charnock*, 8 T. R. 159. *Kill* v. *Hollister*, 1 Wils. 129. *Wellington* v. *Macintosh*, 2 Atk. 525.

(*q*) *Hunter* v. *Rice*, 15 East, 100.

(*r*) The refusing bail where it ought to be granted, is a misdemeanor, and the subject of an action or indictment; 2 Haw. c. 15, s. 13.

(*s*) 1 T. R. 164; 2 Esp. C. 606. *Collett* v. *Jenners*, Rep. temp. Hardw. 133.

(*t*) Tidd's Pr. 264. *Collett* v. *Jenners*, R. T. Hardw. 133. This is done by an application to the Court, on affidavit, stating that the witness is a material one, upon the terms of adding and justifying another.

(*u*) But if the plaintiff should inadvertently have joined issue upon the plea of *nil debet*, instead of having demurred, he will, it is said, be bound to prove all the averments in the declaration, the issuing the writ, the arrest, the execution of the bond, and the assignment, if the action be brought by the assignee. *Qu.*

(*x*) 1 Sid. 383. See 1 Saund. 162; 1 Lev. 254; Com. Dig. Pleader, 2 W. 25.

(*y*) The plea is proved by the production of the recognizance roll, containing an entry of the appearance. *Whittle* v. *Oldaker*, 9 B. & C. 478. If the issue depend on the date of the appearance, the Court of C. P. will order the *date* of the appearance to be entered on the filazer's book, although before the application to the Court, issue has been joined on the plea of *comperuit ad diem*. *Austen* v. *Fenton*, 1 Taunt. 23.

(*z*) *Harris* v. *Ashley*, 1 Sel. N. P. 554. cor. Lord Mansfield. And on a traverse of the assignment, it is not necessary to show that the witnesses subscribed their names in the presence of the officer executing the assignment. *Phillips* v. *Barlow*,[4] 1 Bing. N. C. 433.

(A) (It is competent to prove by the oath of arbitrators, that certain matters were not examined or acted upon by them, and that consequently they had made a mistake in their award. *Roop* v. *Brubacker*, 1 Rawle, 304. {And also the time when, and the circumstances under which, he made his award. *Woodbury* v. *Northy*, 3 Greenl. Rep. 85.})

(B) (See also *Goldstone et al.* v. *Osborne et al.* 2 Carr. & P. 550. 12 Eng. Com. Law Reps. 256.)

[1] Eng Com. Law Reps. xvi. 498. [2] *Id.* xix. 409. [3] *Id.* v. 438. [4] *Id.* xxvii. 446.

Where the bond is taken by the sheriff after the return of the writ, it is void; since the condition is, that the defendant in the original action shall appear at the return of the writ, which is impossible. The defendant may take advantage of the defence under the plea of *non est factum*, by producing the writ or relying upon the statement of the writ and return on the record (*a*).

The bail are estopped from saying that there was no arrest. A return of *non est inventus*, after the taking and before assigning the bond, may make the sheriff liable for a false return, or be the foundation for an application to the Court to set the bond aside, but cannot come in question in an action on the bond (*b*).

Bail are not discharged by the plaintiff's taking a cognovit from their principal, without their consent or knowledge, unless by the terms of it he is to have longer time for payment of the debt and costs than by regularly proceeding in the action (*c*).

BANK, JOINT STOCK. See St. 7 G. 4, c. 36, and tit. Partners.

BANKRUPTCY (A).

Under this head may be considered:—1st, Proofs in actions *by the assignees.*—2dly, Those in actions by creditors or others *against the assignees.*—3dly, Those in actions between the bankrupt and creditors.—4thly, Those on indictments against the bankrupt.—5thly, The competency of witnesses, &c.

1. *Of proofs by Assignees.* Assignees sue either in their representative character, or in their own right. If they claim in their character of assignees, they must (if their character be put in issue) (*d*), prove themselves to be such. The fact that commissioners have already declared the party a bankrupt is not even *primâ facie* evidence of the bankruptcy, for they act upon *ex parte* evidence, and have a mere authority without jurisdiction, and consequently their determination is not in the nature of a decree or judgment *by a Court of competent authority (*e*). But where the assignees declare upon a cause of action which accrued *after* the bankruptcy, without describing themselves as assignees, no evidence of title is necessary (*f*). Proofs by assignees. *121

To establish their title to the bankrupt's property, they must prove, 1. The commission of fiat (*g*). 2. The Trading. 3. The act of bankruptcy. 4. The petitioning creditor's debt. 5. The appointment of assignees.

(*a*) 4 M. & S. 338. For other evidence on the plea of *non est factum*, see tit. Deed.—Non est Factum.

(*b*) *Taylor* v. *Clow*,[1] 1 B. & Ad. 223. (*c*) *Stevenson* v. *Roche*,[2] 9 B. & C. 707.

(*d*) By the rule H. T. 4 W. 4, in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue unless specially denied. A plea to a declaration in trover by the assignee of a bankrupt puts in issue the petitioning creditor's debt, trading, and act of bankruptcy, as well as the plaintiff's appointment as assignee. *Butler* v. *Hobson*,[3] 4 Bing. N. C. 290. *Buckton* v. *Frost*, 1 P. & D. 102.

(*e*) Ld. Raym. 580. See *Bonham's Case*, 8 Coke, 114, Callis. 216. The act of a Judge is not traversable if he be the absolute Judge of the cause; *secus*, in cases for a certificate by such as be no absolute Judge of the cause, as commissioner of bankrupt. *Bonham's Case*, 8 Coke, 114.

(*f*) *Evans* v. *Man*, Cowp. 569, B. N. P. 37. *Thomas* v. *Rideing*, Wightw. 65.

(*g*) By the stat. 1 & 2 W. 4, c. 56, s. 12, the Lord Chancellor is empowered, on petition, and on filing such affidavit and giving such bond as the law requires, to issue his fiat under his hand, in lieu of a commission; and by sec. 13, such fiat, prosecuted in the Court of Bankruptcy, shall be filed and entered of record in the said court, and it shall thereupon be lawful for any one or more of the commissioners thereof to proceed thereon in all respects as commissioners, &c.

(A) (For the bankrupt laws of the U. S. of 1800 and 1841, together with the decisions under the acts of 1800, see the appendix.)

[1]Eng. Com. Law Reps. xx. 378. [2]*Id.* xvii. 477. [3]*Id.* xxxiii. 358.

Fiat. **First.* The commission of fiat is proved by the production of the com-

By sec. 28, the Judges of the Court of Bankruptcy are to seal all such proceedings, documents, and copies as are required to be sealed.

By sec. 29, a certificate of the appointment of assignees, purporting to be under the seal of the said court, shall be received as evidence of such appointment, without further proof.

The st. 2 & 3 W. 4, c. 114, recites that the provisions of the st. 6 G. 4, (ss. 96 and 97), had been found defective, and that no provision had been made in the 1 & 2 W. 4, for entering of record fiats and other proceedings not prosecuted in the Court of Bankruptcy; and enacts, that the records of all commissions of bankrupt, and all proceedings under the same which may have been heretofore entered of record, pursuant to or under colour of the st. 6 G. 4, c. 16, or any other Act, shall be removed into the Court of Bankruptcy, and shall be kept as records of the said court, in such place as the Judges of the said court shall from time to time direct; and it shall be lawful for the Judges of the Court of Bankruptcy to nominate the person heretofore appointed by the Lord Chancellor, to enter such proceedings of record; or in case of his refusal to accept such office, some other fit and proper person as the clerk of enrolment to the said court; and that such clerk of the enrolments, and his successors, shall have the care and custody of all the said records so removed, and shall in like manner enter of record all matters and proceedings in bankruptcy which by this Act or the said recited Acts (6 G. 4, c. 16, and 1 & 2 W. 4, c. 36), or by any order made in pursuance thereof, are or may be directed to be entered of record, upon payment of the fees thereinafter mentioned.

Sect. 2 provides that all commissions of bankruptcy issued before the 1st day of Sept. 1825, and all depositions and other proceedings relating to such commissions, directed to be enrolled, and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record.

Sect. 3. Provided nevertheless, that the certificate of such entry, purporting to be signed by the person appointed to enter such proceedings, or by his deputy, shall have the same effect as if such commission had been issued after the said 1st day of Sept. 1825, and shall be received in evidence, without proof of the appointment or handwriting of such person.

Sect. 4. Any Judge of the Court of Bankruptcy may direct such officer to enter upon the records of the court any commission of bankrupt at any time heretofore issued, and the depositions and proceedings had and taken under the same, or such part or parts thereof as such Judge shall think fit; provided, that such officer may enter of record the several matters directed by the said recited Acts, or either of them, upon the application of any party interested therein, without any special order.

Sect. 5. All fiats already issued, or to be hereafter issued, to be prosecuted elsewhere than in the said Court of Bankruptcy; and all adjudications of bankruptcy by the persons named in such fiats to act as commissioners; and all appointments of assignees, and certificates of conformity made and allowed under such fiats, may and shall be entered of record in the said Court of Bankruptcy, upon the application of any party interested therein, on the payment of the fees thereafter mentioned, without any petition; and that any one of the Judges of the said court may, upon petition, direct any deposition or other proceedings under such fiat to be entered of record as aforesaid.

Sect. 7. In the event of the death of any of the witnesses deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any commission or fiat already issued, or hereafter to be issued, it shall be lawful for the assignees appointed under such commission or fiat, and for all persons claiming through or under them, or acting by or under their authority in the cases hereafter mentioned, to produce and read in evidence in all courts of civil judicature, and in all civil proceedings in maintenance and support of such commission or fiat, any deposition of such deceased witness relative to such petitioning creditor's debt, trading, or act of bankruptcy, which shall have been duly entered of record pursuant to the provisions of the said recited Acts or of this Act; and the production or reading of such deposition, or of any copy thereof duly authenticated according to the provisions of the said recited Acts or of this Act, shall have the same effect as if the matters therein had been deposed to by the same witness in such court according to the ordinary course and practice thereof: Provided always, that the before-mentioned depositions shall be read in evidence in such cases only where the party using the same shall claim, maintain, or defend some right, title, interest, claim, or demand which the bankrupt might have claimed, maintained, or defended in case no commission of bankrupt or fiat had issued, and shall not be read in evidence in any action or proceeding now pending, by which the validity of any commission or fiat is or may be brought into question.

Sect. 8. No fiat nor any adjudication of bankruptcy or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy aforesaid.

Sect. 9 provides, that upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof: Provided nevertheless, that all fiats and proceedings under the same, which may have been entered of record before the passing of this Act, shall and may, upon the production thereof, with the certificate thereon, purporting to be signed by the person so appointed to enter proceedings in bankruptcy, or by his deputy, be received as evidence of the same having been duly entered of record, anything herein contained notwithstanding.

Where an action was pending, and before the late Act, the party applying was entitled to have the proceedings produced for the purpose of their being given in evidence upon a *supœna duces tecum:* the assignees when called upon are bound to have the proceedings enrolled at the request of the parties interested, and if they refuse, it is at the peril of costs; but in such cases the application to the Court against them must be by petition, and not by motion. *Ex parte Johnstone*, 1 Mont. & M. 82. It was held that the courts of law

mission or fiat itself, recorded according to the statute, or by an office-copy (*h*).

*It has been held that assignees under separate commissions against *A.* and *B.*, who declare for goods sold and delivered by both the bankrupts, and also for goods sold and delivered by each, cannot recover in respect of the latter in addition to the former; for, suing in a representative capacity, they cannot, it was said, join rights of action in which those whom they represent could not have joined (*i*). And assignees under separate commissions against *A.* and *B.* cannot state themselves to be joint assignees (*k*); but the assignees under a joint commission against *A.* and *B.* may describe themselves as the assignees of either as well as of both, and in the same action they may recover joint as well as separate debts (*l*). But if they describe themselves as assignees of both, and state promises to both, they must prove the bankruptcy of both (*m*). Assignees under a joint commission against *A.* and *B.* and also under a separate commission against *C.*, may recover a debt due to the three (*n*.) If the plaintiffs sue in trover *123

had no jurisdiction under sections 95 and 96 of the stat. 6 G. 4, c. 16. *Johnson* v. *Gillett*,[1] 5 Bing. 5, and 2 M. & P. 8. Where the title appears in the assignment from the provisional assignee and the commissioners, to the general assignee, it is not necessary to enrol the provisional assignment. *Ex parte Martin*, 1 Mont. 84. A commission against a minor cannot be supported. *O'Brien* v. *Currie*,[2] 3 C. & P. 383. It is not merely voidable, but void. *Belton* v. *Hodges*,[3] 9 Bing. 365. The party is described in the commission as a money-scrivener only; it was held the plaintiff, in an action to try its validity, is not precluded by the limited description in the commission from proving any species of trading. (Per Holroyd, J.) *Smith* v. *Sandilands*, 1 Gow, C. 171. Assignees under a second commission, the former one existing, and no certificate obtained, seized certain goods of the bankrupt; it was held that, to a replication stating the former bankruptcy, a rejoinder that the goods were in the order and disposition of the bankrupt by the permission of the first assignees, was bad, the second commission being void. *Nelson* v. *Cherrell*,[4] 7 Bing. 663; see *Fowler* v. *Coster*,[5] 10 B. & C. 427, and *Till* v. *Wilson*,[6] 7 B. & C. 684. A commission issuing at the instance of the bankrupt, was held, notwithstanding the 6 Geo. 4, c. 16, to be supersedable. *Ex parte Gane*, 1 Mont. & M. 401; overruling the former judgment by the Vice-Chancellor, 2 Gl. & J. 319. A joint commission issued against two, describing them as coal-merchants, of, &c.; it appeared they had dissolved partnership three years before, and had since been engaged on separate farms; and it was held that the description was insufficient. *Ex parte Day*, 1 Mont. & M. 208. Where a joint fiat was taken out against two, one an infant, the Court allowed it to be annulled, either as to him only, or generally. *Watson, ex parte*, 3 Mont. & A. 682; 3 Deac. 277.

(*h*) The stat. 6 G. 4, c. 16, s. 95, enacts, that all things done pursuant to the Act passed in the 5th G. 2, be confirmed, and that the Lord Chancellor shall have power to appoint a proper person, who shall by himself or his deputy enter of record *all matters* relating to commissions, and have the custody of the entries thereof. Sec. 96 enacts, that no *commission of bankruptcy*, *adjudication* of bankruptcy, or *assignment* of the personal estate of the bankrupt, or *certificate* of conformity, shall be received as evidence, unless the same shall have been entered of record (in the registry appointed by the Act, sec. 95.) The same section provides, that on the production in evidence of any instrument so directed to be entered of record, having the certificate thereon purporting to be signed by the person appointed to enter the same, or by his deputy, the same shall, without any proof of such signature, be received as evidence of such instrument having been so entered of record.—By the 97th section it is enacted, that in every action, suit, or issue, office-copies of any original instrument or writing filed in the office, or officially in the possession of the Lord Chancellor's secretary of bankrupts, shall be evidence to be received of every such original instrument or writing respectively; and if any such original instrument or writing shall be produced on any trial, the costs of producing the same shall not be allowed on taxation, unless it appears that the production of such original instrument or other writing was necessary. The same stat., s. 89, enacts, that in any commission against any one or more member or members of a firm, the Lord Chancellor may, upon petition, authorize the assignees to commence or prosecute any action at law, or suit in equity, in the names of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree, or order therein, as if such action or suit had been instituted with the consent of such partner or partners; and if such partner or partners shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void.

(*i*) *Hancock* v. *Haywood*, 3 T. R. 433; but see note (*l*.)

(*k*) *Ray* v. *Davies*,[7] 2 Moore, 3.

(*l*) *Graham* v. *Mulcaster*,[8] 4 Bing. 115. *Scott* v. *Franklin*, 15 East, 428. *Smith* v. *Goddard*, 3 B. & P. 465. *Harvey* v. *Morgan*,[9] 2 Starkie's C. 17. *Stonehouse* v. *De Silva*, 3 Camp. 399.

(*m*) *Hogg* v. *Bridges*,[10] 2 Moore, 122. Note, that it was held in this case that the assignees of *A.* and *B.*, under a joint commission, could not sue for the separate property of either; but see the cases note (*l*). Vide tit. TROVER.

(*n*) *Streatfield* v. *Halliday*, 3 T. R. 779, n., that this was after verdict. In *Allen* v. *Hartley*, 3 T. R. 780,

[1]Eng. Com. Law Reps. xv. 344. [2]*Id.* xiv. 307. [3]*Id.* xxiii. 309. [4]*Id.* xx. 280. [5]*Id.* xxi. 104. [6]*Id.* xiv. 110. [7]*Id.* iv. 45. [8]*Id.* xiii. 367. [9]*Id.* iii. 222. [10]*Id.* iv. 70.

as the assignees of *A.* and *B.*, on the joint possession of both, they cannot recover separate property (*o*).

The appointment of a former assignee having been vacated by the Chancellor, and a new one appointed, the latter is assignee by relation, and may sue on a contract made by the former assignee (*p*).

Proof where no notice has been given under the statute.

The plaintiffs, according to the usual order of proof, next proceed to prove the several requisites of bankruptcy. But under the provisions of the late statute such proof is unnecessary, unless due notice has been given of the intention to dispute those facts, and even then they may be proved in some cases by means of the depositions taken under the commission.

The statute 6 G. 4, c. 16, s. 99, enacts (*q*), that in any action by or against
*124 any *assignee (*r*), or in any action against any commissioner, or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, *no proof shall be required* at the trial of the *petitioning creditor's debt or debts*, or of the *trading or act or acts of bankruptcy respectively*, unless the other party in such action

it was held, that a commission against two or three partners could not be supported. But now see the late stat. 6 G. 4, c. 16, s. 89.

(*o*) *Cock* v. *Turner*, London Sitt. after Hil. 41 G. 3, *cor.* Ld. Kcn. Sel. N. P. 1294. Vide tit. TROVER; and see 2 Saund. 47, n.

(*p*) *Alldritt* v. *Kettridge*,[1] 1 Bing. 355.

(*q*) The statute is prospective only, and applies to such commissions only as are issued after the passing of that Act. *Key* v. *Cook*,[2] 2 M. & P. 720. *Kay* v. *Goodwin*,[3] 6 Bing. 576. Where a commission against *T.* issued upon the petition of the assignees of *K.*, who, after an action of trover brought by them to recover the goods of *T.*, and a notice to dispute given, finding their debt as petitioning creditors insufficient, applied to the Lord Chancellor, under 6 Geo. 4, c. 16, s. 18, that upon satisfactory proof of an existing debt to *M.*, the commission might be proceeded in; upon which an order to that effect was made, and at the trial, in order to support the commission against *K.*, the plaintiffs merely produced the proceedings under his commission; it was held, first, that as the plaintiffs sued as assignees of *T.*, and not as assignees of K., those proceedings were not admissible, the 91st and 92d sections being confined to actions brought by the bankrupt's own assignees, for a debt or demand for which he might have sued. Secondly, that the order of the Lord Chancellor, not having found the debt judicially insufficient, and having been obtained only on the consent of *M.* and the assignees on the one hand, and the petitioning creditor on the other, and without notice to the defendant, who therefore was not apprised that he was to meet the substituted debt, was not a valid order. *Muskett* v. *Drummond*,[4] 10 B. & C. 153. See also as to the first point, *Shaife* v. *Howard*, 2 B. & C. 860. The depositions are made conclusive evidence in all actions in which the bankrupt might have sued, and evidence to the contrary is excluded. Evidence to show that the petitioning creditor's debt was a fraud and contrivance, is inadmissible. *Young* v. *Timmins*, 1 Cr. & J. 148, and 1 Tyr. 15. The same was held in the case of *Glover* v. *Harrison*, *cor.* Bayley and Littledale, Just. of the C. P., at Lancaster, January 1830. Where the defendant received goods from the bankrupt to keep until he wanted them, and he had never made any demand, but the assignees had, before bringing the action (of *detinue*), it was held to be immaterial whether the action were brought by the bankrupt or his assignees; and that the proceedings were conclusive of the trading, &c., under the 92d sect. of Geo. 4, c. 16. *Smith* v. *Woodward*,[5] 4 C. & P. 541. The deposition of the petitioning creditor (on bills drawn and indorsed by the bankrupt), not showing that they were indorsed to the petitioning creditor before the act of bankruptcy, is insufficient; being now made conclusive evidence of the facts therein contained, the deposition in support of such debt must show evidence of the existence of the debt upon the face of it. *Key* v. *Cook*,[6] 3 M. & P. 720. The depositions are conclusive where the bankrupt gives no notice, although the action was commenced before the time for the bankrupt giving notice had expired, if the time has expired before the trial. *Earith* v. *Schroeder*,[7] 1 Mood. & M. C. 24. Where the bankrupt might have sued in trover for goods deposited with the defendant, although the conversion took place after the act of bankruptcy, the depositions are conclusive evidence. *Fox* v. *Mahoney*, 2 Cr. & J. 325. The depositions are conclusive if the bankrupt himself might have maintained the action, although the record does not show it; as where the action is brought to recover the value of goods sold for *cash* by the bankrupt to a creditor, who, as was alleged, intended to retain the amount in fraud of the contract, and where the plaintiffs declared on two counts in trover upon possession by the bankrupt, and conversions before and after the bankruptcy. *Kitchener* v. *Power*,[8] 3 Ad. & Ell. 232; 4 N. & M. 710. Where the depositions were used, and not objected to on the trial, and when additional evidence, if necessary, might have been adduced; held, that it was afterwards too late to object that they were insufficient to establish the act of bankruptcy. *Jacobs* v. *Latour*,[9] 2 M. & P. 203.

(*r*) The statute extends to cases where other defendants besides the assignees are joined in the action. See *Gilman* v. *Cousins and others*,[10] 2 Starkie's C. 282; *Smith* v. *Nicholson*, York Ass. *cor.* Richards, C. B. and afterwards by the Court of Exchequer.

[1]Eng. Com. Law Reps. viii. 346. [2]*Id.* xxii. 222. [3]*Id.* xix. 169. [4]*Id.* xxi. 48. [5]*Id.* xix. 517. [6]*Id.* xxii. 222. [7]*Id.* xxii. 237. [8]*Id.* xxx. 81. [9]*Id.* xv. 388. [10]*Id.* iii. 305.

shall, *if the defendant, at or before pleading* (*s*), *and if *plaintiff before issue joined* (*t*), give notice in writing to such assignee (*u*), commissioner or other person, that he intends to dispute some, and which (*x*), of such matters; and in case such notice shall have been given (*y*), if such assignee, commissioner or other person shall prove the matter so disputed, or the other party admit the same, the Judge before whom the cause shall be tried (*z*), may (if he thinks fit) grant a certificate of such proof or admission; and such assignee, commissioner or other person, shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, if such assignee, commissioner or other person shall obtain a verdict, be added to the costs; and, if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner or other person. Proof by depositions.

The 92d section enacts, that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, *shall be conclusive evidence* (*a*) *of the matters therein respectively contained, in all actions at law or suits in equity*, brought by the assignees for any debt or demand for which the bankrupt might have sustained (*b*) an action or suit (*c*).

(*s*) It seems that notice given with a plea *de novo* would be sufficient. *De Charme* v. *Lane*, 2 Camp. 324. If no notice has been given before the delivery of the plea, the court will give the defendant leave to withdraw the plea, in order to plead again with notice. *Radmore* v. *Gould*, 1 Wightw. 80. *Poole* v. *Bell*,[1] 1 Starkie's C. 328. A defendant who has delivered his plea without notice, cannot, even before the time for pleading is expired, re-deliver his plea with notice. *Ibid.* Notice is necessary in an action against the assignees, (as by the bankrupt to try the question of bankruptcy,) although the defendants are not described as assignees upon the record. *Simmonds* v. *Knight*, 3 Camp. 251. Where the plea was delivered by mistake without a notice to dispute the bankruptcy, and notice of disputing on the same day was tendered and refused, although before the time for pleading had expired, it was held to be insufficient; the defendant should have moved to withdraw the plea, in order to plead *de novo*. *Lawrence* v. *Crowder*,[2] 3 C. & P. 229; see also *Folkes* v. *Scudder*,[3] 3 C. & P. 232.

(*t*) Notice by the plaintiff, served at the time when the issue is delivered with notice of trial, would, it seems, be too late. *Richmond* v. *Heapy*, 4 Camp. 207.

(*u*) Service of notice on a maid-servant at the dwelling-house of the assignee, was held to be insufficient, under the stat. 49 G. 3, c. 121, s. 10. *Howard* v. *Ramsbottom*, 3 Taunt. 526. Service by delivery to a clerk at the defendant's counting-house, before issue joined, was held to be sufficient, without proof that it came into the defendant's hands. *Widger* v. *Browning*,[3] M. & M. 27. Service on the attorney is sufficient. *Howard* v. *Ramsbottom*, 3 Taunt. 526. The notice must be specific; it is insufficient to give general notice of intention to dispute the bankruptcy. *Trimley* v. *Unwin*,[4] 6 B. & C. 587. A plea that *F.* was not duly declared a bankrupt does not operate as notice. *Raphael* v. *Moon*,[5] 7 C. & P. 115.

(*x*) Notice having been given to dispute the act of bankruptcy only, and the depositions having been read to prove the trading and petitioning creditor's debt, the residue of the proceedings is not considered to be in evidence, and the counsel of the party contesting the cause has no right to inspect them. *Black* v. *Thorne*, 4 Camp. 191. *Stafford* v. *Clarke*,[5] 1 C. & P. 26.

(*y*) Notice is no part of the defendant's evidence in the cause, but may be proved at the outset, and will put the plaintiff on strict proof. *Ducharme* v. *Lane*, 2 Camp. 323.

(*z*) The Judge, on a reference of the cause before trial, cannot certify. *Barthorp* v. *Anderson*,[6] 8 Bing. 268.

(*a*) *Earith* v. *Schroder*,[7] M. & M. 26; Eden, 370.

(*b*) Where part of the claim for which the bankrupt might have sustained an action, could not have been recovered by the bankrupt, the proceedings, after notice, are not sufficient proof of the trading, &c.; and if there be no other proof, the plaintiffs must elect to go only for such part of the claim as the bankrupt might have recovered. They must, in such case, abandon counts on their own possession as assignees. *Gibson* v. *Oldfield*,[8] 4 C. & P. 313. *Jones* v. *Fort*,[9] 1 M. & M. 196. Notice left at the counting-house of the party in London with his clerk is sufficient. *Widger* v. *Browning*,[10] 1 M. & M. 27. Proof that the party is an uncertificated bankrupt under a former commission still in force, is admissible without notice. *Phillips* v. *Hopwood*,[11] 1 B. & Ad. 619.

(*c*) An action of ejectment is within these words; per Lord Tenterden, C. J. sitt. after Easter T. 1827.

[1]Eng. Com. Law Reps. ii. 410. [2]*Id.* xiv. 281. [3]*Id.* xxii. 394. [4]*Id.* xiii. 284. [5]*Id.* xxxii. 462. [6]*Id.* xxi. 299. [7]*Id.* xxii. 237. [8]*Id.* xix. 403. [9]*Id.* xxii. 289. [10]*Id.* xxii. 394. [11]*Id.* xx. 457.

If *no notice* of the intention to dispute any of the ingredients of bankruptcy has been given, according to the 90th section, the facts stand admitted as regards the validity of the commission or fiat (*d*).

If due notice has been given under the 90th section, the plaintiffs must
*126 *prove the different steps of bankruptcy. But the depositions will be admissible evidence, and conclusive as to the matters contained in them, in all cases which fall within the scope of the 92d section; unless the defendant prove that the bankrupt has given notice of his intention to dispute the commission within the time, and has proceeded therein with due diligence. In such cases the depositions should be proved, either by the production of the documents themselves from the proper custody, *i. e.* of the solicitor under the commission (*e*), or proof of the handwriting of the commissioners, or by office-copies, according to the late Act (*f*).

The statute makes such depositions *conclusive* as to the matters *therein contained;* and therefore if the evidence supplied by the depositions taken as admitted be insufficient to prove any of the essentials to bankruptcy, the defect should, it seems, be supplied by extrinsic evidence (*g*).

The 1 and 2 W. 4, c. 56, s. 17, authorizes the bankrupt to dispute the adjudication by petitions to the Court of Review, which may grant an issue for trying the validity of the adjudication; and if the verdict or adjudication shall not be set aside such verdict or adjudication shall, as against the bankrupt, the petitioning creditor, and any assignee, and all persons claiming under the assignee, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was, or was not, a bankrupt at the date of such adjudication.

Trading. Next, as to proof of the *requisites of bankruptcy* (*h*); and first, of the *trading*. The trading (*i*) essential to bankruptcy is matter of positive statutory definition and of legal consideration; but it is a question of fact, whether the party has done such acts as constitute him a trader in point of law; and also, when the acts are of a dubious nature, whether they have been done with an *intention* to carry on trade (*k*).

The statute 6 Geo. 4, c. 16, s. 2, enacts (*l*), that "all bankers

(*d*) In an action by assignees against the sheriff, for the proceeds of a levy under a *fi. fa.* after an act of bankruptcy, no notice having been given by the defendant to dispute the bankruptcy, it was held (Tenterden, L. C. J. and Parke, J., *contrà*, Bayley and Littledale, Js.) that, by the omission to give notice, the defendant admitted everything necessary to support the commission, and that the plaintiffs were not bound to prove that a good petitioning creditor's debt existed at the time of the act of bankruptcy relied on. *Norman* v. *Booth*,[1] 10 B. & C. 703.

(*e*) *Collinson* v. *Hillear*, 3 Camp. 30. The bankrupt himself, having obtained his certificate and released his sureties, is a competent witness for this purpose. *Morgan* v. *Pryor*,[2] 2 B. & C. 13.

(*f*) 6 G. 4, c. 16, s. 97; *supra*, 122.

(*g*) *Lawson* v. *Robinson*,[3] 1 Starkie's C. 456. *Cooper* v. *Machin*,[4] 1 Bing. 426. *Marsh* v. *Meager*,[5] 1 Starkie's C. 353. In *Macbeath* v. *Coates*,[6] 4 Bing. 34, it was held that the petitioning creditor's debt had been sufficiently established, although the deposition which was read was defective on that point; and Best, C. J. intimated that the 92d section virtually *excluded* all other proof. In that case, however, *no notice* had been given, and therefore *no proof* of the debt was necessary. But see the report of this case, 12 B. Moore, 122; and *Bevan* v. *Lewis*, 1 Sim. 376.

(*h*) Where the assignees *unnecessarily* went into evidence of trading after notice to dispute, and failing, were nonsuited, the Court refused to set aside the nonsuit. *Johnson* v. *Piper*,[7] 2 N. & M. 672.

(*i*) An illegal trading will support a commission. *Cobb* v. *Symonds*, 5 B. & A. 516. But see *Milliken* v. *Brandon*,[8] 1 C. & P. 387.

(*k*) *Wright* v. *Bird*, 1 Price, 20. *Bartholomew* v. *Davis*, 1 T. R. 573. In *Patman* v. *Vaughan*, 1 T. R. 573, Buller, J. stated to the jury, that if the party endeavoured to make a profit of trading, and was ready to sell to any applicant, and not as a matter of favour, they ought to find him to be a trader.

(*l*) It was held that proof of trading, after the new Act came in force, was essential; and that a commission issued since the 1st September 1825, could not be supported on a trading previously to that time. *Ex parte Batten*, 1 Mont. & M. 287. *Surtees* v. *Ellison*,[9] 9 B. & C. 750. And see *Hewson* v. *Heard; Palmer* v. *Moore;* ib. But acts of buying before the late statute came into operation, are evidence to explain the quality of the subsequent acts. *Worth and another* v. *Budd*,[10] 2 B. & A. 172.

[1] Eng. Com. Law Reps. xxi. 151. [2] *Id.* ix. 8. [3] *Id.* ii. 468. [4] *Id.* viii. 367. [5] *Id.* ii. 423. [6] *Id.* xiii. 330. [7] *Id.* xxviii. 375. [8] *Id* xi. 420. [9] *Id.* xvii. 491. [10] *Id.* xxii. 53.

(*m*), *brokers (*n*), and persons (*o*) using the trade or profession of a scrivener (*p*), receiving other men's monies or estates into their trust or custody, and persons insuring ships or their freight, or other matter, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels (*q*) or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others (*r*), seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities (*s*), shall be deemed traders liable to become bankrupt: provided that no farmer (*t*), grazier, common labourer, or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies, established by charter or Act of Parliament, shall be deemed, as such, a trader liable by virtue of this act (*u*) to become bankrupt." What persons not liable.

(*m*) Where the bankrupt was not merely a shareholder, but an active manager of the business of a joint-stock banking company, it was held to be a sufficient trading. *Hall, Ex parte*, 3 Deac. 405.

(*n*) A shipbroker is a trader liable to become bankrupt, within the 6 Geo. 4, c. 16. *Pott* v. *Turner*,[1] 6 Bing. 702. So is a pawnbroker. *Rawlinson* v. *Pearson*,[2] 5 B. & A. 124. *Qu.* as to an insurance broker. *Ex parte Stevens*, 4 Madd. 256.

(*o*) The wife of a felon sentenced to transportation, if she becomes a trader, is liable to the bankrupt laws, although he in fact remains in this country. *Ex parte Franks*,[3] 7 Bing. 762.

(*p*) An attorney who is a depository of money to be laid out in securities at his own discretion, and receives a compensation distinct from his fees for drawing the conveyance, is a scrivener. *Hutchinson* v. *Gascoigne*,[4] Holt's C. 507. To make a man a *money* scrivener, it must be an occupation to which he resorts in order to gain his living. He must receive other men's monies into his hands for custody. He must carry on the business of being trusted with other people's monies, to lay out for them as occasion offers. Per Gibbs, L. C. J.; *Adams* v. *Malkin*, 3 Camp. 534. *Ex parte Paterson*, 1 Rose, 400.

(*q*) One who keeps a private lodging house, and buys provisions for the lodgers, charging a profit, is within the Act. *Smith* v. *Scott*,[5] 9 Bing. 14.

(*r*) So an executor carrying on trade for the benefit of the testator's children. 3 Esp. C. 88; 10 Ves. 110.

(*s*) Where the party, by the terms of an agreement to purchase, was in the situation of the owner in fee of the soil, from which he made bricks for sale; it was held that he was not, within 6 Geo. 4, c. 16, s. 2, "a person seeking his living by buying and selling, or seeking his living by the workmanship of goods and commodities," which latter clause seems intended to meet the case of persons who make for others. *Heane* v. *Rogers*,[6] 9 B. & C. 577; see *Ex parte Burgess*, 2 Gl. & J. 182.

(*t*) A farmer who buys and sells, for profit, horses not used in the farming business, to the amount of five or six in two years, was held to be a trader. 1 T. R. 573; 2 N R. 78. So if he buy more horses than he wants for use, with a view to a re-sale. *Newland* v. *Bell*,[7] Holt's C. 221. Where a farmer was in the habit of purchasing more sheep than required to stock his farm, and selling immediately the excess without shearing, or any pasturing on his farm; held to amount to a trading as a sheep-salesman within the bankrupt law. *Newal, ex parte*, 3 Deac. 339.

Where, prior to the 6 Geo. 4, c. 16, the bankrupt, a farmer and grazier, had bought cattle, not for the purpose of his farm, but of sale, and after the passing of the Act had in some few instances bought and sold cattle in like manner, it was held that the previous acts were admissible in evidence to explain the nature of the subsequent acts. *Worth* v. *Budd*,[8] 2 B. & Ad. 172.

(*u*) The following, it has been held, previous to the statute 6 G. 4, are not within the scope of the bankrupt laws:—An attorney who receives and places out the monies of his clients in the usual course of business, and charges in respect of the deeds or securities, and not as commission, on the monies in his hands (*Hurd* v. *Brydges*,[9] Holt's C. 654); a schoolmaster who buys books and shoes, and retails them to his pupils (*Valentine* v. *Vaughan*, Peake, 76); one who erects public baths on land granted to him for the purpose (*Williams* v. *Stevens*, 2 Camp. 300); who builds a theatre to be held in shares, for which he is to be paid according to measure and value, he being a shareholder (Ibid); who buys timber which he uses for building of houses which he sells (*Clark* v. *Wilson*, 5 Esp. C. 273); one who keeping hounds buys dead horses, and sells the skin and bones (*Summersett* v. *James*,[10] 3 B. & B. 2); or buying more of an article than he wants, sells the surplus (*Newland* v. *Bell*,[11] Holt's C. 222); a livery stable keeper who buys provender, and sells it to his customers and others (*Cannon* v. *Denew*,[12] 10 Bing. 292); a cowkeeper who sells cows unfit for use (*Carter* v. *Drew*, 1 Swanst. 64); a farmer who buys and sells articles incidental to the occupation of his farm, as where he buys pigs, feeds them on his stubbles, and resells them from time to time (*Patten* v. *Brown*[13], 7 Taunt. 409.) (But where a farmer bought horses, which were not fit for farming, and sold them again, avowing

[1]Eng. Com. Law Reps. xix. 211. [2]*Id.* vii. 46. [3]*Id.* xx. 323. [4]*Id.* iii. 173. [5]*Id.* xxiii. 246. [6]*Id.* xvii. 449. [7]*Id.* iii. 81. [8]*Id.* xxii. 53. [9]*Id.* iii. 212. [10]*Id.* vii. 322. [11]*Id.* iii. 81. [12]*Id.* xxv. 139. [13]*Id.* ii. 157.

The intention to trade may be inferred from a single act of buying and selling.

*128 *The purchase of a single lot of timber, if made with intent to trade, will make a man a trader (*y*).

Proof of trading.

After proof that he has once traded, it is not necessary to prove continued acts of trading up to the very time of the bankruptcy; it is sufficient to prove acts from which it can be inferred that he *intended* to continue the trade (*z*). Thus the soliciting orders for business is evidence of the party's intention to continue the trade, although he has not actually transacted business for some time previous to the bankruptcy (*a*).

Where a fisherman has occasionally bought and sold fish, it is to be presumed that whilst he remains a fisherman he carries on business in the same way (*b*).

*129 *And where business had been carried on by the party in partnership with another, which partnership had been dissolved some years before, and no act of trading had been done for two or three years before the time when the petitioning creditor's debt accrued, but the concerns had not been ultimately wound up, and part of the stock still remained in the warehouse of the parties undisposed of, the jury found, under the direction of the Court, that the trading continued (*c*).

It is a question for the jury whether there has been an entire cessation of trading, or merely an interruption, with intent to resume it, should an opportunity offer (*d*). An admission of a party that he is in partnership

his intention to become a horsedealer, the facts were held to be evidence of trading. *Wright* v. *Bird*, 1 Price, 20.) So although where brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law, whether he be a termor, or entitled in fee; it is otherwise where the business is carried on independently and substantively as a trade. (*Sutton* v. *Weely*, 7 East, 442. *Ex parte Gullimore*, 2 Rose, 424; Eden, 4.) The owner of land who uses the clay for making bricks, and buys chalk for the more convenient burning of the bricks, is not a trader. (*Paul* v. *Dowling*, M. & M. 263. *Ex parte Burgess*, 2 G. & J. 183. *Heane* v. *Rogers*,[1] 9 B. & C. 577.) An executor disposing of his testator's stock is not a trader, although he purchase other articles to make it marketable; *secus*, if he increase the stock, and continue to sell. (*Ex parte Nutt*, 1 Atk. 102. *Ex parte Garland*, 10 Ves. 120.) Where a testator directs the trade to be carried on after his death with part of his property, that part only will be liable in case of bankruptcy. (*Thompson* v. *Andrews*, 1 Mylne & K. 116.) Buying and selling *land* does not constitute a trading. (*Port* v. *Turton*, 2 Wils. 169.) The following persons also were liable:—A clerk in a custom-house, employed by merchants to receive money on debentures, with which he discounts bills on his own account (2 Esp. C. 555); a person who occasionally buys and sells hay, corn, and horses, with a view to profit, but without making them the means of seeking his living (*Stewart* v. *Ball*, 2 N. R. 78. *Bolton* v. *Sowerby*, 11 East, 274); a colonel of a regiment, who occasionally sells horses at Tattersall's (*Ex parte Blackmore*, 6 Ves. 3;) receivers of taxes (5 Geo. 2, c. 30, s. 40); graziers (ibid); drovers (ibid); farmers (ibid); contractors for victualling the navy (1 Vent. 270); innkeepers (2 Burr. 2064); one who draws bills for the purpose of improving his estate, and borrows accommodation bills, in lieu of which he gives his own (*Hankey* v. *Jones*, Cowp. 745.) *Secus*, if there be a continuation with a view to gain profit by the exchange, ibid. *Richardson* v. *Bradshaw*, 1 Atk. 128); a builder who buys timber for building houses, and sells the houses (5 Esp. C. 147. *Secus*, *Dyer* v. *Hudson*, *cor.* Abbott, L. C. J. sittings after T. T. 1825); holders of stock in different trading companies by various statutes (3 Esp. C. 88; 10 Ves. 110.)

(*y*) *Holroyd* v. *Gwynne*, 2 Taunt. 176. See also *Newland* v. *Bell*,[2] Holt's C. 221; *Stewart* v. *Ball*, 2 N. R. 79. Where it appeared that a party had ordered goods for the purpose, as he stated, of sending them abroad, saying, that he would give other goods in exchange for them; Abbott, C. J., on the objection being taken that there was no evidence of selling, said, "I cannot say that if a man buys, and represents himself as a dealer, and offers goods in exchange, he does not buy to sell again; at least I must leave it to the jury, I cannot nonsuit upon it." The quantum of trading is immaterial. *Newland* v. *Bell*, Holt's C. 221. *Cale* v. *Halfknight*,[3] 3 Starkie's C. 56. *Patmore* v. *Vaughan*, 1 T. R. 572.

(*z*) 5 Esp. C. 235.

(*a*) *Wharam* v. *Routledge*, 5 Esp. C. 235. Whether a trader who has ceased to buy, but who is selling off his stock, is liable to a commission depends upon the existence of intention to exercise or resume the trading, and this is a question for the jury. *Ex parte Paterson*, 1 Rose, 402.

(*b*) *Heanny* v. *Birch*, 3 Camp. 233. *Paul* v. *Dowling*, M. & M. 268.

(*c*) *The Executors of Backhouse* v. *Turleton*, *cor.* Ld. Ellenborough, Guildhall, on an issue from the Lord Chancellor to try the fact.

(*d*) Per Ld. Eldon, *Ex parte Patterson*, 1 Rose, 402. *Heanny* v. *Birch*, 1 Rose, 356.

[1]Eng. Com. Law Reps. xvii. 449. [2]*Id.* iii. 81. [3]*Id.* xiv. 162.

with a trader, is evidence of his being a trader, without proof of actual trading (*e*). Although the trader be described as a money-scrivener, and the general words dealer and chapman, be omitted, it is sufficient, *semble*, to prove any species of trading (*f*).

Any species of trading is admissible in evidence to satisfy the general averment that the bankrupt got his living by buying and selling (*g*).

Thirdly. The several acts which constitute bankruptcy are matter of positive statutory definition; and whether a particular act, when proved, falls within the definition, is a question of law; but whether the act itself has been committed, and particularly whether it has been done with that *intention* which in the particular instance is essential to bankruptcy, is usually pure matter of fact for the consideration of the jury. Act of bankruptcy.

By the stat. several of the acts of bankruptcy there specified (*h*) must be

(*e*) *Parker* v. *Barker*,[1] 1 B. & B. 9. But such declarations are not generally evidence in actions by assignees against third persons. *Bromley* v. *King*, R. & M. 228. Declarations, however, made at the time of purchasing goods are evidence to show the intention of the trader as to the mode in which he intended to dispose of them. *Gale* v. *Halfknight*,[2] 3 Starkie's C. 56.

(*f*) *Smith* v. *Sandilands*, Gloster Summ. Ass. 1819, 1 Gow; and per Wood, B., Winch. Sp. Ass. 1820, Mann. Ind. 371. *Hale* v. *Small*,[3] 2 B. & B. 25.

(*g*) *Hale* v. *Small*, 2 B. & B. 25. The bankrupts being described as bankers, being traders according to the statute, it was held that the word bankers might be considered merely as a *designatio personarum*. *Bernasconi* v. *Farebrother*,[4] 10 B. & C. 549.

(*h*) The stat. 6 G. 4, c. 15, s. 3, enacts, that if any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house; or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, *with intent* to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy.

The 4th sect. enacts, that where any such trader shall execute any conveyance or assignment by deed to a trustee or trustees, of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader: provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader, and that the execution by such trader and by every such trustee be attested by an attorney or solicitor, and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within 40 miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within 40 miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

Previous to this statute it was held that an assignment for the benefit of creditors was not an act of bankruptcy, if *all* (*Eckhardt* v. *Wilson*, 8 T. R. 140) or the generality assented. *Inglis* v. *Grant*, 5 T. R. 530.

The 5th sect. enacts, that if any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or upon any detention for debt, lie in prison for 21 days, or having been arrested or committed to prison for any other cause, shall lie in prison for 21 days after any detainer for debt lodged against him and not discharged, every such trader shall be thereby deemed to have committed an act of bankruptcy; or if any such trader, having been arrested, committed or detained for debt, shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention: provided, that if any such trader shall be in prison at the time of the commencement of this Act, such trader shall not be deemed to have committed an act of bankruptcy by lying in prison, until he shall have lain in prison for the period of two months.

By the 6th sect. a declaration of insolvency filed by the trader, and afterwards advertised in the London Gazette (according to the provisions of the statute), shall be an act of bankruptcy from the time of the advertisement; but no commission shall issue unless it be sued out within two calendar months from the time of insertion of such advertisement, and unless the advertisement be inserted within eight days after the filing of the declaration with the secretary of bankrupts; and no docket shall be struck on such act of bankruptcy before the expiration of four days next after the insertion of such advertisement, where the commission is to be executed in London, or before the expiration of eight days where it is to be executed in the country; and the Gazette containing such declaration shall be evidence of such declaration having been filed.

[1]Eng. Com. Law Reps. v. 4. [2]*Id.* xiv. 162. [3]*Id.* vi. 9. [4]*Id.* xxi. 128.

*done with intent to defeat or delay creditors. Under these words it is sufficient to prove an intention to defeat or delay creditors, without proof of
*131 *any actual delay of a creditor (*i*). And it is not sufficient to prove delay, if the intention be wanting (*k*).

Intention. It seems to have been held under the stat. 21 J. 1, c. 15, s. 2, that the departing the realm would constitute an act of bankruptcy, provided it was proved that a creditor was in consequence delayed, independently of any proof of an *intention* on the part of the bankrupt to do so; that is, the latter branch of the clause was considered to be entirely independent of the intent mentioned in the former part: the effect was to render the mere delaying of the creditor, provided it was the consequence of one of the acts specified, an act of bankruptcy. As in *Woodier's Case*, who departed the realm because he had killed his wife (*l*); and in that of *Raikes* v. *Pereau* (*m*), where the primary reason for the bankrupt's going abroad was, that a young woman had refused to live with him as his mistress unless he took her abroad. In both these cases creditors were delayed, and for that reason the question of intention was considered to be immaterial.

In the subsequent case of *Robertson* v. *Liddell* (*n*), this stat. (21 J. 1) was much discussed, and it was held that the words were to be read, "to the *intent* his creditors *shall*, or *that thereby* they may be defeated;" making the *intent* to govern the whole clause. Still those cases might probably have been decided as they were, consistently with the latter construction: since, although the primary object of the bankrupt in going abroad might not be to delay his creditors, yet if the delaying his creditors

The 7th sect. enacts, that an adjudication founded on such an act of bankruptcy shall be valid, although concerted between the trader and any other person.

By the 8th sect., if any such trader shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction or security *shall be an act of bankruptcy*; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt.

By sect. 10, if a trader, having privilege of parliament, shall not, within one calendar month after personal service of a copy of a summons sued out by his creditor, pay, secure or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as any Judge of the court out of which the summons issued shall approve of, to pay such sum as shall be recovered, together with costs, and within one calendar month next after personal service of such summons cause an appearance to be entered to such action in the proper court, every such trader shall be deemed a bankrupt from the time of the service of such summons.

By sect. 11, if such trader, having privilege, &c. neglect, after personal service of the order, to pay money ordered to be paid by any Court of Equity, on a peremptory day fixed by that Court for such payment, he shall be deemed to have committed an act of bankruptcy from that day. An act of bankruptcy was committed on the 6th of March, prior to 5 Geo. 4, c. 98, coming into force, by which all former Bankrupt Acts were repealed, but which was itself repealed by the 6 Geo. 4, c. 16, after which the commission issued; held, that it was to be considered as if the 5 Geo. 4 had never existed, and that the commission was well supported by that act of bankruptcy. *Phillips* v. *Hopwood*,[1] 10 B. & C. 39.

(*i*) It was so held under the now repealed stat. 1 J. 1, c. 15, s. 9, where the words were "to the intent or whereby creditors may be defeated or delayed." *Robertson* v. *Liddell*, 9 East, 487, in which the case of *Fowler* v. *Padgett*, 7 T. R. 509, was overruled, where it had been held that the word *or* in the statute meant *and*. See *Hammond* v. *Hicks*, 5 Esp. 139; 1 Taunt. 273, 370; 3 Smith, 349. *Wilson* v. *Norman*, 1 Esp. C. 334; *Holroyd* v. *Gwynn*, 2 Taunt. 176; *Ramsbottom* v. *Lewis*, 1 Camp. 279; *Holroyd* v. *Whitehead*, 3 Camp. 530; *infra*, 132, 133; [14 Ves. 80.]

(*k*) *Windham* v. *Paterson*,[2] 1 Starkie's C. 145. *Warner* v. *Barber*,[3] Holt's C. 175.

(*l*) B. N. P. 39.

(*m*) Co. B. L. 5th edit. 73; and see *Vernon* v. *Hankey*, Co. B. L., where Buller, J. approved of the decision in *Woodier's Case*, and said that it had always been considered and acted upon as good law.

(*n*) 9 East, 487. *Holroyd* v. *Gwynn*, 2 Taunt. 176.

[1]Eng. Com. Law Reps. xxi. 25. [2]*Id.* ii. 331. [3]*Id.* iii. 66.

was the immediate and necessary consequence of his act, it might be considered as *evidence* of such an intention (*o*). And it seems to be probable that under the present statute (6 Geo. 4, c. 16), which makes the intention to delay essential to the act of bankruptcy, it would be held that where the delaying of creditors was the natural, immediate and necessary consequence of the trader's act, the very act itself would supply strong evidence of intention; for in law as well as morals, every one must be considered to contemplate the natural and immediate consequence of his act (*p*).

Declarations.

In order to prove the intention of the bankrupt to delay a creditor, declarations made by him, which were cotemporary with the act itself, are admissible. Accordingly, what the party said on requesting his servant or clerk to deny him to creditors (*q*), or when he departed from his dwelling-house, or even upon his return home again, is evidence to show with what intention he secluded or withdrew himself from his creditors (*r*).

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Intent to delay creditors.

*The bankrupt was arrested and taken twelve miles from home on the 5th, was discharged at one o'clock in the afternoon of the 6th, and returned home at ten o'clock on the night of the 7th; it was held, that what he said to a witness (who inquired where he had been), as to the reason of his absence, was admissible, in explanation of his act (*s*). So what the bankrupt said on removing his books is evidence (*t*). Where, in trespass for taking goods, the question was as to the bankruptcy of the plaintiff, it was held that letters found in his possession after the bankruptcy, with post-marks of a date previous thereto, must be taken to show that he received them before, and were evidence to show, in explanation of his conduct, that he had received intimation of the facts mentioned in the letters having taken place, although they were not evidence that the facts stated really did so happen (*u*). But declarations or admissions by the bankrupt, which are subsequent to the act are not admissible (*x*).

Where the proceedings were read in evidence (under the stat. 49 G. 3, c. 121), a deposition stated that the bankrupt had absented himself, and that he had admitted that he had absented himself for the purpose of avoiding his creditors, but did not specify the time of such admission, and

(*o*) See the observations of Lawrence, J. in *Fowler* v. *Padgett*, 7 T. R. 516.

(*p*) See tit. INTENTION—MALICE; and see the observations of Abbot, L. C. J. in *Pulling* v. *Tucker*,[1] 4 B. & A. 385. *Ramsbottom* v. *Lewis*, 1 Camp. 280. Where the bankrupt, on going abroad, left with his clerk a power to act, but without making any provision for bills becoming due, and the inevitable consequences must be to delay his creditors, it was held to be an act of bankruptcy. *Kilner, ex parte*, 3 Mont. & Ayr. 722.

(*q*) *Jamieson* v. *Eamer*, 1 Esp. C. 381.

(*r*) *Bateman* v. *Bailey*, 5 T. R. 512; B. N. P. 41. *Ambrose* v. *Clendon*, Ca. T. H. 267; 4 Esp. C. 233. *Wilson* v. *Norman*, 1 Esp. C. 334. *Robertson* v. *Liddell*, 9 East, 487. *Holroyd* v. *Gwynne*, 2 Taunt. 176. Declarations made by the bankrupt at the time of his return, that he had quitted to avoid the service of a writ against him, are admissible and sufficient evidence of an act of bankruptcy, without further proof of the existence of the writ or of the debt, or of there being any creditor. *Newman* v. *Stretch*,[2] 1 M. & M. 338. A creditor called at the house of the bankrupt by appointment for payment of his debt, and saw the bankrupt, who shortly after left the room, and did not return; the wife afterwards informed the creditor he was gone out; it is for the jury to say, whether he left his house to avoid or delay a creditor, and the wife's answer is admissible as part of the *res gestæ*. *Charrington* v. *Brown*,[3] 11 More, 341. The admissibility of such declarations cannot be decided by any positive rule as to time, but must depend on the nature and strength of their connection with the disputed act. Where the question was, whether giving a security by the trader to *G.* on the 25th of October, amounted to an act of bankruptcy, it was held that a conversation which the trader had with *L.*, to whom he had on the 25th of October promised to give a security on the following day, and in which he falsely professed a total ignorance of the security, was admissible evidence to show the real nature of the transaction. *Ridley* v. *Gyde*,[4] 9 Bing. 349. See *Rawson* v. *Haigh*,[5] 2 Bing. 99.

(*s*) *Bateman* v. *Bailey*, 5 T. R. 512.

(*t*) *Ambrose* v *Clendon*, Ca. T. H. 267.

(*u*) *Cotton* v. *James*, 1 M. & M. 276, and 3 C. & P. 505.

(*x*) *Robson* v. *Kemp*, 4 Esp. C. 233.

[1]Eng. Com. Law Reps. vi. 455. [2]*Id.* xxii. 330. [3]*Id.* xxii. 410. [4]*Id.* xxiii. 304. [5]*Id.* ix. 335.

it was held that there was not even *primâ facie* evidence to prove the act of bankruptcy (*y*).

Departing the realm. Intention.

Where the act to be proved, is the departing the realm with *intent* to delay creditors, the *intention* of the party is a question of fact for the determination of the jury; to be collected either from the contemporary declarations of the trader, or to be presumed from circumstances, considering the mode and reason of the departure, the state of his affairs at the time, and other circumstances likely to operate as motives. The case is subject to the general presumption of law, that a man contemplates that result which is the natural and obvious consequence of his act, although he may have had another primary and immediate object in view (*z*). A letter written by the trader during his absence is evidence to explain its nature (*a*); for the departing the realm is a continuing act (*b*).

*133 *If the delay of creditors be the necessary consequence of the departure, the intention to delay may be inferred, although the party had another and more immediate object in departing; as on account of domestic dissensions (*c*), to avoid a prosecution for felony (*d*), or in order to live with a mistress (*e*); and so in other cases where the purpose of departure is *aliene* from that of trade, for the party must be supposed to contemplate and intend that which is the immediate and necessary consequence of his act (*f*).

But it is not enough to show that the party left England and proceeded to Ireland, where he also carried on trade, without leaving funds behind him for the payment of his debts, for *non constat* that he did not go for the very purpose of providing funds; and this case differs essentially from that of *Holroyd* v. *Whitehead*, since there the intention of the departure was *aliene* from that of trade (*g*).

If a subject, domiciled in Ireland, leave his family there and come to England to settle his affairs, and return to Ireland abruptly to avoid an arrest, he commits an act of bankruptcy (*h*).

Departure from the dwelling-house.

To prove an act of bankruptcy by *a departure* from the dwelling-house, the act of departing must be proved; and secondly, the *intent* to delay creditors, &c. (*i*); and on the other hand, any facts are admissible which tend to disprove the intention, and to show that the trader departed without

(*y*) *Marsh*. v. *Meager*,[1] 1 Starkie's C. 353.

(*z*) Vide *supra*, 131.

(*a*) *Windham* v. *Paterson*,[2] 1 Starkie's C. 146.

(*b*) *Rawson* v. *Haigh*,[3] 2 Bing. 99. *Lees* v. *Marton*, 2 Mo. & R. 211. *Maylin* v. *Eyloe*, 2 Str. 809.

(*c*) *Holroyd* v. *Whitehead*, 3 Camp. 530.

(*d*) *Woodier's Case*, B. N. P. 39.

(*e*) *Raikes* v. *Pereau*, Co. B. L. 73.

(*f*) See Mr. J. Lawrence's observations in *Fowler* v. *Padgett*, 7 T. R. 516. In the case of *Holroyd* v. *Whitehead*, (3 Camp. 530, subsequently approved of by Lord Ellenborough, *Windham* v. *Paterson*,[2] 1 Starkie's C. 146,) the bankrupt left his dwelling-house on account of domestic dissensions with his wife, and left a letter stating that there would be 20*s*. in the pound for creditors, but that, be it less or more, he had done with trade, desiring that no one should be allowed to take goods out of the warehouse in preference, and giving no directions for the continuance of his business; during his absence a creditor called for money, who went away unsatisfied. And it was left to the jury, whether, under the circumstances, the party had not left his house with an intention to delay his creditors, and whether a creditor had not been delayed; and the jury found both these facts. See also *Ramsbottom* v. *Lewis*, 1 Camp. 279.

(*g*) *Windham* v. *Paterson*,[2] 1 Starkie's C. 144. See *Warner* v. *Barber*,[3] Holt's C. 175.

(*h*) *Williams* v. *Nunn*, 1 Camp. 152, *cor.* Chambre, J. 1 Taunt. 270; where it is stated that the family resided in England, and the Court adverted to that circumstance.

(*i*) See the cases above cited, p. 132–3; also *Wilson* v. *Norman*, 1 Esp. C. 334; *Robertson* v. *Liddell*, 9 East, 487. As has already been seen, proof of actual delay is unnecessary, although the contrary was once held. *Barnard* v. *Vaughan*, 8 T. R. 149. Where the trader departed under the false notion that the officer who had called had a writ for him, it was held to be an act of bankruptcy. See also *Ex parte*, *Bamford*, 15 Ves. 449. *Aldridge* v. *Ireland*, 1 Taunt. 273; *Holroyd* v. *Whitehead*, 3 Camp. 530; *Williams* v. *Nunn*, 1 Taunt. 273; *Hammond* v. *Hickes*, 5 Esp. C. 139. Under the words of the stat. 21 J. 1, "Whereby the creditors may be defeated or delayed for the recovery of their just and true *debts*," it was held, that an absconding to avoid an attachment for the non-delivery of goods pursuant to an award, being a mere *duty* and not a debt, was not within the statute. *Lingwood* v. *Eade*, 1 Atk. 196.

[1] Eng. Com. Law Reps. xxii. 305. [2] *Id.* ii. 423. [3] *Id.* ii. 331. [4] *Id.* iii. 66.

any intention to delay his creditors (*k*). The intention of the trader in a doubtful case, is one of fact for the jury (*l*).

*What the trader said on quitting his dwelling house is admissible evi- *134
dence to show his intent (*m*).

Such declaration to be admissible must be made at the time of the act, or so near to it as to form part of the same transaction, either whilst the trader is absenting himself or immediately after his return (*n*).

A trader who has no settled house or counting-house, but takes up his residence at a public-house in the place to which his business carries him, may commit an act of bankruptcy by a departure from that house (*o*).

A trader on absenting himself stated that writs were out against him; it was held to be unnecessary to prove that fact (*p*), for the intention is the same, whether the assertion was true or false.

Otherwise absent himself.—It is sufficient to prove an absenting of himself by the trader from his usual place of business; as from a counting-house, where he has a dwelling-house in the country, with intent to delay his creditors (*q*); and in general, any absence from his dwelling-house, for however short a period, is sufficient. As where a trader, on being called upon by several creditors for money, leaves his house under pretence of getting money for them, and spends the evening at a billiard-table, or at a tavern (*r*). So where a trader apprehending an arrest concealed himself in a back room in another person's house, until a sheriff's officer, who he

Absenting himself.

(*k*) See Lord Mansfield's observations in *Worseley* v. *Demattos*, 1 Burr. 467. *A.*, a publican, leaves his dwelling-house at seven in the morning, intending to complete a sale of his stock in the public-house, and having received the money, to abscond to Ireland; he completes the contract, and receives the purchase-money at another house in Manchester, and immediately proceeds to Ireland without returning to his house. Lord Abinger held, that if the purchase and payment of the money was *bonâ fide*, it was no act of bankruptcy, from the original departure to affect the subsequent sale the same morning. *Bardsley* v. *Harrison*, Liverpool Summer Assizes, 1835.

(*l*) *Deffle* v. *Desanges*,[1] 8 Taunt. 671; *Aldridge* v. *Ireland*, cited, 1 Taunt. 273.

(*m*) See the general principle, Vol. I. p. 351, *Ambrose* v. *Clendon*, C. T. H. 267.

(*n*) A deposition, stating an admission by the trader, of an absenting to avoid creditors, but not stating the *time* of such admission, is not receivable. *Marsh* v. *Meager*,[2] 1 Starkie's C. 353. The authorities somewhat differ as to the admitting of declarations made after a return. See the cases of *Bateman* v. *Bayley*, 5 T. R. 512, where such evidence was held to be admissible; and *Newman* v. *Stretch*,[3] M. & M. 338, where such evidence was admitted by Parke, B.; but the correct rule seems to have been laid down by that learned Judge in *Lees* v. *Marton*, 1 Mo. & R. 211, that such a declaration is inadmissible, unless it be made by the trader whilst he is absenting himself, or immediately after his return. See further, 2 Evans's Pothier, 285; *Maylin* v. *Eyloe*, 2 Str. 809; *Rawson* v. *Haigh*,[4] 2 Bing. 104; *Ridley* v. *Gyde*,[5] 9 Bing. 349; *Ex parte*, Palmer, 1 D. & C. 373; *Smallcombe* v. *Bruges*, M'Cleland, 45. In the Case of *Smith* v. *Cramer*,[6] 1 Bing. N. C. 585, the trader having absented himself on the 16th of February, two letters written by him on the 16th of January, in which he asked for time upon two bills of exchange, were admitted to show the motives of his absence. Here, however, the letters showed that the trader was in difficulties not long before his departure, and they were admissible to prove that fact, as acts done in the management of his affairs, and therefore tending to show the state of those affairs.

(*o*) *Holroyd* v. *Gwynne*, 2 Taunt. 176. See Com. Dig. Bankrupt [C.] 1.

(*p*) *Wilson* v. *Norman*, 1 Esp. C. 334. See *Robertson* v. *Liddell*, 9 East, 487; *Holroyd* v. *Gwynne*, 2 Taunt. 176; M. & M. 338.

(*q*) *Judine* v. *Da Cossen*, 1 N. R. 234, where the trader quitted his counting-house in town, taking his books with him, without the *animus revertendi*, and went to his dwelling-house in the country, where he slept a few nights, and then finally quitted it. If one who has no constant dwelling absent himself from his usual place of abode, with intent, &c. it is an act of bankruptcy. Com. Dig. Bankrupt, [C.] 1. The bankrupt, on being applied to for a debt, said, he could not pay then, but promised to meet the creditor at an inn in the evening, but failed to do so; it is for the jury to say, whether he broke such appointment with any other than the intent to delay the creditor with whom he made it. *Widger* v. *Browning*,[7] 9 D. & R. 306. The absenting, to constitute an act of bankruptcy, must be from a place of business where, from the ordinary course of his life and business, he would be expected to be present. *Bernasconi* v. *Fairbrother*,[8] 10 B. & C. 549.

(*r*) *Bigg* v. *Spooner*, 2 Esp. C. 651.

[1]Eng. Com. Law Reps. iv. 244. [2]*Id.* ii. 423. [3]*Id.* xxii. 330. [4]*Id.* ix. 335. [5]*Id.* xxiii. 304. [6]*Id.* xxvii. 498. [7]*Id.* xxii. 394. [8]*Id.* xxi. 128.

was informed was going towards his house, had left the street (*s*), and then returned home. So where being arrested he fled from the officer to the house of another person (*t*).

*135 *So the riding out of town in order to avoid a writ, and get the term of the plaintiff (*u*), is an act of bankruptcy. So where a debtor in the habit of frequenting the Royal Exchange appointed a creditor to meet him there, and directed a friend, in case the creditor inquired for him, to say that he was not there (*x*).

Where one of three bankers who resided at the place where the business was carried on, the other two living at a distance, shut up the house and stopped payment, it was held that this was not evidence of a joint bankruptcy by the three (*y*).

It is not essential to prove that any creditor was actually delayed (*z*).

Intention. The question of intention in this, as in other cases, is usually for the jury; and if evidence be offered in explanation of the absence, and in order to rebut the presumption to delay creditors, as that he did it to avoid irritation and harsh language, the case is for their consideration (*a*). If a person who has no settled dwelling absent himself from his usual abode with intent to delay creditors, it is an act of bankruptcy (*b*).

Beginning to keep house. *Beginning to keep house.*—This act of bankruptcy must be evidenced by some act by which the party secludes himself (*c*) from the solicitation of his creditors, with the *intention* of doing so. The most usual proof consists of an actual denial to a creditor, by a clerk or servant authorized to

(*s*) *Vincent* v. *Prater*, 4 Taunt. 603. *Chenoweth* v. *Hay*, 1 M. & S. 676. See also, *Bayly* v. *Schofield*, 1 M. & S. 338.

(*t*) *Bayly* v. *Schofield*, 1 M. & S. 338; and see *Wilson* v. *Norman*, 1 Esp. C. 334. So where one of two partners lived in London, the other in Manchester, and the London partner having left his house with intent to delay his creditors, and having been a few days at Manchester, both of them left their country house there to avoid an arrest, carrying with them their books of accounts. *Spencer* v. *Billing*, 3 Camp. 312. Where a trader abstained from going to a place to make inquiry as to an execution against him, to which he would have gone but for fear of an arrest, it was held to be an absenting himself. *Robson* v. *Rolls*,[1] 9 Bing. 648.

(*u*) *Maylin* v. *Eyloe*, Stra. 809. *Qu.* whether if a trader leave the realm without any intention to delay his creditors, but whilst absent he deliberately forms that intention, and announces it, he commits an act of bankruptcy. See *Windham* v. *Paterson*,[2] 1 Starkie's C. 144; and 1 Christian's B. L. 178.

(*x*) *Gimmingham* v. *Laing*,[3] 6 Taunt. 532. Gibbs, C. J., in that case intimated that the words "otherwise absenting himself," meant from creditors, and not from any particular place. And see *Robson* v. *Rolls*, 9 Bing. 648; and *Robinson* v. *Carrington*, 1 Mont. & A. 12, where the Master of the Rolls held that a mere failure to keep an appointment with a creditor was a sufficient absenting. But in *Bernasconi* v. *Fairbrother*,[4] 10 B. & C. 556, the Court held that an absenting (according to the decisions) was to be confined to an absenting himself from his own particular place of business at which a man might be expected to be; or from one or more particular creditors at some other place; and per Parke, B., in *Lees* v. *Marton*, 1 M. & R. 212; no case has gone the length of deciding, that where the appointment is to meet the creditor at his (the creditor's) place of residence, and the debtor breaks that appointment, such conduct amounts to an act of bankruptcy; and where a trader, who, on being arrested, had obtained his liberty on a promise to attend and execute a bail bond, but did not attend, it was held to be no act of bankruptcy. *Schooling* v. *Lee*,[5] 3 Starkie's C. 149; and in the case of *Tucker* v. *Jones*,[6] 2 Bing. 2, the Court of Common Pleas held that the failure to keep an appointment with a creditor was not an absenting within the statute. Where the trader, upon the advice of the attorney of the petitioning creditor, went into his office in order to avoid a public arrest at the suit of the petitioning creditor, it was held to be no act of bankruptcy. *Mills* v. *Elton*, 3 Price, 142.

(*y*) *Mills* v. *Bennet*, 2 M. & S. 566.

(*z*) *Hammond* v. *Hickes*, 5 Esp. C. 139. *Robertson* v. *Liddell*, 9 East, 487. *Supra*, 130.

(*a*) *Vincent* v. *Prater*, 4 Taunt. 603. A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money and would not pay him that day, and would go out of the way and not return home till dinner-time; and it was held that it was for the jury to consider whether he absented himself in order to delay the creditor, and that they were warranted in finding that he did not.

(*b*) Com. Dig. BANKRUPT, [C.] 1.

(*c*) It is sufficient if the trader secrete himself in the house of a friend where he is lodging, and where persons are in the habit of calling upon him. *Curteis* v. *Willis*, 1 R. & M. 58.

[1]Eng. Com. Law Reps. xxiii. 409. [2]*Id.* ii. 331. [3]*Id.* i. 476. [4]*Id.* xxi. 128. [5]*Id.* xiv. 173. [6]*Id.* ix. 291.

do so by *the trader, who is in the house. But although this is the usual medium of proof, it is not the only one; for if a trader seclude himself in a private part of the house, in order to avoid his creditors, who are by this means deprived of access to him, he begins to keep house, and commits an act of bankruptcy (*d*). As where a trader removes from a part of the house where his creditors usually have free access to him, to a more retired part of it, by means of which his creditors are prevented from importuning him (*e*).

Under the stat. 21 J. 1, c. 15, where the evidence of the act of bankruptcy consisted in the denial to a creditor by order of the trader (*f*), it was necessary to prove an actual denial (*g*) to a creditor (*h*); and it was held to be insufficient to prove a denial to an agent of the creditor (*i*), without proof that the trader knew him to be such agent, having a pressing demand against the trader (*k*); or that the trader gave orders to be denied to the creditor; but if he gave a general order to be denied to all, and was denied to a creditor, it was sufficient, although he wished to avoid a different creditor (*l*). Proof that the trader was in distressed circumstances, and that he was by his own order denied to several persons, some of whom called more than once, was held to be evidence to go to a jury of a denial to a creditor (*m*). *But under the late statute the actual delay- *137

Denial.

(*d*) 1 Camp. 271; Com Dig. Bankrupt, [C.] 1. *Dickinson* v. *Foord*, Barnes, 160; *Robertson* v. *Liddell*, 9 East, 487.

(*e*) *Dudley* v. *Vaughan*, 1 Camp. 271. See also *Chenoweth* v. *Hay*, 1 M. & S. 677; 1 Taunt. 270, 479. *R.* v. *Bebb*, cited 1 M. & S. 354. *Key* v. *Shaw*,[1] 8 Bing. 321. Partners reside in the place in which they carry on business as bankers, and close the windows and shutters of the bank; this is a beginning to keep house. *Cumming* v. *Bayley*, 6 Bing. 363. But is no act of bankruptcy by a partner who does not reside there. *Mills* v. *Bennett*, 2 M. & S. 556. *Hawkins* v. *Whitten*,[2] 10 B. & C. 217. *Ex parte Manor*, 19 Ves. 543. An order to be denied to creditors, is but *evidence* of an intention to delay. *Lazarus* v. *Waithman*,[3] 5 Moore, 513. A general order to deny with that intent, or a general order to admit no one whom the servants did not know, for fear of a second arrest, followed up by their admitting no person, without its being ascertained from the window who he was, is sufficient. *Harvey* v. *Ramsbottom*,[4] 1 B. & C. 55. Or a general order to deny, and a beginning to keep house, is sufficient. *Lloyd* v. *Heathcote*,[5] 2 B. & B. 388. Note, in the latter case there was a denial to the collector of church and highway-rates. See *Gimmingham* v. *Laing*,[6] 6 Taunt. 532; and see *Bayley* v. *Schofield*, 1 M. & S. 338.

(*f*) *Dudley* v. *Vaughan*, 1 Camp. 271. *Ex parte Foster*, 17 Ves. 416.

(*g*) *Garret* v. *Moule*, 5 T. R. 575. *Hawker* v. *Saunders*, Co. B. L. 79. *Dudley* v. *Vaughan*, 1 Camp. 271.

(*h*) Per Lee, C. J., B. N. P. 40. A denial to a tax-gatherer is sufficient. *Jeffs* v. *Smith*, 2 Taunt. 401.

(*i*) B. N. P. 39, 40; 1 Montague, 87; *Barrow* v. *Foster*, Green, 44. A denial to the clerk of a holder of a bill is sufficient. 2 T. R. 59.

(*k*) 7 Vin. Abr. 61, pl. 14, *Ex parte Levi;* but a denial to the holder of a bill on the morning of the day when it becomes due is sufficient. *Colkett* v. *Freeman*, 2 T. R. 59.

(*l*) *Mucklow* v. *May*, 1 Taunt. 479; and see *Colkett* v. *Freeman*, 2 T. R. 59.

(*m*) *Jamieson* v. *Eamer*, 1 Esp. 381. But in the case of *Garret* v. *Moule*, (5 T. R. 595), the trader being in expectation that several bills would be presented to him for payment, was advised by his friends to keep out of the way of his creditors, and he accordingly gave orders to his clerk to be denied to every person; he retired up stairs with his account books, where he remained several days, and was denied to several persons, but it did not appear that they were creditors. A creditor on two bills of exchange to the amount of 100*l.* called, but did not ask for the bankrupt, understanding he was from home. The Court of K. B. held, that these circumstances did not constitute an act of bankruptcy; and Ld. Kenyon observed, that the question on trials of that kind had always been asked, whether or not the debtor was denied the creditor, which showed in what light the statute was considered. See also *Hawkes* v. *Saunders*, Co. B L. 79; B. N. P. 40. Notwithstanding this authority, it is probable that such a case would have met a different decision, even before the late statute. For according to the principle established in *Robertson* v. *Liddell*, (9 East, 487,) it is not material whether the intention was carried into effect by an actual delay of any creditor. A denial is the mere medium of proof. A trader may have no servant or agent to deny him; and then this medium of proof becomes inapplicable. The fact of intention is perfectly independent of any actual delay. The beginning to keep house must no doubt be manifested by some overt act of seclusion on the part of the trader, and although he does not at all remove from the room or part of the house which he usually occupies, a denial to a creditor, through a servant, is as much an act of seclusion as if he had barred or nailed up the door; and a denial in such case seems to be almost the only act by which the beginning to keep house can be manifested; but where the trader actually removes from a more public part of his house, which he usually occupies, to a more private one, and there secludes himself with the intention to delay his creditors, the act

[1]Eng. Com. Law Reps, xxi. 305. [2]*Id.* xxi. 60. [3]*Id.* xvi. 401. [4]*Id.* viii. 25. [5]*Id.* vi. 166. [6]*Id.* i. 476.

ing of a creditor seems to be immaterial, except as a mean of proving the *intent* to delay, provided he be actually denied or conceal himself, or do some other act which evidences the beginning to keep house. A mere direction to be denied, without more, is insufficient (*n*). But if a trader in his own house hear himself denied to a creditor, and, with intent to delay his creditors, does not come forward, it is an act of bankruptcy, although he gave no direction to be denied (*o*).

A concerted denial is not evidence of bankruptcy, except as against one who was privy to the concert (*p*).

Intention. The presumption of an intention to delay a creditor, arising from denial, may be rebutted by any evidence which proves the denial to have proceeded from a different motive. As by evidence that the trader was sick at the time, or engaged in company, or that it was at the house where he does not transact business, and that he referred the creditor to his shop (*q*). So a refusal to see a creditor because it was the trader's dinner hour, is not an act of bankruptcy (*r*), or on a Sunday (*s*). As the bankruptcy consists in the act of seclusion by the trader with intent to delay his creditors, the intention with which the *creditors* call is immaterial (*t*).

Yield himself to prison. If a person upon being arrested choose rather (*u*) to go to prison than pay the debt, although he has money sufficient, declaring that he does it in order to force his creditors to come to a composition, this is evidence of an act of bankruptcy, under the clause, *or yield himself to prison* (*x*).

*138 Fraudulent conveyance. *In order to prove an act of bankruptcy under the words of the late statute, "make or cause to be made any fraudulent grant, or conveyance of any of his lands, tenements, goods or chattels, or any fraudulent surrender of his copyhold, &c., or make any fraudulent gift, delivery (*y*), or transfer (*z*)

of bankruptcy seems to be as complete without proof of actual delay, as in the case of a departure from the dwelling-house or realm with that intent; and it was so held in the case of *Dickenson* v. *Foord*, Barnes, 160. And see *Bayly* v. *Schofield*, 1 M. & S. 338; *Bignold* v. *Waterhouse*, Ibid. 255; *Dudley* v. *Vaughan*, 1 Camp. 271;[1] *Harvey* v. *Ramsbottom*, 1 B. & C. 55; *Lloyd* v. *Heathcote*,[2] 2 B. & B. 388; *Lazarus* v. *Waithman*,[3] 5 Moore, 313. Where the fact to be established was a mere denial of the defendant being at home when the officers came to his house, it was held, that it being made by the wife did not prevent its being received, the answer being part of the *res gestæ*. *Att.-gen.* v. *Goode*, 1 M. & Y. 286.

(*n*) *Fisher* v. *Boucher*, 10 B. & B. 705. See *Lloyd* v. *Heathcote*,[2] 2 B. & B. 388.

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(*q*) Per Ld. Mansfield, *Round* v. *Hope*, Co. B. L. 94, 5th edit. *Field* v. *Bellamy*, B. N. P. 39. But where the trader *being ill*, directed his servant to say that he was not at home, it was held that it was a question for the jury whether it was an act of bankruptcy. *Lazarus* v. *Waithman*,[3] 5 Moore, 313.

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(*x*) *Ex parte Barton*, 7 Vin. Ab. tit. Creditor and Bankrupt, 61, 62, pl. 15.

(*y*) The word "delivery," connected with the words "gift or transfer," is to be confined in meaning to transactions of the same nature; where therefore goods were removed with intent to delay a creditor, and delivered to a party having no claim over them, held that it was not an act of bankruptcy; and at all events, a delivery of the goods by the party's agent generally conducting his business cannot be so; a man cannot commit an act of bankruptcy by the conduct of his agent. *Cotton* v. *James*,[5] 1 Mood. & M. C. 277.

(*z*) A warrant of attorney given for the purpose of entering up judgment in four days, and seizing the property of an insolvent party, to the detriment of his general creditors, was held to be a charge, or a transfer of it, within the 7 Geo. 4, c. 57, s. 32, and void. *Cumming* v. *Bailey*,[6] 6 Bing. 363. *Sharpe* v. *Thomas*,[7] 6 Bing. 416. And see *Doe* v. *Carter*, 8 T. R. 300.

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of any (*a*) of his goods or chattels," (*b*) it is necessary, in the first place, to prove an actual conveyance, gift, or delivery; and 2dly, to prove that such conveyance or gift or delivery was fraudulent, and with intent to defeat or delay creditors.

Proof of the conveyance.

1st. A conveyance, when it is by *deed* or other *instrument*, must be proved (*c*) in the regular way by means of the subscribing witnesses. But as against a defendant, in an action for the value of goods attempted to be conveyed, his admission of the execution of the deed, on his examination before the commissioners, supersedes the necessity of proving the deed in the usual way by the subscribing witness (*d*). The deed or other instrument must be properly stamped (*e*). The conveyance will enure as an act of bankruptcy, although it is void through fraud; as where an insolvent trader conveys to an infant son (*f*).

That the conveyance, &c., was fraudulent.

2dly. That the conveyance, gift or delivery was fraudulent, and made with intent to defeat or delay creditors. It is fraudulent in point of law where the *necessary effect* is to prevent a fair distribution amongst creditors, contrary to the spirit of the bankrupt laws (*g*). As where the trader transfers the whole of his effects to particular creditors (*h*), to the exclusion of *any other (*i*), although the transfer be on trust for the benefit of all his creditors (*k*). *139

(*a*) It was sufficient even under the stat. of 21 Jac. 1, c. 15, that *part* was conveyed. See *Ex parte Foord*, cited 1 Burr. 477; B. N. P. 40; *Linton* v. *Bartlett*, 3 Wils. 47; *Morgan* v. *Horseman*, 3 Taunt. 243. But it was necessary to prove a conveyance by *deed*.

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(*h*) *Newton* v. *Chantler*, 7 East, 145. Note, that the trader, when he gave the bill of sale was under arrest at the suit of the creditor to whom the bill of sale was given; but the Court held that this made no difference, and that the case was not distinguishable from that of *Butcher* v. *Easto*, Doug. 294. But the Court held that the case of a *partial* transfer might be open to a very different consideration. In *Thornton* v. *Hargreaves*, 7 East, 549, Lawrence, J. observed, "If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy; and if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditor. And see *Worsely* v. *Demattos*, 1 Burr. 467. The transfer of all the bankrupt's property to one of his creditors is an act of bankruptcy, although the deed be executed by the bankrupt only, and not proved to have been acted on. *Botcherby* v. *Lancaster*,[2] 1 Ad. & Ell. 77. *Siebert* v. *Spooner*, 1 M. & W. 714. See *Pulling* v. *Tucker*,[3] 4 B. & A. 382. An assignment, *bona fide*, and for value, so far as the vendee is concerned, is not an act of bankruptcy, although the trader meditated an absconding to defraud his creditors. *Baxter* v. *Pritchard*,[4] 1 Ad. & Ell. 456. The sale of the whole of a trader's property is not of itself an act of bankruptcy, and some fact must be shown from which fraud may be inferred. An assignment for benefit of creditors is not an act of bankruptcy, except in cases within the 4th section. See *Rose* v. *Haycock*, 1 Ad. & El. 461, Lord Tenterden's judgment. An assignment of part of the trader's property in trust to sell and dispose of the proceeds as he shall direct, is not of itself an act of bankruptcy. *Robinson* v. *Carrington*, 1 Mont. & Ayr. 1. And see *Carr* v. *Burdiss*, 1 C. M. & R. 443; *Abbott* v. *Burbage*,[5] 2 Bing. N. C. 444; *Greenwood* v. *Churchill*, 1 M. & K. 546; *Belcher* v. *Prittie*,[6] 10 Bing. 408.

(*i*) It is an act of bankruptcy if all the creditors do not concur. *Eckhardt* v. *Wilson*, 8 T. R. 140, vide *infra*, note (*l*). And if one only be excluded. *Ex parte Foord*, 1 Burr. 477.

(*k*) *Dutton* v. *Morrison*, 17 Ves. 199. And such an assignment is an act of bankruptcy, although none

[1] Eng. Com. Law Reps. xix. 120. [2] *Id.* xxviii. 45. [3] *Id.* vi. 455. [4] *Id.* xxviii. 124. [5] *Id.* xxix. 391. [6] *Id.* xxv. 184.

ing of a creditor seems to be immaterial, except as a mean of proving the *intent* to delay, provided he be actually denied or conceal himself, or do some other act which evidences the beginning to keep house. A mere direction to be denied, without more, is insufficient (*n*). But if a trader in his own house hear himself denied to a creditor, and, with intent to delay his creditors, does not come forward, it is an act of bankruptcy, although he gave no direction to be denied (*o*).

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(*f*) *Whitwell* v. *Thomson*, 1 Esp. C. 68.

(*g*) Per Le Blanc, J. in *Newton* v. *Chantler*, 7 East, 145. See *Linton* v. *Bartlett*, 3 Wils. 47. *Wilson* v. *Day*, 2 Burr. 827. *Compton* v. *Bedford*, 1 Bl. R. 362; 1 Burr. 484. See Lord Eldon's observations in *Dutton* v. *Morrison*, 17 Ves. 199; and see *Ex parte Foord*, Burr. 477; *Hooper* v. *Smith*, 1 Blacks. 441; *Kettle* v. *Hammond*, Cooke, 86; *Harman* v. *Fisher*, Cowp. 617, 629; *Kaye* v. *Bolton*, 6 T. R. 134. So also is a conveyance of all, with the exception of a small part. Ibid.

(*h*) *Newton* v. *Chantler*, 7 East, 145. Note, that the trader, when he gave the bill of sale was under arrest at the suit of the creditor to whom the bill of sale was given; but the Court held that this made no difference, and that the case was not distinguishable from that of *Butcher* v. *Easto*, Doug. 294. But the Court held that the case of a *partial* transfer might be open to a very different consideration. In *Thornton* v. *Hargreaves*, 7 East, 549, Lawrence, J. observed, "If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy; and if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditor. And see *Worsely* v. *Demattos*, 1 Burr. 467. The transfer of all the bankrupt's property to one of his creditors is an act of bankruptcy, although the deed be executed by the bankrupt only, and not proved to have been acted on. *Botcherby* v. *Lancaster*,[2] 1 Ad. & Ell. 77. *Siebert* v. *Spooner*, 1 M. & W. 714. See *Pulling* v. *Tucker*,[3] 4 B. & A. 382. An assignment, *bona fide*, and for value, so far as the vendee is concerned, is not an act of bankruptcy, although the trader meditated an absconding to defraud his creditors. *Baxter* v. *Pritchard*,[4] 1 Ad. & Ell. 456. The sale of the whole of a trader's property is not of itself an act of bankruptcy, and some fact must be shown from which fraud may be inferred. An assignment for benefit of creditors is not an act of bankruptcy, except in cases within the 4th section. See *Rose* v. *Haycock*, 1 Ad. & El. 461, Lord Tenterden's judgment. An assignment of part of the trader's property in trust to sell and dispose of the proceeds as he shall direct, is not of itself an act of bankruptcy. *Robinson* v. *Carrington*, 1 Mont. & Ayr. 1. And see *Carr* v. *Burdiss*, 1 C. M. & R. 443; *Abbott* v. *Burbage*,[5] 2 Bing. N. C. 444; *Greenwood* v. *Churchill*, 1 M. & K. 546; *Belcher* v. *Prittie*,[6] 10 Bing. 408.

(*i*) It is an act of bankruptcy if all the creditors do not concur. *Eckhardt* v. *Wilson*, 8 T. R. 140, vide *infra*, note (*l*). And if one only be excluded. *Ex parte Foord*, 1 Burr. 477.

(*k*) *Dutton* v. *Morrison*, 17 Ves. 199. And such an assignment is an act of bankruptcy, although none

[1]Eng. Com. Law Reps. xix. 120. [2]*Id.* xxviii. 45. [3]*Id.* vi. 455. [4]*Id.* xxviii. 124. [5]*Id.* xxix. 391. [6]*Id.* xxv. 184.

So if it be of such part as when actually transferred would disable him from trading (*l*).

*140 Fraudulent preference.

*In such case it makes no difference whether the transfer resulted from the threats and importunity of the creditor, or was voluntary (*m*). But in such cases it is necessary to prove that the assignment will have the effect of preventing the trader from carrying on his business; as by evidence of the general state of his affairs at the time. It is not sufficient to show that under pecuniary pressure he parted with articles essential to his business (*n*). Where the transfer to a creditor is *partial*, the question is whether it was voluntary on the part of the trader, and made with intent to give him a preference over the other creditors. If it was made voluntarily, and in contemplation of bankruptcy, it necessarily follows that it was intended to give a fraudulent preference, and therefore constitutes an act of bankruptcy (*o*).

of the creditors have executed it, and though it has never been acted on, or out of the trader's possession. *Botcherby* v. *Lancaster*,[1] 1 Ad. & Ell. 77; 3 N. & M. 383, S. C.

(*l*) In *Hooper* v. *Smith*, 1 Bl. 441, Lord Mansfield says, "If a man makes over so much of his stock in trade as to disable himself from being a trader, this would be fraudulent; it would be, as I said in *Compton* v. *Bedford* (1 Blacks. 362), an assignment of his solvency." In *Hassell* v. *Simpson*, 2 Montague's B. L. 253; Doug. 88, Ld. Mansfield observed, "A man may be insolvent without being a bankrupt, and a man may become a bankrupt and yet be able to pay 25*s.* in the pound: the reason why a man becomes a bankrupt who conveys away all his property is, that he thereby *becomes incapable of trading*." Where the trader transferred one-third part of all his effects in consideration of a loan of 120*l.*, and, being in insolvent circumstances, absconded two days after, it was held to be an act of bankruptcy. *Linton* v. *Bartlett*, 3 Wils. 47; and see *Devon* v. *Watts*, 1 Noy, 86. It must be of so much of his property as to incapacitate him from carrying on business by the insolvency which would ensue. *Wedge* v. *Newlyn*,[2] 4 B. & Ad. 831. And *semble*, even the transfer of property essential to the carrying on the business is not sufficient, without showing incapacity to replace the property. *Ib.* A transfer to bankers of a trader's leasehold property, with all his stock in trade, and also a policy of insurance, as a security for monies advanced and to be advanced, with a power of sale, and a proviso that the trader should retain possession till default, but not including all the trader's property, being made *bona fide*, is not an act of bankruptcy. *Carr* v. *Burdiss*, 1 C. M. & R. 443. In the case of *Balme* v. *Hutton*, 2 Y. & J. 101; 1 C. M. & R. 448, an assignment of machinery to a creditor, the trader having other property besides that assigned, does not on the face of it amount to an act of bankruptcy, and is not an act of bankruptcy, although the parties would, if possession had been taken, have been unable to carry on their trade. But in the case of *Balme* v. *Jewison*, K. B. Nov. 21, 1829, the same deed was held to be an act of bankruptcy, it being conceded on the trial that the question which the jury had before decided in reference to that deed, was not again to be submitted to the consideration of the jury, but that if the court should be of opinion that on the face of it the deed was not an act of bankruptcy, the counsel for the defendant should be at liberty to move, it being admitted that if the deed was to operate immediately, so as to put the property in the possession of the person in whose favour that deed was made, it would be impossible to carry on the business, and would therefore be an act of bankruptcy. The counsel for the defendant accordingly moved, but the Court was of opinion that the deed operated immediately, and that as its effect would be, that on possession taken, it would be impossible to carry on the business, it was an act of bankruptcy; and that it was an act of bankruptcy by the party executing, although the other partner did not execute, there being no proviso, as in the case 17 Ves., for being void in case the other party did not execute. But an assignment for the general benefit of creditors, assented to by all or by the generality (*Inglis* v. *Grant*, 5 T. R. 530,) is not an act of bankruptcy. So where one of two partners conveyed all his freehold and copyhold estate in trust to raise money to facilitate a settlement with his creditors, the pecuniary assets of the firm not being sufficient to liquidate the debts of the firm. *Berney* v. *Davidson*,[3] 1 B. & B. 408. *Berney* v. *Vyner*,[4] Ibid. 482.

(*m*) *Newton* v. *Chantler*, 7 East, 145. *Thornton* v. *Hargreaves*, Ibid. 544. *Butcher* v. *Easto*, Doug. 294. *Stewart* v. *Moody*, 1 C. M. & R. 777.

(*n*) *Wedge* v. *Nemlyn*,[5] 4 B. & Ad. 381. As that a miller transferred his wagons and horses to a creditor, who arrested him. *Ib.* A mere colourable exception has of course no operation. *Ex parte Foord*, cited 1 Burr. 477. *Compton* v. *Bedford*, 1 W. Bl. 362. *Low* v. *Skinner*, 2 W. Bl. 996. *Berney* v. *Davidson*,[3] 1 B. & B. 408. *Berney* v. *Vyner*,[4] Ibid. 482.

(*o*) Ibid. And see *Thornton* v. *Hargreaves*, 7 East, 544. In that case the trader being pressed by a creditor for payment, or for a security, executed a bill of sale of goods, apparently the whole of his stock, and immediately left off business and became a bankrupt; and it was held that as the bankrupt did not by the execution of the bill of sale redeem himself from any present difficulty, the presumption was, that he acted not under the pressure of a threat of process, but with intent to give a fraudulent preference. See also *Fidgeon* v. *Sharpe*,[6] 5 Taunt. 539; *Smith* v. *Payne*, 6 T. R. 152; *Harman* v. *Fisher*, Cowp. 117. And a voluntary payment under circumstances which might reasonably lead the trader to suppose bankruptcy to be probable, though not inevitable, is fraudulent. *Poland* v. *Glynn*,[7] 2 D. & R. 310.

[1] Eng. Com. Law Reps. xxviii. 45. [2] *Id.* xxiv. 173. [3] *Id.* v. 134. [4] *Id.* v. 156. [5] *Id.* xxiv. 173. [6] *Id.* i. 183. [7] *Id.* xvi. 88.

The question, however, in such cases of partial transfer is, whether the trader did in fact intend to give a preference to particular persons, to the prejudice of his general creditors (*p*), and in contemplation of bankruptcy. *A fraudulent intention, in the ordinary sense of the word, is not essential *141
to a fraudulent preference; neither is any privity on the part of the creditor necessary (*q*).

It has been held that, although the fact that the trader at the time of the transfer contemplated bankruptcy be strong, if not absolutely conclusive evidence of fraudulent preference, it is not essential to such proof. Where a trader conveyed an equity of redemption, to which he was entitled, to particular persons, and it was found by the jury that the conveyance was fraudulent, and made with intent to give a preference to those persons to the prejudice of the general creditors, it was held to be an act of bankruptcy, although the trader continued to carry on his trade, and no commission issued till three years after (*r*).

(*p*) *Pulling* v. *Tucker*,[1] 4 B. & A. 382. It is always a question of *quo animo:* Did he transfer to obtain relief or to favour the particular creditor? Did he contemplate bankruptcy? Did he yield to pressure? Was the act capable of affording present relief? The bankrupts (country bankers) having suspended payments, and being in failing circumstances, the delivery of cash and notes by one of the partners to the town agent, with the view of reducing the balance, although no undue preference be intended by such partner, is to be taken as such, the insolvency of the house being necessarily consequent; and cash delivered over by the other partners to the agent, in the expectation and on condition of receiving support, which is not rendered, cannot be retained by the defendant. See Mont. B. L.—The bankrupt, in the habit of advancing sums to his son, the defendant, for maintenance and discharge of his bills, gives him a sum of money on the day when he stops payment, knowing himself at the time insolvent, but not expecting to become bankrupt; the question is whether it was paid in the ordinary course in which he maintained him, in which case the assignees cannot recover it back, or whether it was for the purpose of securing him an advantage over, and to give him a benefit at the expense of the creditors. *Abell* v. *Daniell*,[2] 1 Mood. & M. C. 370. The cases, observes Lord Kenyon (*Whitwell* v. *Thompson*, 1 Esp. C. 78), where the assignment by a trader of his property has been deemed fraudulent and an act of bankruptcy, have been where it has been made for a by-gone and before contracted debt; but that it never could be taken to be law that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who could assist him in his difficulties, as a security for advances. The bankrupt before any act of bankruptcy, having a large order to execute for the East India Company, obtained from the defendants advances to enable him to execute it, upon an agreement that they should receive the amount of the order from the Company and repay themselves, which they accordingly did; held that it amounted to an equitable assignment of that particular fund, and was not a fraudulent preference, to which there must be both an insolvency in the trader, and a voluntary payment or transfer by him. *Hunt* v. *Mortimer*,[3] 10 B. & C. 42. And it seems that a payment made in pursuance of a previous contract, cannot be deemed the result of a preference. *Vacher* v. *Cocks*,[4] 1 B. & Ad. 145. A sale by a trader of goods for ready money, under circumstances which ought to have led the buyer as a man of business to entertain suspicions of an intention to defraud creditors, is an act of bankruptcy, if the jury so find it. *Cook* v. *Caldecott*,[5] 1 Mood. & M. C. 522.

(*q*) Per Bayley, J. *Poland* v. *Glynn*,[6] 2 D. & R. 310. *Harman* v. *Fisher*, Cowp. 117. If a man's circumstances be such as to fairly lead him to believe bankruptcy inevitable, and he voluntarily makes a payment to one creditor to the exclusion of the rest, it is a fraud within the statute. Per Gibbs, C. J., *Fidgeon* v. *Sharp*,[7] 5 Taunt. 539. The *bonâ fide* payment of a just debt fraudulently and in contemplation of bankruptcy, is an act of bankruptcy. *Bevan* v. *Nunn*,[8] 9 Bing. 107. Although the transaction took place four months before the commission issued. *Ibid.*

(*r*) *Pulling* v. *Tucker*,[9] 4 B. & A. 382. In *Smith* v. *Payne*, 6 T. R. Ld. Kenyon, C. J. laid great stress on the circumstance that the trader did not contemplate bankruptcy at the time. In *Pulling* v. *Tucker*, the deed recited that three persons mentioned, had agreed to advance to the trader specified sums of money, payment of which was admitted to have been made at the time of the execution of the deed, a receipt being indorsed on the back, signed by the trader (the defendant) and witnessed by his clerks. It was proved that no money passed when the deed was executed, that two of the parties stated to have advanced the money were the defendant's brothers, and the third proved that he knew nothing of the transaction. The Court held that the question, as above stated, had been properly left to the jury, on the authority of *Morgan* v. *Horseman*, 3 Taunt. 241. In that case, it was held that a deed whereby a debtor being pressed conveyed estates in trust to sell, and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference, was an act of bankruptcy. In that case (Abbott, L. C. J. observes), it was, it is true, expressly stated that the deed was executed in contemplation of bankruptcy; but Mansfield, C. J. lays no stress on that conveyance, for he expressly says, "a conveyance either of all or of part of a man's property in favour of fewer than all his creditors is an act of bankruptcy, because it is the means whereby the creditors may be defeated or delayed." Abbott, C. J. further observed, that if it were material that the

[1]Eng. Com. Law Reps. vi. 455. [2]*Id.* xxii. 337. [3]*Id.* xxi. 26. [4]*Id.* xx. 364. [5]*Id.* xix. 403. [6]*Id.* xvi. 88. [7]*Id.* i. 183. [8]*Id.* xxiii. 272. [9]*Id.* vi. 455.

But according to later authorities, it seems that in case of a partial transfer, it is necessary to show, not only that the preference was voluntary, but that it was given in contemplation of bankruptcy (*s*).

*142 *In such instances, however, that is where the transfer is partial, it is usually a question to be decided by the aid of extrinsic evidence, under all the circumstances, whether it was done in order to give a fraudulent preference to the individual to the prejudice of the creditors in general, and in contemplation of bankruptcy. And for this purpose it may be material to show the situation of the trader and his affairs at the time, that he was insolvent at the time, and knew that he was so (*t*); it is necessary to show that he contemplated bankruptcy. So it is material to prove circumstances which show a motive for undue preference; such as the relationship of the trader to the transferee, or acts or declarations of the trader at the time of the transfer, manifesting an intention to show favour; suspicious circumstances attending the transfer itself; that it was made on the proposal of the trader (*u*), at an unseasonable hour (*x*); that it was executed in secret (*y*); that the conveyance, &c. is falsely dated (*z*); that its terms are general, where in an ordinary case they are usually specific (*a*); that it was made to secure a sum not due (*b*), or a larger sum than was due (*c*); that the trader suppressed evidence by which the real nature of the transaction might be elucidated (*d*); that the property conveyed constituted the whole or a considerable part of the trader's effects (*e*); that the bankrupt soon afterwards ceased to trade, or absconded.

deed should have been executed in contemplation of bankruptcy, there was strong evidence of the fact. For the bankrupt being in insolvent circumstances, conveys his real estate to certain persons as a security for debts then due, or any other debts which might become due. Such a deed given under such circumstances would make bankruptcy inevitable, and a man must be supposed to contemplate the consequence of his own act.

(*s*) *Morgan* v. *Brundrett*,[1] 5 B. & Ad. 289. *Gibbins* v. *Phillips*,[2] 7 B. & C. 529. *Poland* v. *Glyn*, 4 Bing. 22. And this is a question of fact under all the circumstances of the case. *Poland* v. *Glyn*, 4 Bing. 22. *Flook* v. *Jones*,[3] 4 Bing. 20; Doug. 85. *Atkinson* v. *Brindall*,[4] 2 Bing. N. C. 225. See *Devon* v. *Watts*, Doug. 85. An assignment by an insolvent is void if made with the intention of petitioning the Court for his discharge, although it be made more than three months before the commencement of his imprisonment. *Becke* v. *Smith*, 2 M. & W. 191.

(*t*) *Newton* v. *Chantler*, 7 East, 138. The question, as regards contemplation of bankruptcy is not what was the real state of the trader's affairs, but what was the state of his affairs in his own judgment. *Belcher* v. *Prittie*,[5] 10 Bing. 408.

(*u*) See *Crosby* v. *Crouch*, 11 East, 256. *Smith* v. *Payne*, 6 T. R. 152; *Myleton* v. *Butler*, 2 B. & P. 283; *infra*, note (*z*). It is not necessary to show that the bankrupt took the first step. *Morgan* v. *Brundrett*,[6] 2 B. & Ad. 289. It has been held, that it is not sufficient to show an intent to favour third persons. *Abbott* v. *Pomfret*,[7] 1 Bing. N. C. 462; but *qu.*

(*x*) *Compton* v. *Bedford*, 1 Blacks. 362, where the assignment was at midnight. *Harman* v. *Fisher*, Cowp. 117, where the transfer was at five in the morning, after sitting up all night. *Hartshorn* v. *Slodden*, 1 B. & P. 582. See below, note (*f*).

(*y*) *Wilson* v. *Day*, 2 Burr. 827. *Jacob* v. *Shepherd*, Burr. 478; and see *Twine's Case*, 3 Co. 8.

(*z*) *Ingleton* v. *Buller*, 2 B. & P. 283. The acceptor of a bill of exchange, two days before the bill became due, called on the indorser and stated that he was insolvent; the indorsee insisting on payment, the acceptor paid it, and four days afterwards became bankrupt; the bill had been altered so as to fall due before the transaction, but without the indorser's (the defendant's) knowledge; the jury were directed that there was strong ground to infer fraud, and that the inference, as far as related to the bankrupt, was strengthened by the alteration. Lord Eldon, C. J. distinguished the case from that of *Smith* v. *Payne*, 6 T. R. 152, on the ground that there the creditor came to the debtor, and the security was taken for a debt actually due.

(*a*) The generality of the gift, without any exception, was one of the *indicia* in *Twine's Case;* 3 Co. 81; the maxim being *dolus versatur in generalibus*. In *Jacob* v. *Shepherd*, Burr. 478, Ld. Mansfield, C. J. in assigning reasons for the validity of the instrument, observes that the deed was of specific goods. See also *Wilson* v. *Day*, 2 Burr. 827; *Alderson* v. *Temple*, 4 Burr. 2235; and see also Montague's B. L. vol i. p. 66; Deason, B. L. vol. i. p. 442.

(*b*) See note (*z*); and *Pulling* v. *Tacker*,[8] 4 B. & A. 382.

(*c*) *Wilson* v. *Day*, 2 Burr. 827.

(*d*) *Alderson* v. *Temple*, 4 Burr. 2235. *Worsely* v. *Demattos*, Burr. 467. *Devon* v. *Watts*, Doug. 86.

(*e*) *Thornton* v. *Hargreaves*, 7 East, 549.

[1]Eng. Com. Law Reps. xxvii. 79. [2]*Id.* xiv. 97. [3]*Id.* xiii. 328. [4]*Id.* xxix. 316. [5]*Id.* xxv. 184. [6]*Id.* xxvii. 79. [7]*Id.* xxvii. 459. [8]*Id.* vi. 455.

Evidence in answer to a case of voluntary or fraudulent preference, where the facts are not conclusive, consists of circumstances tending to show that the transaction was not voluntary on the part of the trader, but was the result of importunity or compulsion (*f*). It is not voluntary if it be made *under the apprehension that a degree of force, civil or criminal, *143
is about to be applied (*g*). It is not necessary to show that any threat was used; it is sufficient if the act be the result of *pressure* and *importunity* on the part of the creditor (*h*). If *urgency* be used it rebuts the presumption of voluntary preference (*i*). *A.* having in September discounted three bills for *B.*, afterwards suspecting his credit, required a security to be put into his hands, and *B.* accordingly, at different times between November and February, deposited books to the amount of 300*l.* with him, to be sold by him for his own benefit, in case the bills should not be paid by the acceptors; the books were chiefly brought by *B.* in a hackney-coach, in the evening; *B.* committed an act of bankruptcy in March, and *A.* had then the bills unpaid in his hands. Upon an action brought by the assignees, they were nonsuited on the ground that there was no voluntary preference, since the bankrupt parted with the books upon the defendant's importunity; and although the bills were not due, the defendant was liable upon them, and had a right to a further security (*k*).

Where *B.* had property to a large amount at the Custom-house, which stood in his own name, but which he had purchased with *A.*'s money, and there was evidence to show that he had been induced to transfer the whole to *A.*, under the apprehension that *A.* would prosecute him for the forgery of a bill which he had deposited with *A.* as a security, it was left to the jury to say whether the transfer was voluntary, or was made under the apprehension that a degree of force, civil or criminal, was about to be applied; and Lord Ellenborough informed them, that everything which might overcome the free-will of the party was sufficient to exclude a voluntary preference (*l*). So payment to an obligee, who importunes for payment before the forfeiture of the bond, is good (*m*).

Where a trader, in contemplation of bankruptcy, voluntarily sent his clerk to pay the amount, but before the payment the creditor applied for payment, it was held to be good (*n*). This was on the principle that the preference intended was not communicated; but the authority of this case has been questioned (*o*).

(*f*) Either a demand of payment of a debt due, or a demand of further security, repels the presumption of voluntary preference. See Ld. Ellenborough's observations in *Crosby* v. *Crouch*, 11 East, 256. And secrecy in the mode of delivery will not make it fraudulent where it is not otherwise fraudulent; as where a creditor demands a security for a running debt. See Lord Ellenborough's observations, 11 East, 261.

(*g*) *De Tastet* v. *Carroll*,[1] 1 Starkie's C. 88; and see *Atkins* v. *Seward*, *cor.* Holroyd, J. Winchester Spring Ass. 1819, Manning's Index, 2d edit. 63. The bankrupt stated that he paid the money after a threat of arrest, partly with a view of relieving his father from liability; it is for the jury to consider the motives and intention of the bankrupt, in order to ascertain whether the payment was in fact made in consequence of the threats. *Cook* v. *Rogers*,[2] 7 Bing. 438. *Harman* v. *Fisher*, Cowp. 117; but see *Bayley* v. *Ballard*, 1 Camp. 416.

(*h*) See *Smith* v. *Payne*, 6 T. R. 152.

(*i*) Per Ld. Ellenborough, in *Crosby* v. *Crouch*, 2 Camp. C. 166. 11 East, 256. In *Hartshorn* v. *Slodden*, 2 B. & P. 582. Ld. Alvanley was of opinion, that if the creditor pressed for payment, the intention of the bankrupt was not material. See *Belcher* v. *Prittie*,[3] 10 Bing. 407.

(*k*) *Crosby* v. *Crouch*, 2 Camp. C. 166; 11 East, 226.

(*l*) *De Tastet* v. *Carroll*,[1] 1 Starkie's C. 88.

(*m*) *Hartshorn and others* v. *Slodden*, 4 Esp. C. 60; 2 B. & P. 582. *Thompson* v. *Freeman*, 1 T. R. 155. *Thornton* v. *Hargreaves*, 7 East, 544. *Crosby* v. *Crouch*, 11 East, 256. *Belcher* v. *Jones*, 2 M. & W. 258.

(*n*) *Bayley* v. *Ballard*, 1 Camp. C. 416.

(*o*) *Singleton* v. *Butler*, 2 B. & P. 283. And see *Cooke* v. *Rogers*,[2] 7 Bing. 446. The real question seems to be as to the ultimate motive of the trader; whether he yielded to the demand, or availed himself of the opportunity offered to give a fraudulent preference.

[1]Eng. Com. Law Reps. ii. 308. [2]*Id.* xx. 194. [3]*Id.* xxv. 184.

Where the holder of a bill promised the acceptor, whom he knew to be insolvent, that if the bill was paid he would effect a composition with his creditors, the preference was held to be fraudulent (*p*).

*144 *Where a trader purchased goods on the 8th of October, for the purpose of exportation, but finding that he must stop payment, and that he could not export them, returned them on the 16th of October to *B.*, the vendor, and stopt payment on the 17th; and his creditors refusing him time, he became a bankrupt on the 2d of November: it was held that the jury were warranted in finding that the delivery of the goods to *B.* was not in contemplation of bankruptcy (*q*).

Where a creditor obtained a preference not fraudulent, with a view to an intended composition with creditors, but without any view to a bankruptcy, and the composition never took place, but the trader afterwards became bankrupt, it was held that the creditor was entitled to retain his securities (*r*).

Where a sale has been completed by the actual delivery of goods to a trader, before payment, he cannot give the vendor a preference by rescinding the contract and returning the goods (*s*). But where goods in *transitu* are given up by the trader, it is a question for the jury whether they were given up *bonâ fide*, and without any motive of undue and voluntary preference, although the trader was on the verge of bankruptcy (*t*).

Goods were sent to a trader in February, with an option, according to the course of trade, of returning them; he having done no act to determine his option, on the 4th and 5th of March returned the goods, requesting a written approbation of this act, being then insolvent; such approbation was not given till after the bankruptcy, and it was held that the property passed to the assignees (*u*).

Continuance of possession.

The fact that the property conveyed remained after the transfer in the possession of the trader, is strong, and being unanswered, is conclusive evidence of fraud (*x*). For the trader thereby obtains false credit to the deception or prejudice of his creditors (*y*). But this fact is not *conclusive* evidence of fraud; it may be explained by circumstances (*z*) which show that such possession was given as the nature of the case will admit of.

The engineer of a canal company borrowed money from the company, in order to pay his creditors, and executed a bill of sale of timber, and other articles of his property, deposited on the premises of the company, (which he had bought with money advanced by them,) and delivered them to the company by the delivery of a copper halfpenny; and the Court held that since such possession had been delivered to the company at the time of executing the deed, as the case admitted of, the deed was not fraudulent (*a*).

(*p*) *Singleton* v. *Butler*, 3 Esp. C. 215; 2 B. & P. 283. *Smith* v. *Payne*, 6 T. R. 152.

(*q*) *Fidgeon* v. *Sharp*,[1] 1 Marsh. 196. And see *Moore* v. *Barthrop*,[2] 1 B. & C. 5.

(*r*) *Wheelwright* v. *Jackson*,[3] 5 Taunt. 109.

(*s*) *Barnes* v. *Freeland*, 6 T. R. 80. See *Haswell* v. *Hunt*, 5 T. R. 221; *Neate* v. *Ball*, 2 East, 117.

(*t*) *Dixon* v. *Baldwin*, 5 East, 175.

(*u*) *Neate* v. *Ball*, 2 East, 117; *infra*, 111, note (*y*).

(*x*) A conveyance of goods without deed is fraudulent, unless possession be given; if it be by deed, it is fraudulent, and an act of bankruptcy. Per Ld. Kenyon, C. J. in *Manton* v. *Moore*, 7 T. R. 71.

(*y*) *Manton* v. *Moore*, 7 T. R. 67. *Worseley* v. *Demattos*, 1 Burr. 467. A trader being in distressed circumstances, assigns *all* his estate to a creditor as a security for an unliquidated sum, without delivering any kind of possession, except by giving a letter of attorney to his own clerk to collect debts. The assignment was held to be fraudulent, on the ground of undue preference, and because there had been no alteration of possession. *Wilson* v. *Day*, 2 Burr. 827.

(*z*) Per Ld. Mansfield, 1 Burr. 484.

(*a*) *Manton* v. *Moore*, 7 T. R. 67; and see below, REPUTED OWNERSHIP.

[1]Eng. Com. Law Reps. i. 183. [2]*Id.* viii. 5. [3]*Id.* i. 30.

In general, one privy to a fraudulent deed, cannot set it up as an act of bankruptcy (*b*); and it would be a fatal objection to show that the petitioning *creditor was a party, or privy to the fraudulent deed; but if he was not privy, it is no objection that the co-plaintiffs being co-assignees with him, were privy (*c*); and it is no objection that the petitioning creditor was party to a deed of trust, by which the bankrupt assigned certain property for the benefit of his creditors, in consideration of which they released their debts, it having been afterwards discovered by the petitioning creditor that the bankrupt had previously committed a secret act of bankruptcy (*d*). Proof of privity to a fraudulent deed. *145

Or having been arrested or committed to prison for debt, &c. (*e*) shall on such arrest, or on any detention for debt, lie in prison for twenty-one days, &c. Lying in prison, &c.

To establish an act of bankruptcy by lying in prison (*f*), it must be shown that the trader lay in prison twenty-one days before the issuing the commission; a subsequent lying in prison will not give effect to a previous commission (*g*).

It was held under the stat. 21 J. 1, c. 1, that a commission issued fifty-six days *inclusively* after the arrest was good (*h*).

A trader being arrested on the 4th, was at large till the 8th, when he returned into custody; on the 10th he was removed by *habeas corpus* into the King's Bench, where he remained more than two months; and it was held that the act of bankruptcy related to the 8th (*i*), since there must be a *continuous imprisonment* of two *lunar* months.

A trader being arrested put in bail, and afterwards surrendered in discharge of his bail; it was held that the imprisonment was to be computed from the surrender, and not from the arrest (*k*). But where a trader was sick at the time of the arrest, and could not be removed, but continued in the custody of a follower, the imprisonment was reckoned from the arrest (*l*); so where he has had the benefit of the rules during the period (*m*); and so it was where mere formal bail were put in before a Judge, to get the trader turned over to the prison of the court, upon which he was surrendered, and sent there, for there was an entire continuous imprisonment from the time of the arrest (*n*).

A commission issuing before the time has expired cannot be supported, but it is otherwise as to a commission which issues after the docket is struck (*o*).

Or having been arrested, shall escape, &c. Escape.

A prisoner having been arrested in Kent, and brought up by *habeas corpus* to be bailed, was permitted by the sheriff to call at a house in London, and it was held that the passing through another county, by the permission of the sheriff, did not amount to an act of bankruptcy (*p*).

(*b*) *Jackson* v. *Irwin*, 2 Camp. 49. *Bamford* v. *Baron*, 2 T. R. 594, n. *Tappenden* v. *Burgess*, 4 East, 230. *Tope* v. *Hockin*,[1] 7 B. & C. 101. *Back* v. *Gooch*,[2] Holt's C. 13.
(*c*) *Tappenden* v. *Burgess*,[3] 4 East, 230. *Dutton* v. *Morrison*, 14 Ves. 193.
(*d*) *Doe* v. *Anderson*,[3] 1 Starkie's C. 262.
(*e*) A penalty due to the Crown for smuggling is within this statute. *Cobb* v. *Symonds*,[4] 5 B. & A. 516.
(*f*) *Supra.*
(*g*) *Moser* v. *Newman*,[5] 6 Bing. 556; See *Higgins* v. *M'Adam*, 3 Y. & J. 1. The trading must be before the imprisonment. *Ex parte Lynch*, 1 Mont. & Bl. 453. *Glassington* v. *Rawlins*, 3 East, 407; 4 Esp. 221. *Gordon* v. *Wilkinson*, 8 T. R. 507. But see 2 Show. 512; 14 Ves. 80, 83. *Wydown's Case*, Ibid.
(*h*) 3 East, 407. See Com. Dig. tit. Temps. *Lacon* v. *Hooper*, 6 T. R. 224.
(*i*) *Barnard* v. *Palmer*, 1 Camp. 509.
(*k*) *Tribe* v. *Webber*, Willes, 464; 1 Burr. 438.
(*l*) *Stevens* v. *Jackson*, 4 Camp. 164.
(*m*) *Soames* v. *Watts*,[6] 1 C. & P. 400.
(*n*) *Rose* v. *Green*, 1 Burr. 437.
(*o*) *Gordon* v. *Wilkinson*, 8 T. R. 507. *Ex parte Dufresne*, 1 V. & B. 51.
(*p*) *Rose* v. *Green*, Burr. 437.

[1]Eng. Com. Law Reps. xiv. 22. [2]*Id.* iii. 9. [3]*Id.* ii. 382. [4]*Id.* vii. 179. [5]*Id.* xix. 165. [6]*Id.* xi. 436.

The arrest or detention for debt in these cases should be proved by an
*146 *examined copy of the writ (if returned), and return of *cepi corpus*, the warrant, and arrest, or by the *habeas corpus* and commitment (*q*); and the fact of lying in prison twenty-one days, may be proved either by any person acquainted with the fact, or by the books of the prison (*r*).

The act of bankruptcy has relation to the time of the arrest or going to prison (*s*), and the property vests in the assignees from that time.

By the Insolvent Act, 7 G. 4, c. 57, the filing a petition to take the benefit of the Insolvent Act is, in some cases, an act of bankruptcy, provided the party be declared bankrupt before the time advertised in the Gazette for hearing the petition, or within two calendar months from the filing of it. An office copy of the petition is made evidence of the act. The filing is not complete till it reaches its destination in the proper office (*t*).

In order to establish an act of bankruptcy against a Member of Parliament, for not paying or securing his creditor a debt of 100*l.*, after the suing out the writ of summons, &c., under the stat. 4 G. 4, c. 33, it is not absolutely necessary that such creditor should be called (*u*).

The assignees may rely on *any* act of bankruptcy previous to the issuing of the commission, and are not limited to that on which the commission was founded (*x*).

Where the sheriff took possession under an execution, and afterwards on the same day the bankrupt surrendered; and it was held that the assignees were not entitled to recover against the execution creditor (*y*). The property vests in the assignees by relation only from the moment of the surrender or arrest (*z*).

Petitioning creditor's debt.

Fourthly. It is necessary to prove that the petitioning creditor's debt (*a*)
*147 *existed at the time of the act of bankruptcy (*b*), and also that it existed whilst the party was a trader (*c*).

(*q*) *Salte* v. *Thomas*, 3 B. & P. 188. The prison books are not evidence of the cause of commitment.

(*r*) *Salte* v. *Thomas*, 3 B. & P. 188.

(*s*) *King* v. *Leith*, 2 T. R. 141. And see the provision of the stat. 6 G. 4, c. 16, *supra*, 130.

(*t*) *Garlick* v. *Sangster*,[1] 9 Bing. 46.

(*u*) *Burton* v. *Green*,[2] 3 Car. & P. C. 306.

(*x*) *Reed* v. *James*,[3] 1 Starkie's C. 134. *Hopper* v. *Richmond*,[4] Ibid. 507.

(*y*) *Thomas* v. *Desanges*, 2 B. & A. 686. See also *Sadler* v. *Leigh*, 4 Camp. 197. And see tit. TIME; and the stat. 6 G. 4, c. 16, s. 108.

(*z*) *Gordon* v. *Wilkinson*, 8 T. R. 507. *King* v. *Leith*, 2 T. R. 141.

(*a*) By the stat. 6 G. 4, c. 16, s. 15, no commission shall be issued unless the single debt of such creditor, or of two or more persons being partners, petitioning for the same, shall amount to 100*l.* or upwards, or unless the debt of two creditors so petitioning shall amount to 150*l.*, &c. or unless the debt of three or more creditors so petitioning shall amount to 200*l.* &c. And that every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have any security in writing or otherwise for such sum or not. A commission on the petition of *four* creditors is good, although it does not appear on the face of the affidavit that the debts amounted to 200*l.*; proof being given at the trial that they amounted to that sum. *Hill* v. *Heale*, 2 N. R. 196. 100*l.* in notes bought at 10*s.* each is sufficient. *Ex parte Lee*, 1 P. W. 782. The 7 Geo. 4, c. 46, s. 9, and 1 & 2 Vict. c. 96, are to be taken together; and held that the public officer thereby authorized to sue any member of a joint-stock banking company may sue out a *fiat* in bankruptcy against such member. *Hall*, *ex parte*, 3 Deac. (B. C.) 405. The debt must be a legal one—a promissory note made in violation of a statute cannot be proved, and consequently cannot form a good petitioning creditor's debt, *Ex parte Randleson*, Mo. & M. 86. See further as to the petitioning creditor's debt, *Ex parte Birch*,[5] 4 B. & C. 880; *Bleasby* v. *Crossly*,[6] 3 Bing. 430; *Flook* v. *Jones*,[7] 4 Bing. 20; *Shaw* v. *Hervey*,[8] 1 M. & M. 526. Sect. 8 provides that payment to the petitioning creditor after the docket struck shall be an act of bankruptcy. See *Rose* v. *Maine*,[9] 1 Bing. N. C. 357. *Ex parte Vernon*, 2 Cox, 61. *Ex parte Paxton*, 15 Ves. 463.

(*b*) *Moss* v. *Smith*, 1 Camp. 489; 46 G. 3. c. 145; 14 Ves. 80–3. And where the proceedings under the commission merely showed that the debt existed at the date of the commission, and not that it existed at the time of the act of bankruptcy, it was held to be insufficient (*Clarke* v. *Askew*, 1 Starkie's C. 428; 14 East, 197; *infra*, 149). In *Wright* v. *Lainson*, 2 M. & W. 739, it was held that an I. O. U. bearing date before the bankruptcy was insufficient without proof that it was in existence before the bankruptcy. See the observations of Lord Abinger and Alderson, B. on this case, in *Goodtitle* v. *Milburn*, Ib. 859, 860. But if the note

[1]Eng. Com. Law Reps. xxiii. 259. [2]*Id.* xiv. 320. [3]*Id.* ii. 327. [4]*Id.* ii. 488. [5]*Id.* x. 464. [6]*Id.* xiii. 36. [7]*Id.* xiii. 328. [8]*Id.* xxii. 374. [9]*Id.* xxvii. 419.

*The debt is insufficient if one of the petitioning creditors be an infant (*d*); but the husband alone may sue out a commission on a promissosy note to the wife before coverture (*e*). A debt due *from* a partnership will support a separate commission (*f*); but where a debt is due *to* a partnership, all must concur in the petition (*g*). Where, in the case of a partnership, an account has been rendered and a balance struck, it will support a commission (*h*). An executor may sue out a commission before probate, provided he obtain probate previous to the adjudication (*i*); though the probate be not properly stamped till after the adjudication (*k*). A debt due to an attorney for costs is sufficient, although he has not delivered a bill according to the statute (*l*).

The late statute provides that a debt shall be sufficient to support a com-

be proved to be in existence before the docket struck, the date previous to the bankruptcy is evidence of its previous existence. *Obbard* v. *Betham*,[1] M. & M. 486. And its continued existence up to the time of the act will be presumed. *Jackson* v. *Irwin*, 2 Camp. 50; unless other transactions have intervened. *Gresley* v. *Price*,[2] 2 C. & P. 48. Such previous existence may be evidenced by circumstances; as if it can be shown that about the date of the bill, goods were sold of corresponding amount. *Cowie* v. *Harris*,[3] M. & M. 141. As to the effect of an act of bankruptcy prior to the petitioning creditor's debt, vide *infra*.

(*c*) *Dawe* v. *Holdsworth*, Peake, S. C. 64; *Meggott* v. *Mills*, 12 Mod. 157; 1 Ld. Raym. 286; 1 Montague's B. L. 33. *Butcher* v. *Easto*, Doug. 282; *Heanney* v. *Birch*, 3 Camp. 234. Where the party before he became a trader became indebted to the petitioning creditor in a sum exceeding 100*l*, and afterwards became a trader, but ceased to be such at the time of committing an act of bankruptcy, it was held, that the commission might be supported upon such debt and act of bankruptcy. *Bailie* v. *Grant*,[4] 9 Bing. 121. Where there existed at the time of the act of bankruptcy a sufficient debt on which a commission might have issued, and also at the time of its issuing, and the balance throughout continuing sufficient for that purpose, it is not material that payments had in the interim been made more than sufficient to discharge the balance due at the time of the act of bankruptcy, *Shaw* v. *Harvey*,[5] 1 M. & M. 526. Taxed costs upon a judgment, as in case of nonsuit, being only recoverable by attachment, do not constitute a sufficient petitioning creditor's debt. *Ex parte Stevenson*, 1 M. & M. 262. Where the petitioning creditor had sworn to a debt for *money advanced*, it being only part of the amount of purchase money of premises which were surrendered to him by way of mortgage, held, that it being only an equitable debt, it would not support a commission. *Ex parte Hawthorne*, 1 Mont. 132. Notes of the bankrupts given for a pre-existing debt, payable at *S.* on demand, are a sufficient debt to support the commission, although no demand has been previously made at *S.* 6 M. & S. 295. A trader by deed conveyed all his personal estate to four persons, in trust to pay and discharge his debts, &c., containing a proviso that the said parties, trustees and creditors, should, on or before —— next, make such proof (of debts) if required, and *execute these presents*, with a covenant not to sue, operating as a release by the creditors signing it; two only of the said trustees executed the deed, and not the others; held, that the effect of the words of such proviso was not to avoid the deed if the parties therein named should not execute it, but merely to take away from such parties the right to recover a dividend; the debt therefore of a party executing it was extinguished, and would not constitute a petitioning creditor's debt to found a commission. *Small* v. *Marwood*,[6] 9 B. & C. 300. Where the debt was for money lent on a mortgage, payable after six months' notice, but not to expire before a day stated, it was held sufficient to support a commission sued out before that day. *Hill* v. *Harris*,[7] 1 M. & M. 448. Partners, upon being appointed treasurers to a company, executed a joint and several bond, conditioned amongst other things, when thereunto required, to pay over balances, &c.; held, that upon their bankruptcy before any request made to pay, &c., it was not a sufficient breach to constitute an existing debt, proveable against their separate estates. *Ex parte Lancaster Can. Co.*, 1 Mont. 27. Held also, that it could not be considered a contingent debt, within the 6 Geo. 4, c. 16, s. 56, to give a right of proof, under which there must be an actual debt dependent on a contingency. Ib. Three parties jointly indebted, covenanted jointly and severally on *demand* to pay: and the deed also contained a stipulation that any debt existing previous to such demand should remain a debt, in like manner as if no covenant had been entered into, it being intended only as an additional security; held, that until actual demand the debt remained joint only, and was proveable against the joint estate only, and not against the separate estates. *Ex parte Fairlie*, 1 Mont. 17. Upon a petition on a bill of exchange accepted by the defendant, which, after examination by the commissioners, has been lost, such loss may be proved in an action by the assignees on notice to dispute the debt; for though the legal remedy may be gone, the debt remains. *Pooley* v. *Millard*, 1 Cr. & J. 411; 1 Tyr. 331. Where the act of bankruptcy consists of lying in prison, the trading must be before the imprisonment. *Ex parte Lynch*, 1 Mont. & B. 453; 6 M. & S. 295; *Higgin* v. *Macadam*, 3 Y. & J. 1.

(*d*) *Ex parte Morton*, Buck. 42.
(*e*) *Ex parte Barber*, 1 G. & J. 1. *M'Neilage* v. *Holloway*, 1 B. & A. 218.
(*f*) *Ex parte Crisp*, 1 Atk. 134.
(*g*) *Buckland* v. *Newsam*, 1 Taunt. 477.
(*h*) *Ex parte Nosey*, 1 Mont. & A. 46.
(*i*) *Ex parte Puddy*, Buck. 235; 3 Madd. 241.
(*k*) *Rogers* v. *James*,[8] 7 Taunt. 147.
(*l*) *Ex parte Sutton*, 11 Ves. 164. *Ex parte Howell*, 1 Rose, 112.

[1]Eng. Com. Law Reps. xxii. 363. [2]*Id.* xii. 22. [3]*Id.* xxii. 270. [4]*Id.* xxiii. 276. [5]*Id.* xxii. 374. [6]*Id.* xvii. 385. [7]*Id.* xii. 356. [8]*Id.* ii. 52.

mission, although the time of credit had not elapsed at the time of the act of bankruptcy (*m*).

A creditor who receives a sum of money after notice of the act of bankruptcy, sufficient, if taken in payment, to reduce his debt below the sum of 100*l.*, may still sue out a commission (*n*); and it is no objection that the debt has since merged in a security of a higher nature (*o*), or that the debtor has become insolvent, and included the debt in his schedule (*p*). But where a bankrupt contracts a further debt, after he leaves off trade, and pays money without directing the application, the payment will be set against the old debt, and consequently if it reduce the old debt to less than 100*l.* it will not support a commission (*q*). A creditor who has taken in
*149 *part payment the bill of the trader on a drawee, who had no effects of the trader's in his hands, may petition although he gave no notice of the dishonour of the bill (*r*). A judgment-creditor who has taken his debtor in execution cannot afterwards sue out a commission of bankrupt (*s*) on the same debt. Damages for breach of promise of marriage, the verdict being before, but the judgment after an act of bankruptcy, will not support a commission (*t*).

It has been decided, that a debt barred by the Statute of Limitations is insufficient (*u*), even though it has been kept alive by the suing out of process, and entering of continuances (*x*).

A warrant of attorney given as a security against running acceptances is a *debitum in præsenti*, which will support a commission (*y*).

The evidence to prove the debt is the same as if the action had been brought against the bankrupt (*z*). Therefore an admission of the debt by

(*m*) Stat. 6 G. 4, c. 16, s. *supra*, note (*a*). A bill of exchange or promissory note operates as a debt from the date, and therefore an indorsee may petition on a bill or note *dated* before the act of bankruptcy, though not due till after. *Bingley* v. *Maddison*, 1 Co. B. L. 20. *Glaister* v. *Hewer*, 7 T. R. 498. *Brett* v. *Levett*, 13 East, 213. *Ex parte Thomas*, 1 Atk. 73. *Macarty* v. *Barrow*, 2 Str. 949; Eden, 47; 2 Wils. 135. But it must appear that the indorsement to the petitioner was previous to the commission. *Rose* v. *Rowcroft*, 4 Camp. 245. *Ex parte Botter*, 1 Mont. & B. 412. And where a bill was drawn by the bankrupt in favour of a creditor, and he became bankrupt before the bill became due or was presented, it was held to be a good debt, although *after* the suing out of the commission the amount was paid by the acceptor *Ex parte Douthat*,[1] 4 B. & A. 67. See *Macarty* v. *Barrow*, Str. 949. *Chilton* v. *Wiffin*, 3 Wils. 17. *Starey* v *Barns*, 7 East, 435. *Abraham* v. *George*, 11 Price, 423. Where the bill drawn by the bankrupt has become due before the bankruptcy, proof must be given of presentment and notice of dishonour. *Cooper* v. *Machin*,[2] 1 Bing. 426. If two exchange acceptances, and one before the bills become due commits an act of bankruptcy, the other cannot sue out a commission. *Sarratt* v. *Austin*, 4 Taunt. 200; and see *Bleasby* v. *Crossley*,[3] 3 Bing. 438. Neither can the acceptor of a bill for the accommodation of the bankrupt who does not pay it till after the bankruptcy, for till payment he is a mere surety. *Ex parte Holding*, 1 G. & J. 97. Interest, where it is not expressed in the body of the bill, cannot be added to make up the amount. *Ex parte Burgess*,[4] 2 Moore, 745; *Cameron* v. *Smith*, 2 B. & A. 305; and see *Brett* v. *Levett*, 13 East, 213.

(*n*) *Mann* v. *Shepherd*, 6 T. R. 79. Buck. 283.

(*o*) *Ambrose* v. *Clendon*, Ca. T. H. 267; 2 Str. 1042. Or that the creditor has obtained judgment for it. *Bryant* v. *Withers*, 2 M. & S. 123.

(*p*) *Jellis* v. *Mountford*,[5] 4 B. & A. 256; *Ex parte Shuttleworth*, 2 G. & J. 68.

(*q*) *Meggott* v. *Mills*, Ld. Raym. 286; Comb. 463.

(*r*) *Bickerdike* v. *Bollman*, 1 T. R. 405.

(*s*) *Cohen* v. *Cunningham*, 8 T. R. 123.

(*t*) *Ex parte Charles*, 14 East, 197.

(*u*) *Gregory* v. *Hurrill*, Eden's B. L. 46, 2d edit.[6] 5 B. & C. 341;[7] 1 Bing. 324; reversing the judgment of the Court of C. P.[8] 3 B. & B. 212. But note that the writs were not returned, nor were the continuances entered until after the issuing the commission. See *Taylor* v. *Hipkins*,[9] 5 B. & A. 489. *Ex parte Roffey*, 2 Rose, 245. Where the debt arose on a joint note made in 1825, with a party who, in 1835, executed an assignment for the benefit of his creditors, under which a dividend was afterwards received in respect of the note and interest; held, that such payment by a co-contractor did not revive the debt against the bankrupt so as to make it proveable. *Woodward ex parte*, 3 Mont. & Ayr. 609; and 3 Deac. 290, 294; *Jackson* v. *Fairbank*, 2 H. Bl. 340.

(*x*) See the last note.

(*y*) *Miles* v. *Rawlyns*, 4 Esp. C. 194.

(*z*) B. N. P. 37. *Abbott* v. *Plumbe*, Doug. 216. *Koopes* v. *Chapman*, Peake, 19.

[1]Eng. Com. Law Reps. vi. 354. [2]*Id.* viii. 367. [3]*Id.* xiii. 36. [4]*Id.* iv. 241. [5]*Id.* vi. 420. [6]*Id.* xi. 251. [7]*Id.* viii. 335. [8]*Id.* vii. 415. [9]*Id.* vii. 169.

the bankrupt *before his bankruptcy* is evidence (*a*). So are entries in the bankrupt's books (*b*), or declarations of the bankrupt before the bankruptcy; declarations by the bankrupt as to the debt, made after the act of bankruptcy, but before the commission, have been received in evidence (*c*). But it has since been decided, after a consideration of all the authorities, that an admission made by the bankrupt after an act of bankruptcy, though before the commission, is not admissible to establish the petitioning creditor's debt (*d*). An acknowledgment by a trader of a debt by bond does not supersede the necessity of proving it by the attesting witness (*e*).

The date upon a promissory note is not even *primâ facie* evidence to show that it had existence prior to the act of bankruptcy (*f*). If the creditor petition as the indorsee of a bill, the time of indorsement must be proved (*g*).

Proof that the bankrupt and petitioning creditor attended before the commissioners, and discussed the amount of the debt, and that the commissioners *struck off items objected to, and struck a balance in favour of the petitioning creditor, is presumptive evidence, from the conduct and demeanor of the bankrupt (the plaintiff in the action), of a balance to that amount; but it is not evidence in the nature of an adjudication or award (*h*). Where the creditor petitions as the assignee of a bankrupt, it is necessary to prove all the steps of the former bankruptcy (*i*). But parties to the record may prove title as assignees, by means of depositions under the statute, although they be not described as such on the record (*k*). *150

Where a new petitioning creditor's debt has been substituted, under the statute 6 Geo. 4, c. 10, s. 18, it is sufficient to prove the petition to the Chancellor for the substitution, the Chancellor's order referring the sufficiency of the debt to the commissioner, and the finding of the commissioner thereon; it is not necessary to produce the Chancellor's order confirming such finding (*l*).

By the statute 2 & 3 Will. 4, c. 114, provision is made as to proof of the ingredients of bankruptcy in case of the death of any witness.

Where a defendant, whether the bankrupt himself, or any other person, has done any act by which he acknowledges the bankruptcy, the proof of that act, as against that person, supersedes the necessity of the regular detailed proof (*m*). Where an auctioneer, in a catalogue of goods for sale, Superseding evidence.

(*a*) *Brett* v. *Levett*, 13 East, 213; 2 H. B. 279. *Dowton* v. *Cross*, 1 Esp. C. 168. *Hoare* v. *Coryton*, 4 Taunt. 560. *Bobson* v. *Kemp*, 4 Esp. C. 234.

(*b*) *Jackson* v. *Irwin*, 2 Camp. 50. *Watts* v. *Thorpe*, 1 Camp. 376.

(*c*) *Brett* v. *Levett*, 13 East, 213, where the declaration of a bankrupt made after the act of bankruptcy, but before the commission, was admitted, in order to supply proof of notice to him of the dishonour of the bill of exchange; and see *Dowton* v. *Cross*, 1 Esp. C. 168. But see *Watts* v. *Thorpe*, 1 Camp. 376; 2 Camp. 49; *Hoare* v. *Coryton*, 4 Taunt. 560; *Robson* v. *Kemp*, 4 Esp. C. 233.

(*d*) *Smallcombe* v. *Burges*, 13 Price, 136; *Sanderson* v. *Laforest*,[1] 1 C. & P. 46.

(*e*) *Abbott* v. *Plumbe*, Doug. 216.

(*f*) The contrary was held in *Taylor* v. *Kinloch*,[2] 1 Starkie's C. 175, upon a mistaken report of a case (cited from memory) which had been tried on the northern circuit. This case was mentioned by Bayley, J.; and it appears that further evidence was held to be necessary to prove the existence previous to the bankruptcy.

(*g*) *Rose* v. *Rowcroft*, 2 Camp. 245. (*h*) *Jarrett* v. *Leonard*, 2 M. & S. 265.

(*i*) *Doe* v. *Liston*, 4 Taunt. 741. See *Antram* v. *Chace*, 15 East, 209. Previous to the stat. 6 G. 4, c. 16.

(*k*) *Doe* v. *Liston*, 4 Taunt. 741; *Simmons* v. *Knight*, 3 Camp. 251; *Newport* v. *Hollings*,[3] 3 C. & P. 223; *Rowe* v. *Lant*, Gow. 24.

(*l*) *Bachelor* v. *Vyse*, 1 M. & R. 331.

(*m*) Trover by the assignees of a bankrupt; amongst other admissions, one was by the defendant's attorney, that a commission had issued against the party under which he was duly declared bankrupt, and the plaintiffs chosen assignees; such admission dispenses with the necessity of producing the proceedings, and no notice having been given to dispute any of the proceedings, the commission is conclusive. *Perring* v. *Tucker*, 3 M. & P. 557; *Pole* v. *March*, 1 B. & Ad. 558. In an action by an assignee the defendant con-

[1] Eng. Com. Law Reps. xi. 309. [2] *Id.* ii. 344. [3] *Id.* xiv. 279.

describes them to be "the property of the bankrupt" (*n*), it is *primâ facie* evidence of the fact. So where a debtor to the bankrupt, for goods sold by the latter, stated an account to the plaintiff as assignee, and paid him part (*o*). But a trader declared to be a bankrupt does not, by surrendering under it, preclude himself from disputing the legality of the commission, for he is bound by law to surrender himself (*p*) (1); neither is a creditor who has received part of the debt before the commission, and proves the rest under it, estopped from disputing it in an action brought by the assignees to recover the first payment (*q*). The proving a debt under a commission
*151 *is not even *primâ facie* evidence of the bankruptcy in an action by the assignees against the creditor (*r*).

Proof of the assignment.

An assignment under the statute 6 Geo. 4, c. 16, was proved by its production, bearing the registrar's certificate of its having been entered of record according to the statute (*s*), or by an office copy (*t*). It has been held that if the assignment be produced, it is (*u*) necessary to prove the execution by the commissioners.

And where the title of the assignees to the lands, tenements, and hereditaments of the bankrupt came in question, the assignees, in cases where an actual assignment under that statute is necessary, proved their title by the conveyance from the commissioners, that is, by deed indented and enrolled (*x*) in one of the courts of record at Westminster (*y*).

The deed had no relation to the bankruptcy, so as to vest such property in the assignees from that time, and therefore they could not recover for a trespass, or on a demise in ejectment anterior to the bargain and sale, although subsequent to the bankruptcy (*z*).

Where there had been a provisional assignment it was necessary that it should be proved in the manner already stated (*a*), and the assign-

sented, provided the plaintiff would waive holding him to bail, to admit every fact except as to merits, as the only question he wished to try was, whether he was liable on a certain agreement, and a common appearance was accordingly entered; having received the benefit, he cannot afterwards recede, and insist upon proof of the bankruptcy and title of the assignees. *Davis* v. *Burton*,[1] 4 C. & P. 166. The defendant, on being applied to by the assigneess, said he would call and pay the money, held to be sufficient. *Pope* v. *Monk*,[2] 2 C. & P. 112. An affidavit, that a party is indebted to the deponent in the sum of 100*l*., and has become bankrupt, is conclusive evidence of the bankruptcy. *Ledbetter* v. *Salt*,[3] 4 Bing. 623; 1 M. & P. 597. Proof by an admission is sufficient, although title is expressly denied by the plea. *Inglis* v. *Spence*, 1 C. M. & R. 432. And see *Munk* v. *Clarke*,[4] 2 Bing. N. C. 299, *supra*.

(*n*) *Maltby* v. *Christie*, 1 Esp. 340; 1 B. and A. 677; 16 East, 193.

(*o*) *Dickinson* v. *Coward*, 1 B. & A. 677. See *Pope* v. *Monk*, 2 C. & P. 112.

(*p*) 9 East, 21; Taunt. 80, 84, 96. *Ex parte Jones*, 11 Ves. 409. Nor do the formal words of the petition for enlarging the time of his surrender amount to such an admission.

(*q*) *Stewart* v. *Rickman*, 1 Esp. C. 108. *Hope* v. *Fletcher*, Sel. N. P. 238. *Collins* v. *Forbes*, 3 T. R. 322. But see *Walker* v. *Burnell*, Doug. 305; where it was held that the assignees under a former commission, after proving a debt under the second commission, could not dispute it.

(*r*) *Rankin* v. *Horner*, 16 East, 191; *Watson* v. *Wace*,[5] 5 B. & C. 153. Vide tit. Admissions.

(*s*) By the stat. 6 G. 4, c. 16, *supra*, 129. (*t*) Ibid.

(*u*) *Gomersall* v. *Serle*, 2 Y. & J. 5. But Lord Tenterden in *Tucker* v. *Barrow*, sitt. after Mich. 1827, held the contrary: and see the 97th sect. which makes office copies evidence, and imposes a restraint on the production of the originals.

(*x*) The indorsement of enrolment, or an examined copy, is conclusive evidence of enrolment. See Vol. I. and Index, tit. Bargain and Sale.—Enrolment. *R.* v. *Hopper*, 3 Price, 495; 1 Doug. 56.

(*y*) 6 Geo. 4, c. 16, s. 64. The clause excepts copyhold and customary land; it also directs the assignment and registration of colonial lands, and of all deeds, papers, and writings respecting the same.

(*z*) *Doe* v. *Mitchell*, 2 M. & S. 466. See *Elliott* v. *Danby*, 12 Mod. 3; *Perry* v. *Bowes*, 1 Ventr. 260.

(*a*) *Supra* 151. See 2 Christian's B. L. 448. If the action be brought by the provisional assignee, who sues out a *latitat*, it is no defence under the general issue that other assignees were appointed between the issuing the writ and the declaration. *Page* v. *Bauer*,[6] 4 B. & A. 345. The assignment was directed to be made by the provisional assignees to the creditors' assignees, an assignment by the former to the com-

(1) [See cases under the U. S. bankrupt law, collected in Mr. Day's note to *Donovan* v. *Duff*, 9 East, 25.]

[1]Eng. Com. Law Reps. xix. 324. [2]*Id.* xii. 50. [3]*Id.* xv. 91. [4]*Id.* xxix. 345. [5]*Id.* xi. 187. [6]*Id.* vi. 449.

ment by the provisional assignee to the second assignee was also to be proved (*b*).

Under the late statute, 1 & 2 Will. 4, c. 56, it is sufficient to prove the appointment of the assignees under the seal of the Court of Bankruptcy (*c*).

*When the assignees have proved their title to sue in that character, *152
they proceed to prove the cause by action (1). In some instances, the proof and grounds of defence are (*d*) just the same as if the action had

missioners, and by them to the creditors' assignees, was held to be insufficient. *Moult* v. *Massey*,[1] 1 B. & Ad. 636.

(*b*) By the 45th section of the stat. 6 G. 4, c. 16, s. 45, provisional assignees may be removed at the meeting of creditors for the choice of assignees, if they think fit, and such assignees so appointed shall deliver up and assign all the estate of the bankrupt come to their possession; and all estate of the bankrupt so delivered up and assigned shall be as effectually and legally vested in the assignees so chosen, as if the first assignment had been made to them.

(*c*) By that stat., s. 25, when any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt shall become absolutely vested in and transferred to the assignee or assignees for the time being, by virtue of their appointment, without any deed of assignment for that purpose. And as often as any such assignee shall die or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignee, as the case may require.

By sec. 26, similar provision is made for the vesting of the real estate.

By sec. 27, where a conveyance of the property of a bankrupt would require to be registered, the certificate of the appointment of the assignee shall be registered.

By sec. 29, it is enacted that a certificate of the appointment of such assignees, purporting to be under the seal of the court of bankruptcy, shall be received in evidence without further proof. The stat. 6 G. 4, c. 16, s. 91, exempts all commissions, conveyances and instruments, relating to the estates of bankrupts, from stamp duty, from Sept. 1, 1825.

(*d*) The assignees of *A. & B.* cannot recover where *A. & B.* by reason of the fraud of *A.*, could not have recovered had not the bankruptcy taken place. *Jones* v. *Yeates*,[2] 9 B. & C. 532; and see *Kymer* v. *Larkin*,[3] 5 Bing. 71. An admission by a defendant before commissioners of bankrupt, that he had received a sum of money on account of the bankrupt, will not support a count on an account stated with the assignees, for he does not admit that the money remains in his hands. *Tucker* v. *Barrow*,[4] 7 B. & C. 623. The petitioning creditor's debt accrued on the 4th April, previous to which, as well as subsequently, acts of bankruptcy had been committed, and goods had been sold in three parcels, two before the 4th of April, and the third on the 9th; held, in trover by the assignees, that they could only recover in cases where the bankrupt himself might impeach the transaction, unless the delivery were subsequent to the act of bankruptcy after the petitioning creditor's debt accrued, and that they were entitled only to recover in respect of the third parcel. *Ward* v. *Clarke*,[5] 1 M. & M. 497. The defendant claiming a lien on the deeds of a bankrupt, had extorted a mortgage of other premises belonging to the bankrupt's brother, as a consideration for giving them up; held, that the assignees could not maintain any action against the defendant, as for a payment extorted from the bankrupt. *Noble* v. *Kersey*,[6] 4 C. & P. 90. By the contract of sale of several pipes of wine lying in a bonded warehouse, the vendee was bound to pay the duty, and he was only entitled to receive them by the delivery order, on payment thereof; the obligees to the Crown were called upon to pay the duty, and were repaid by the vendors; held, that the assignees of the vendee were precluded from demanding the wine before they had repaid those sums, and that the fact of the bankrupt having been charged with the warehouse rent did not make the possession of the warehouseman the possession of the bankrupt. *Winks* v. *Hassall*,[7] 9 B. & C. 372. A creditor, in order to relieve the goods of a party become bankrupt, taken in execution, paid the amount directed to be levied to the sheriff, with notice of a docket having been struck, directing him to retain the money in his hands; the assignees afterwards repaid him the amount, and sued the sheriff for money had and received; held, that as the assignees did not exist at the time, and as the money paid was not their money, they could not maintain the action. *Semble* the rule *omnis ratihabitio*, &c. cannot be carried so far as to give effect to acts done when the ratifying parties did not exist. *Bucker* v. *Booth*,[8] 1 M. & M. 518. Where bankers were, by the terms agreed upon, to discount only such indorsed bills remitted to them as should be necessary to cover acceptances becoming due, held that they could not, after having dishonoured acceptances, discount a bill which had been so remitted, as they had no right to discount it without also executing the trust reposed in them, and that their assignees could not retain such bill against the petitioners. *Ex parte Frere*, 1 Mont. & M. 263. The defendant in April, upon an advance of money, received the title-deeds of an estate about to be purchased by the mortgagor, untainted with any usurious consideration, and previous to the conveyance of the estate insisted upon the mortgagor purchasing goods at a price above their value as a bonus, or otherwise he would not continue

(1) [The assignees, and not individual creditors, have the right to sue for property fraudulently conveyed by the bankrupt, and withheld from the list of the estate given in. *Edwards* v. *Coleman*, 2 Bibb, 204.]

[1]Eng. Com. Law Reps. xx. 461. [2]*Id.* xvii. 436. [3]*Id.* xv. 371. [4]*Id.* xiv. 133. [5]*Id.* xxii. 369. [6]*Id.* xix. 290. [7]*Id.* xvii. 397. [8]*Id.* xxii. 372.

Evidence by assignees in particular actions.

been brought *by the trader himself (*e*); and there is nothing in the evidence which is *peculiar* to bankruptcy, except, indeed, that the bankrupt himself, after having obtained his certificate and released the assignees, is a competent witness (*f*).

Trover.

Where trover is brought by the assignees on a conversion after the bankruptcy, though before the commission, it is unnecessary to prove an actual demand, since the property vests in the assignees by relation so as to avoid all mesne acts (*g*).

But by the bankruptcy an immediate and premature end is put to all transactions between the bankrupt and those with whom he dealt, and a new interest arises on the part of the creditors, by which the rights of the parties are much varied.

Evidence peculiar to bankruptcy.

Evidence on the part of the assignees, peculiar to cases of bankruptcy, is frequently necessary.

1st. To show that the trader, at the time of the bankruptcy, was in possession, &c. as *reputed owner.*

2dly. That the right to particular property *vested* in the bankrupt by delivery, &c., so as to pass to his assignees.

the mortgage; held, that the original possession of the title-deeds being good, gave a right to the estate whenever it should be conveyed to the mortgagor, and that the assignees of the latter could not maintain trover, even for the latter conveyance. *Wood* v. *Grimwood*,[1] 10 B. & C. 679. Assignees do not claim in strictness *under* the bankrupt, but adversely to him, and by operation of law. *Gould* v. *Shoyer*,[2] 6 Bing. 738. See[3] 8 B. & C. 448. App. Vol. II. tit. APPROPRIATION. Where the bankrupt became tenant to the defendant under an agreement for a lease, and was distrained on by the superior landlord in consequence of the defendant's neglect to satisfy the rent, held that the assignees were entitled to sue in an action on the case for damages sustained by the bankrupt in consequence of such distress, as upon a breach of an implied agreement for quiet enjoyment; and that they might sue in case or assumpsit. *Hancock* v. *Caffyn*,[4] 8 Bing. 358. Where the bankrupt had borrowed of a third party a carriage, and lent it to the defendant, by whom it was broken and damaged, and the owner proved the amount of the damage under the bankruptcy, although no dividend was ever paid, held that the assignees were entitled to maintain the action for damages, but only to recover nominal damages. *Porter* v. *Varley*,[5] 9 Bing. 93. Where one of the defendants, having become possessed of shares in a mining company, by the regulations of which it was necessary for him to sign the deed of association and receive a certificate before a certain day; and he residing in the country, directed his son, the other defendant, to sign the deed in his own name and receive the certificate, which he accordingly did, and after his father's bankruptcy sold them and paid over the whole proceeds to his father, before any demand by the assignees; held, that as after the execution of the deed the father never had any legal property in the shares, and if the assignees had obtained possession of the certificate they could only have compelled an assignment by the son in equity, they could not maintain trover for the certificate. *Dawson* v. *Rishworth*,[6] 1 B. & Ad. 574. The plaintiffs put up the bankrupt's goods to sale, and amongst them, some stereotype plates, which were at the time in the defendant's hands, the defendant claiming a lien thereon, were included by him in the sale, but the assignees refused to authorize it: they however afterwards signed the catalogue, to exempt them from the auction duty; held, that this was not to be deemed an adoption of the sale, so as to defeat their right to maintain trover against the defendant for the goods; held also, that in respect of a modern trade, like that of stereotype printing, there could be no general usage to support the claims of a general lien on the plates, not being manufactured by him, but only sent to print from. *Bleaden* v. *Hancock*,[7] 1 M. & M 465. Money had and received to the use of the assignees, where the proper form of action; see *Simpson* v. *Sykes*, 6 M. & S. 295. Assignees under the 6 Geo. 4, c. 16, may maintain an action for unliquidated damages which have accrued before the bankruptcy, by non-performance of a contract. *Wright* v. *Fairfield and others*,[8] 2 B. & Ad. 727. Where bills were delivered to the defendant by a bankrupt, with the view of giving a fraudulent preference, and the amount was received after the bankruptcy, held that the assignees could not recover in trover without proving a previous demand and refusal; the receipt of the money was not in itself a conversion. *Jones* v. *Fort*,[9] 9 B & C. 764.

(*e*) They may adopt and rely upon a contract made by the bankrupt subsequently to his bankruptcy. *Butler* v. *Carver and others*,[10] 2 Starkie's C. 434. The assignees may either enforce or reject such a contract at pleasure. If a bankrupt after his bankruptcy sell goods, the assignees may bring either *trover* or *assumpsit* for the value. *Hassey* v. *Feddall*, 3 Salk. 59; Holt, 95; 12 Mod. 324.

(*f*) Vide *infra*, 192.

(*g*) *Kiggill* v. *Player*, 1 Salk. 111; B. N. P. 41;[11] 2 Starkie's C. 306. Before the late statute, where the assignees sought to impeach a delivery by the bankrupt, as made in contemplation of bankruptcy, it was necessary to prove an actual demand. *Nixon* v. *Jenkins*, 2 H. B. 135; but as such a delivery is now void, being an act of bankruptcy, a demand seems now to be unnecessary.

[1]Eng. Com. Law Reps. xxi. 148. [2]*Id.* xix. 219. [3]*Id.* xv. 261. [4]*Id.* xxii. 318. [5]*Id.* xxiii. 272. [6]*Id.* xx. 442. [7]*Id.* xix. 317. [8]*Id.* xxii. 175. [9]*Id.* xvii. 493. [10]*Id.* iii. 417. [11]*Id.* iii. 357.

3dly. To show the right of the assignees in *disaffirmance* of some act of disposition by the bankrupt.

1. That the bankrupt, at the time of the bankruptcy, had the possession, &c. of the goods as *reputed owner.* Reputed ownership.

By the statute 5 Geo. 4, c. 16, s. 72, it is enacted, that if any bankrupt (*h*), *at the time (*i*) he becomes bankrupt, shall, by the consent and permission of the true owner (*j*) thereof, have in his possession (*k*), order, or disposition (*l*), any goods or chattels (*m*), whereof he was *reputed* *154

(*h*) The statute does not apply to property which comes into the bankrupt's possession after the act of bankruptcy. *Lyon* v. *Weldon*,[1] 2 Bing. 334.

(*i*) Goods which have subsequently come into his possession are not within the statute. *Lyon* v. *Weldon*,[1] 2 Bing. 334. So if taken out of the bankrupt's possession *before* the act of bankruptcy. *Jones* v. *Dyer*, 15 East, 21. *Arbouin* v. *Williams*, M. & M. 72. It has been held at Nisi Prius, that a removal on the same day with the act of bankruptcy would not take the case out of the statute. *Arbouin* v. *Williams*, 72, *sed. qu.* It has been held that a demand of the goods before bankruptcy was sufficient. *Smith* v. *Topping*,[2] 5 B. & Ad. 674.

(*j*) The consent of a person who was permitted by the true owner to deal with the goods as his own is not sufficient, *Fraser* v. *Swansea Canal Company*,[3] 1 Ad. & Ell. 355.

(*k*) On a loan, the dock tickets of tallow in the docks were deposited by the borrower; these had been taken originally not in his own name, but in that of another, as a trustee (for secrecy in the trade), whose name was indorsed on the tickets without his knowledge or interference, and the goods remained in his name at the dock; held, upon his becoming bankrupt, that never having had possession of the tickets, without the production of which the tallow would not have been delivered to him or to his order, they were not in his reputed ownership within the statute. *Ridout* v. *Alder*, 1 Mont. 103. After the death of one partner, the survivors accepted, by way of a compromise, securities for a debt due to the original firm, and afterwards became bankrupt; held, that such securities were property in their order and disposition, within the 6 Geo. 4, c. 16, s. 72, for the benefit of the creditors of the surviving partners, but that goods purchased by the original firm jointly with other firms, and remaining in the possession of the latter, were not within the statute. So of goods shipped in the life-time of the partner, but returned after his death; and of a bill of lading sent to the holder of a bill not paid, and in his hands at the time of the bankruptcy. So goods sent by a debtor to the partnership after the death of the partner, and at the time of the bankruptcy in the possession of an agent of the partnership, who claimed a lien thereon for freight. So a plantation estate mortgaged to the partnership, but not conveyed until after the death of the partner, and at the time of the bankruptcy in the possession of the survivors; except as between the partners, the real estate of a partnership retains its original character. *Ex parte Taylor*, 1 Mont. 240. Upon a party being admitted as a dormant partner, it was agreed that the stock, debts, &c. should form the new partnership stock, that he should receive a certain per-centage on his capital, but should not interfere, and the firm was carried on as before; upon their bankruptcy, held that the creditors of the old firm were entitled to have the stock, &c. considered as within the *order and disposition* of the two original partners, to be administered as their separate estate, although some of the creditors had notice of the dormant partner. *Ex parte Jennings*, 1 Mont. 45.

(*l*) As to the effect of these words, see below.

(*m*) Under the statute 21 J. 1, c. 19, book debts, bills of exchange, and choses in action, are within this description. 1 Wilson, 260. *Ryall* v. *Rolle*, 1 Ves. 348; 1 Atk. 165. *Hornblower* v. *Proud*, 5 B. & A. 327. The assignee of a simple contract debt is deemed to have the order and disposition of the debt, with the consent of the true owner, until the debtor has notice of the assignment. *Buck* v. *Lee*,[4] 1 A. & E. 804. So a freight assigned, and notice having been given to the party who is to pay it, is no longer in the order and disposition of the assignor. *Douglas* v. *Russell*, 4 Sim. 524; 1 M. & K. 488. An Act made canal shares personal property, and transmissible according to printed forms in the form of a conveyance; held, per V. C. Shadwell, that they were not to be considered as goods and chattels generally, but merely for the purposes mentioned in the Act, viz. to representatives, and were not within the clause of reputed ownership. But the judgment was reversed on appeal. *Ex parte Lancaster Can. Co.* 1 Mont. 116. And see *Vauxhall Br. Co.* 1 Gl. & J. 101. *Nelson* v. *London Assurance Co.*, 2 S. & S. 282. Shares in a newspaper, *Longman* v. *Tripp*, 2 B. and R. 67. The bankrupt, previous to his bankruptcy, effected policies of insurance on his life, which he assigned, and delivered over the policies; the assignee gave no notice of the assignment to the office until after the bankruptcy; it was held, that the policies remained in the order and dispositon of the bankrupt, and passed to his assignees. *Ex parte Colvill*, 1 Mont. 110.

The wife being possessed of gas shares, the bankrupt pledges the certificates as a security for advances; no notice having been given to the company until after the act of bankruptcy, the shares are within his order and disposition. *Spencer*, *ex parte*, 3 Mont. & Ayr. 697. The bankrupt had deposited with *A. B.* as a security for a loan, shares in a foreign mining company, accompanied with an agreement to complete the transaction when required, and he communicated such deposit to one of the directors, who communicated it to the board before the act of bankruptcy committed; *A. B.* afterwards sealed up the shares, and entrusted them to the bankrupt to keep in his iron safe for better custody, where they remained until three weeks before the bankruptcy, when they were delivered back; held, not to be within the order and disposition of the bankrupt at the time of his bankruptcy; *semble*, shares of a company, possessing lands abroad for the purposes of trade, are not to be deemed real property. *Ex parte Richardson*, 3 Deac. 496; and 1 Mont. & Ch. 43.

[1]Eng. Com. Law Reps. ix. 424. [2]*Id.* xxvii. 152. [3]*Id.* xxviii. 105. [4]*Id.* xxviii. 220.

*owner (*n*), or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission; provided,
*156 that *nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made *as a security* for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act of Parliament made in the fourth year of his present Majesty, intituled, *An Act for the Registering of Vessels* (*o*).

The obvious intention of this provision (*p*) is to prevent a trader from acquiring a false and delusive credit to the deception of others, by an *apparent* property in goods which do not belong to him.

Where railway shares were deposited by the bankrupt's partner with bankers, as security for acceptances by a third party, and for whom the bankers had discounted them, and who, being managing director of the company; was informed at the time of renewing the bill that the certificates of the shares had been so deposited; held, that as the bankrupt had parted with the possession of them, and that, as transfer could be made without the authority of the party for whose use they had been so deposited, the bankrupt was not to be deemed the reputed owner, and the shares were not in his order and disposition. *Ex parte Harrison*, 3 Deac. 185; and 3 Mont. & Ayr. 596. Where the same party was secretary to two offices, with one of which shares were deposited; held not sufficient notice of the transfer of the bankrupt's interest to prevent the claim of reputed ownership. *Bignold, ex parte*, 3 Deac. 151; and 3 Mont. & Ayr. 477. Where certificates of shares of a foreign bank were transmitted to the bankrupts on a contract for joint purchase of them, and clothed with a trust to apply the proceeds, when disposed of, to retire bills drawn for the purchase; held, that they were not within the order and disposition as the property of the bankrupt, and did not therefore pass to the assignees. *Brown, ex parte*, 3 Deac. 91; 3 Mont. & Ayr. 472. Where on a joint commission against *G.* and *L.*, the latter obtained his certificate, and in consideration of undertaking to pay his creditors in full within a certain time, obtained a deed poll to enable him to supersede, and they also executed a power of attorney to enable *F.* to receive the dividends for the use of *L.* and do what was requisite to enable *L.* to supersede. The consideration was never performed, and afterwards a second commission issued against *L.*; held, that the creditors, and not *F.*, were entitled to receive the dividends, and that the reputed ownership and order and disposition of them was not in the bankrupt. *Smithers, ex parte*, 3 Mont. & Ayr. 693. So are mortgages and sales upon condition of goods and chattels as well as absolute sales. *Hornblower* v. *Proud*, 2 B. & A. 327. And so is a mortgage by one partner to another of his moiety of his stock in trade, if the partner so mortgaging remain in possession as the visible proprietor of the moiety. *Ibid.* *A.*, the owner of lease of house and fixtures, mortgages both and becomes bankrupt; the fixtures do not pass to assignees as goods and chattels. *Boydell* v. *M'Michael*, 1 C. M. & R. 77. All goods and chattels are within the statute. Ships *ex parte Burn*, 1 J. & W. 378. *Stephens* v. *Sale*, cited 1 Ves. 352. Although the decisions are not uniform on the subject, the general rule seems to be that fixtures are not within the words goods and chattels. In the cases of *Coombs* v. *Beaumont*, *Clarke* v. *Crownshaw*,[1] 3 B. & Ad. 804, Park, J. intimated that the distinction with respect to fixtures as between landlord and tenant, did not prevail under the statute. In *Trapps* v. *Harper*, the Court of Exchequer held that fixtures might pass to the assignees as personal property. This seems, however, to have been overruled by the case of *Boydell* v. *M'Michael*, 1 C. M. & R. 177, and is opposed to the current of authorities, in which it has been held that steam engines, boilers (*Hubbard* v. *Bagshaw*, 4 Simons, 326), vats, stills and utensils (*Horne* v. *Baker*, 9 East, 215; *Clarke* v. *Crownshaw*,[1] 3 B. & Ad. 804), if fixed to the freehold, do not pass to the assignees. And see *Ex parte Lloyd*, 1 Mont. & Ayr. 494. *Ex parte Belcher*, 2 Mont. & Ayr. 160. *Ex parte Wilson*, *Ibid.* 60. In *Hubbard* v. *Bagshaw*, the plate of a steam engine (which formed no part of the working apparatus), was fixed to the freehold; every other part was secured by bolts and screws, and might be removed without injury to the building; but it was held that the steam engine did not pass.

(*n*) As to reputed ownership, see the cases cited below. Where household furniture and stock, in pursuance of an agreement of sale of a house and furniture, were left in the possession of the seller three months after the sale, it was held that they did not pass to his assignees, the *sale being notorious* in the neighbourhood. *Muller* v. *Moss*, 1 M. & S. 335. Where, on the contrary, a house was let on a lease containing a covenant for its determination on the lessee's committing an act of bankruptcy, and by another deed the furniture was demised subject to a similar covenant, and the jury found that the lessee was the reputed owner of the furniture, it was held that it passed to his assignees. *Hickenbotham* v. *Groves*,[2] 2 C. & P. 492.

(*o*) See the stat. 4 Geo. 4, c. 41. If a vendee of a ship neglect to take possession after the arrival in an English port, and notice thereof, the property passes to the assignees. *Mair* v. *Glennie*, 4 M. & S. 240. *Richardson* v. *Campbell*,[3] 5 B. & A. 196. An alteration in the register is no notice to the world. *Kirkley* v. *Hodgson*,[4] 1 B. & C. 588. And it gives no validity to a transfer otherwise invalid. *Robinson* v. *Macdonnell*, 5 M. & S. 236; and *Monkhouse* v. *Hay*, 4 Moore, 549; and *Hay* v. *Fairbairn*, 2 B. & A. 193. But if a vendee of ship registered in his name take possession before an act of bankruptcy committed by the vendor, the property is in the vendee. *Robinson* v. *Macdonnell*, 2 B. & A. 134.

(*p*) The language is nearly the same with that of the stat. 21 Geo. 1, c. 19, s. 11.

[1]Eng. Com. Law Reps. xxiii. 190. [2]*Id.* xii. 229. [3]*Id.* vii. 66. [4]*Id.* viii. 154.

Whether particular property was in the possession of the bankrupt at the time of his bankruptcy, as the *reputed owner*, is usually a question of fact under the particular circumstances of the case (*q*).

*Where the assignees bring the action to recover the amount of the goods which the defendant claims as his own property, either by virtue of a sale to him by the bankrupt, or as being originally his own, it is incumbent on the assignees to prove that the goods remained in the possession of the bankrupt, he being still a trader (*r*) up to the time of the bankruptcy (*s*), and that he was the *reputed owner*, and appeared to have the order and disposition of the goods. The mere possession of goods in a shop, in the ordinary course of business, at the time of the act of bankruptcy, is *primâ facie* evidence for the assignees under the statute (*t*). Where, according to the course and usage of dealing, in respect of a particular subject of occupation (*e. g.* a colliery), articles used may either be the property of the owner or lessee; mere possession is not, it seems, a *157

(*q*) In *Walker* v. *Burnell*, Doug. 303, Lord Mansfield, C. J. left it as a question for the jury, whether *Biner*, the bankrupt, was in possession at the time of his bankruptcy. And per Buller, J. questions of this kind have more of fact in them than of law. The sort of possession, disposition, &c. are facts to be proved, and are for the consideration of the jury. *Ibid.* And Eyre, C. J. in *Lingham* v. *Biggs*, 1 B. & P. 82, approved of Mr. J. Buller's observation, and he added, that where once it is ascertained whether the bankrupt was the *reputed owner* or not, there is little difficulty in deciding. From that *reputed ownership* false credit arises, from that false credit arises the mischief, and to that mischief the remedy of the statute applies. But it may be a question of law. A tenant had the possession of machinery and implements for working a colliery, under a demise of the colliery, and had merely a qualified property in them, subject to the terms of the lease. And although the jury found that the tenant at the time of his bankruptcy was the reputed owner, and found for the plaintiffs (the assignees), the court directed a verdict to be entered for the defendant, on the ground that in point of law the tenant never had a possession, order, and disposition, &c. within the stat. 21 J. 1, c. 19. Note, that the implements and machinery were to be valued when the lessee yielded up the premises, and the difference between that and a former valuation to be paid by the landlord and tenant, according as the second valuation was greater or less than the first. The lease was determined by forfeitures, and it was held that the landlord was entitled to the whole without valuation. *Storer* v. *Hunter*,[1] 3 B. & C. 468. Note, that this case was distinguished from those of *Lingard* v. *Messiter*,[2] 1 B. & C. 308, and *Kirkley* v. *Hodgson*,[3] 1 B. & C. 588, on the ground that in those cases the bankrupt had at one time been the owner of the property. In the above case of *Walker* v. *Burnell*, Buller, J. observes: possession of goods for sale in a shop may be within the statute, but the possession of furniture in a house is no more evidence of a right to that furniture than of a right to the house.—Where goods are sold, but remain in the possession of the vendor, they will pass to his assignees on his bankruptcy, unless something be done to render the change *notorious to the public at large*. In *Knowles* v. *Horsefall*,[4] 5 B. & A. 134, where *A.*, a spirit-merchant, sold to *B.* several casks of brandy, some of which were in his own vaults, and others in the vaults of a regular warehouse-keeper, and the casks were to remain there till the vendee could conveniently remove them; and *A.* became bankrupt before any removal or notice to the warehouse-keeper; it was held that they passed to the assignees. Although it was notorious the parties carried on the wine trade at the place where the parties resided, that such sale had taken place, and although the purchaser had put a mark upon them; *secus*, where the goods were left in the possession of the bankrupt only till they could be conveniently shipped, 1 Atk. 185. In *Thackwaite* v. *Cock*, 3 Taunt. 487, it was held, that hops which were sold, but remained in the vendor's possession till his bankruptcy, the vendee paying rent, passed to the assignees, although it was according to the custom of the particular trade that they should so remain. But where wine sold by the bankrupt was, for the purchaser's convenience, bottled and deposited in the bankrupt's cellar, set apart in a particular bin marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, it was held not to be within the statute. *Ex parte Marrable*, 1 G. & J. 402. *Carruthers* v. *Payne*,[5] 5 Bing. 270. Where goods in the possession of an agent or company are transferable by means of warrants, a transfer by delivery of the warrant usually amounts to a complete transfer of the possession. See *Lucas* v. *Dorrien*,[6] 1 Moore, 29; and *infra*, tit. VENDOR AND VENDEE. So as to wines in the London Docks. *Ex parte Davenport*, M. & B. 165. As to machinery and utensils annexed to the freehold, see further *Trappes* v. *Harter*, 3 Tyr. 603. *Boydell* v. *M'Michael*, 1 C. M. & R. 77. Where a trader gave a creditor an order to receive money in the hands of *A.*, and directed *A.* to transmit it to the creditor, and whilst it was in the hands of the carrier the trader became bankrupt, Ld. Ellenborough held that the case was within the statute. *Hervey* v. *Liddiard*,[7] 1 Starkie's C. 123. The possession of a pawnee is not the possession of a bankrupt pawner. *Greening* v. *Clarke*,[8] 4 B. & C. 316.

(*r*) *Gordon* v. *East India Company*, 7 T. R. 228. (*s*) 15 East, 21.

(*t*) See the observation of Buller, J. in *Walker* v. *Burnell*, Doug. 303, *secus*, (*semble*,) as to the possession of furniture in a house. *Ibid.*

[1]Eng. Com. Law Reps. x. 115. [2]*Id.* viii. 83. [3]*Id.* viii. 154. [4]*Id.* vii. 46. [5]*Id.* xv. 447. [6]*Id.* ii. 105. [7]*Id.* ii. 323. [8]*Id.* x. 341.

sufficient foundation for presuming ownership in the occupier (*u*); in such a case, possession ought not to raise such an inference in the mind of any cautious person. And where the bankrupt has been once proved to be the owner of goods, and to be in possession at the time of the bankruptcy, the *onus* of proving a change of possession lies on the party who claims against the assignees (*x*).

Proof that the former owner of a ship had the possession, order, and disposition of the vessel, up to the time of his bankruptcy, was held to be sufficient to vest the property in the assignees, although he had assigned his interest, and the transfer had been duly registered, according to the register acts (*y*). So (before the late statute) in the case of a joint interest in a ship, mortgaged by the bankrupt, where he continued in the management of her, together with the part-owners, and acted as a visible part-owner till he became a bankrupt (*z*).

Where the property consists of household furniture, stock in trade, or utensils in trade, it is sufficient that the bankrupt remained in possession of the house, and carried on the trade as the apparent owner of the stock and utensils, up to the time of the bankruptcy. As, where a creditor took the household furniture, and the articles belonging to a coffee-house, under an execution against *B.*, and then let them to *B.*, who covenanted not to remove them without the owner's consent, and permitted *B.* to remain in
*158 *possession as before (*a*). After the seizure of *B.*'s stock in trade upon a *fi. fa.* by the trader's shopmen, under a warrant on a Saturday, they carried away the key, but opened the shop again on Monday morning, and although *B.* did not interfere, business was carried on, apparently, as usual, and in the evening of the Monday *B.* committed an act of bankruptcy; it was held that the goods passed to the assignees, notwithstanding the execution, since the possession of the servants was the possession of the master (*b*).

So where *B.* a brewer, being in partnership with *A.*, mortgaged a moiety of the stock in trade, utensils, debts, &c. to *C.* in trust for *A.*, but continued in possession, and acted as *A.*'s partner till he, *B.*, became bankrupt; for being in possession, and acting as partner, receiving debts, &c. *B.* was as much the reputed owner as *A.* (*c*). So where *A.* sold a dyer's plant to *B.*, and at the end of a year *B.* covenanted to deliver up the plant, in consideration of *A.*'s cancelling *B.*'s unpaid notes, which he had given to *A.*

(*u*) Per Abbott, C. J. in *Storer* v. *Hunter*,[1] 3 B. & C. 376. And see *Thackwaite* v. *Cock*, 3 Taunt. 487.

(*x*) *Lingard* v. *Messiter*,[2] 1 B. & C. 308. *Clark* v. *Crownshaw*,[3] 3 B. & Ad. 804.

(*y*) *Hay* v. *Fairbairn*, 2 B. & A. 134. *Robinson* v. *M'Donnell*, 2 B. & A. 134.

(*z*) *Hall* v. *Gurney*, Co. B. L. 5th edit. 342. See the stat. 6 Geo. 2, c. 5, s. 72. It seems to be now settled that the share of a dormant partner goes to the assignees. *Ex parte Enderby*,[4] 2 B. & C. 389. And see *Ex parte Dyster*, 2 Rose, 256. *Contra*, *Coldwell* v. *Gregory*, 1 Price, 119. So a ship registered in the name of one owner, but suffered to be in the possession, order, and disposition of the partnership, passes to the assignees. *Ex parte Burn*, 1 J. & W. 378.

(*a*) *Lingham* v. *Biggs*, 1 B. & P. 82. Where a landlord distrained upon the goods of his tenant, which he took at the appraisement, and left the goods in the possession of the wife of the tenant, who shortly after became bankrupt, after which the landlord again distrained as for the former rent; held, that the goods were in the order and disposition of the bankrupt, and passed to the assignees, and that the rent having been satisfied, the goods could not be again distrained. *Ex parte Shuttleworth*, 1 D. & Ch. 223. And see *Toussaint* v. *Hartop*,[5] Holt's C. 335. *Doker* v. *Hasler*, 4 Bing. 479. See *Longman* v. *Tripp*, 2 N. R. 67, as to the publisher's right to a newspaper.

(*b*) Per Ld. Ellenborough, C. J. *Jackson* v. *Irwin*, 2 Camp. 49. And see *Horne* v. *Baker*, 9 East, 215; *Thackwaite* v. *Cock*, 3 Taunt. 487. But see *Coldwell* v. *Gregory*, 1 Price, 119. So in *Yates* v. *Powell*, *cor.* Abbott, L. C. J. sittings after T. T. 1823, the goods had been taken in execution twelve months before at the suit of the trader's brother; but the sheriff remained in possession one day only, and then the bankrupt's son took possession, and carried on the business, bought goods, &c.

(*c*) *Ryall* v. *Rolle*, 1 Ves. 248; 1 Wils. 268; 1 Atk. 165. *Toussaint* v. *Hartop*,[5] Holt's C. 335.

[1]Eng. Com. Law Reps. x. 115. [2]*Id.* viii. 83. [3]*Id.* xxiii. 190. [4]*Id.* ix. 122. [5]*Id.* iii. 122.

in payment for the plant; and it was stipulated that *A.* should let the plant to *B.* for a term, with a proviso that *B.* should deliver up the plant, and that *A.* might take possession of it upon the failure in payment of rent. There was a memorandum that *B.* had given possession to *A.* by the delivery of a single winch; *B.* remained in possession till his bankruptcy, and it was held that the property vested in the assignees (*d*).

A., a trader and an officer in the East India Company's service, assigned his privilege of shipping goods to England to *B.*, but (such an assignment being prohibited), the goods were shipped, entered, warchoused, and sold in *A.*'s name, and the proceeds were carried to his account; but before he received them from the company he became a bankrupt; it was held that the assignees were entitled to such proceeds (*e*). So where *A.*, a distiller, leased to *B.* (his former partner,) and *C.* a distill-house, with the stills, vats and utensils, which had before been used by *A.* and *B.*, and after this *B.* and *C.* carried on business as partners, in possession of the premises and utensils, till they became bankrupt; the court were of opinion that the bankrupts had, at the time of the bankruptcy, acquired the reputed ownership of the vats and utensils (which were moveable), and had thereby acquired the real ownership for their creditors (*f*).

Where *A.* who kept a public-house, asserted that she was married to *P.*, and entered his name at the Excise Office, with a note in the margin *"" married," and *P.* afterwards had the license, and continued in possession of the house and goods till he became a bankrupt, the court held that *A.* could not, after asserting that *P.* was her husband, claim them as her sole property (*g*). So where the trustees for the wife of *B.* and her children by a former husband, permitted *B.* to remain in possession of the goods (on condition that he should pay to them certain sums for the use of the children,) until the evening before he committed an act of bankruptcy, the case was held to be within the statute (*h*). *159

Evidence of reputation is admissible to prove the defendant to be the *reputed* owner, where the reputation is supported by facts; but bare reputation, unsupported by facts, although perhaps *admissible*, is *insufficient* evidence to prove an apparent ownership under the statute (*i*).

Proof in answer.

The presumption arising from the bankrupt's *possession* of property at the time of the bankruptcy is frequently capable of being answered and explained away by evidence which shows that possession was given up by the bankrupt, as far as the nature of the case admitted; or that there was not such a permissive possession as is contemplated by the statute. For the *mere possession* of the property by the bankrupt is not in itself sufficient to entitle the assignees to claim it for the creditors.

Where there is a possession, without any wilful permission on the part of the owner which may delude creditors, the case is not within the statute; as where, *first*, such possession is delivered as the circumstances of the case will permit; or, *secondly*, where the bankrupt has possession as executor (*k*) or administrator; or where the husband has possession of the separate property of the wife (*l*); or has a mere temporary custody of it; or

(*d*) *Bryson* v. *Wylie*, 1 B. & P. 83, n. (*e*) *Gordon* v. *The East India Company*, 7 T. R. 228.
(*f*) *Horne* v. *Baker*, 9 East, 215.
(*g*) *Mace* v. *Cadell*, Cowp. 232. (*h*) *Darby and others* v. *Smith*, 8 T. R. 82.
(*i*) *Oliver* v. *Bartlett*,[1] 1 B. & B. 269. So evidence of a contrary reputation is evidence for the defendant, *Gurr* v. *Britton*,[2] Holt's C. 327. And see *Muller* v. *Moss*, 1 M. & S. 335; *Lingham* v. *Biggs*, 1 B. & P. 82; *Horne* v. *Baker*, 9 East, 215.
(*k*) *Ex parte Marsh*, 1 Atk. 159; 3 P. Wms. 187; 3 Burr. 1366.
(*l*) *Jarman* v. *Wooloton*, 3 T. R. 618.

[1]Eng. Com. Law Reps. v. 81. [2]*Id.* iii. 121.

has the possession for such a purpose as excludes the presumption of ownership, and consequently where no delusion can arise; as where the bankrupt has possession as factor (*m*), or as bailee, or as a banker for a specific purpose. *Thirdly*, the owner may show that in point of fact the bankrupt was not the *reputed owner*. *Lastly*, the defendant may show that the possession was adverse (*n*).

That actual possession cannot be given.

1st. Where a ship or cargo is sold whilst the ship is at sea, then, since actual possession cannot be taken before her return, it is sufficient if in the meantime the grand bill of sale and bill of lading be transferred, for there was no other way of delivering possession (*o*). So where a trader, as a security for money lent, assigned the bills of lading and policies of insurance of the cargo of a ship at sea, and the policies were indorsed to the lender, the trader became bankrupt, and Lord Hardwicke, C. held, that since everything which could show a right to the cargo had been delivered over to the defendant (against whom the assignees had filed a bill) the bankrupt could no longer be said to have the order and disposition of it (*p*). So where a trader, as a security for a debt due to the defendant, agreed to assign the cargo of a ship homeward bound, and to deposit the policy of insurance on the goods with the defendant, and to indorse and
*160 deliver the bills of lading *to him as soon as they arrived; the policy and letters of advice were accordingly deposited with the defendant, and the bill of lading was indorsed to him as soon as it arrived, but after an act of bankruptcy committed by the trader. The defendant obtained possession of the cargo, and on trover brought by the assignees, the court held that the case of *Brown* v. *Heathcote* strongly applied; since, although in that case there was an assignment of the bill of lading, and in this, only an agreement to assign, this circumstance made no difference, since in both cases the title was merely an equitable one (*q*).

Where the ship was in an Irish port at the time when the owner mortgaged her, and delivered all the deeds, &c. to the mortgagee, and during the space of a month the mortgagee might have taken possession of her in the Irish port, it was held, that the delivery of the muniments constituted a sufficient possession, and that the mortgagee was not bound to take possession of her in a foreign port (*r*).

Where *A.*, a trader, deposited with *B.* a bill of sale, of a sixteenth part of a ship not at sea, and there was no evidence that the trader had acted as owner after the deposit, Lord Thurlow, C. held, that *B.* was entitled to the produce of the bill of sale against the assignees of *A.*, who had become bankrupt; since in the case of assignments of *shares* of ships this seemed to be the only way of delivering possession (*s*).

Possession as executor, &c.

2dly. It has been held, that where the bankrupt has possession of the goods as an executor or administrator, or under a trust (*t*), the case is not

(*m*) *Ex parte Chion*, 3 P. Will. 187, n. Cullen's B. L. 225.

(*n*) *Smith* v. *Topping*,[1] 5 B. & Ad. 674.

(*o*) *Brown* v. *Heathcote*, 1 Atk. 160. *Atkinson* v. *Maling*, 2 T. R. 462. *Lempriere* v. *Pasley*, 2 T. R. 485; *supra* 15, note (*s*), 156, note (*o*).

(*p*) *Brown* v. *Heathcote*, 1 Atk. 160.

(*q*) *Lempriere* v. *Pasley*, 2 T. R. 485.

(*r*) *Ex parte Batson*, 3 Bro. C. C. 362. See also *Atkinson* v. *Maling*, 2 T. R. 462.

(*s*) *Ex parte Stadgroom*, 1 Ves. jun. 163. See also *Manton* v. *Moore*, 7 T. R. 67.

(*t*) *Shaftesbury, Earl of*, v. *Russell*,[2] 1 B. & C. 666, where the Duke of Marlborough, as the owner of an estate, had the use of furniture which was settled in trustees in trust to permit the owner of the estate to use it, and it was held, that on the bankruptcy of the duke the furniture would not have passed to his assignees. So where a testator directed that, in case his son should carry on his trade, his house and furniture should not be sold, but that his trustees should permit his widow and children to reside in the dwelling-house, and have the use of the furniture, it was held that the furniture did not pass to the assignees of the

[1] Eng. Com. Law Reps. xxvii. 152. [2] *Id.* viii. 178.

within the statute (*u*); so that where an executor becomes bankrupt, the commissioners cannot seize even money which belonged to the testator, if it can be specifically distinguished from the property of the bankrupt himself (*x*). Neither does it extend to a possession by the bankrupt as a trustee for another; as, where a trader bought South Sea stock for *I. S.* in his own name, but entered it in his book as bought for *I. S.*, after which he became bankrupt, it was held that *I. S.* was entitled to the stock (*y*). So where the husband has possession of the separate property of the wife, settled in *trustees upon her before marriage (*z*). So where the bankrupt *161
has possession as a mere factor or agent for sale (*a*). As where a carpenter receives timber to convert into a waggon (*b*): or a tailor cloth to work up into clothes (*c*). It was agreed between *F.* and *K.*, that *K.* should contract with the commissioners of the Victualling-office to do certain work in his own name; that he should have a guinea per week, and one-fourth of the clear profits, and that *F.* should supply timber for the purpose. Timber was accordingly supplied by *F.*, and was received by the King's officers in the yard where the work was to be done. *F.* was one of *K.*'s sureties, which, according to the practice as to government contracts, would not

mother and son. *Ex parte Martin*, 2 Rose, 331. Stock transferred by the accountant-general into the name of the mortgagee without the privity of the mortgagor, does not pass. *Ex parte Richardson*, Buck. 480. But by true owner is meant legal owner; and where a trustee sold, and let the purchaser into possession before payment, the property was held to pass. *Ex parte Dale*, Buck. 365. In general, property which the bankrupt holds as trustee only, does not pass to his assignees. *Winch* v. *Keeley*, 1 T. R. 619. *Taylor* v. *Plumer*, 3 M. & S. 576. *Smith* v. *Pickering*, Peake, 50. *Ex parte Watkins*, 1 Mont. & Ayr. 689.

(*u*) *Ex parte Ellis*, 1 Atk. 101; 4 T. R. 629. *Ex parte Marsh*, 1 Atk. 159. But if a person entitled to take out administration neglect to do so, and he becomes bankrupt, the goods pass to the assignees, although he takes out administration after the bankruptcy. *Fox* v. *Fisher*,[1] 3 B. & A. 135.

(*x*) Per Lord Mansfield, 3 Burr. 1366, 1 Atk. 101.

(*y*) By Lord Parker, C. *Ex parte Chion*, 3 P. Wms. 187. And see Lord Mansfield's observations in *Mace* v. *Cadell*, Cowp. 233.

(*z*) *Jarman* v. *Wooloton*, 3. T. R. 618. But if property be settled on the wife to enable her to carry on a separate trade, and the husband intermeddle, the property will be liable to his debts. *Ibid.* So if the bankrupt have the possession of goods which come to his wife as administratrix, where some of the next of kin are infants, they do not pass to his assignees (*Viner* v. *Cadell*, 3 Esp. 388); but if she takes a beneficial interest in the property, her own share passes to the assignees who become tenants in common with her in her representative capacity. *Ibid.* The goods of a woman married to, and living with an insolvent, and being ignorant that he had a former wife living, do not pass to the assignees. *Secus*, if she allow him to continue in possession after discovering the former marriage. *Miller* v. *Demetz*, 1 Mo. & R. 479. See also *Dean* v. *Brown*, 3 B. & C. 336.

(*a*) Per Lord King, C. in *Godfrey* v. *Furzo*, 3 P. Wms. 186. Per Ld. Mansfield, in *Mace* v. *Cadell*, Cowp. 233. And see the observations of Lawrence, J. in *Horne* v. *Baker*, 9 East, 215. See *Atkins* v. *Barwick*, 1 Str. 165; Fort. 353; 10 Mod. 431. *Harman* v. *Fisher*, Cowp. 125. So if the factor take notes in payment, or exchanges the goods for other goods, the notes or property do not pass to the assignees. *Whitcomb* v. *Jacob*, 1 Salk. 160. And see *Taylor* v. *Plumer*, 3 M. & S. 562. Otherwise, if the factor sells and receives the price before the bankruptcy, the principal must come in with the rest of the creditors. *Scott* v. *Surman*, Willes, 490. But if the price be not paid before the bankruptcy, but is afterwards received by the assignees, the principal may sue them. *Ib.* Goods sent on sale and return are within the statute, if the party retain them after a reasonable time for making his election has expired. *Livesay* v. *Hood*, 2 Camp. 83. *Gibson* v. *Bray*,[2] 1 Moore, 519; 8 Taunt. 76. *Neate* v. *Ball*, 2 East, 117. *Aliter*, if a reasonable time has not elapsed, as if the goods were not received till the evening before the bankruptcy.[2] 1 Moore 519; 8 Taunt. 76. Where there was a custom that the purchaser of hops should leave them in the vendor's warehouse for the purpose of sale, it was held that they passed to his assignee. *Thackwaite* v. *Cock*, 3 Taunt. 487. Where foreign merchants, through their agents, procured consignments and remitted bills to the consignees for the amount, and informed the consignors of having so done, but before payment the agents became bankrupt; held, that the latter were to be deemed agents through the whole transaction, and that, notwithstanding the claim of the agents or the consignees, the consignors were entitled to recover the bills from such agents. *In re Douglass*, 1 Mont. & Ch. (B) 1. Where foreign merchants remitted bills to factors, who sold them and entered the amount of the price in their books to the credit of the principals, who had the right of drawing on them to the amount; held, that upon the bankruptcy of the factors the principals were entitled to the proceeds of the bills, and that the bankrupts having indorsed them in their own names, were not to be deemed the owners of them. *Ex parte Pauli*, 3 Dcac. 169. And see *Scott* v. *Surman*, Willes, 405.

(*b*) *Collins* v. *Forbes*, 3 T. R. 316. (*c*) *Ibid.*

[1]Eng. Com. Law Reps. v. 243. [2]*Id.* iv. 23.

have been allowed, had it been known that he was concerned in the contract. *K.* became bankrupt, and *F.* took possession of the timber; and upon an action brought by the assignees of *K.*, it was held that the case did not fall within the statute, since there was never any sale of the timber to *K.*, nor any general delivery, so as to give him the absolute disposition of it; and the storekeepers would not have permitted *K.* himself to have sold the timber to any other person, since they considered it as delivered solely for the purpose of the contract (*d*).

*162 Possession as banker.

*So the owner may show that a banker, at the time he became bankrupt, had possession of specific money or bills of his in his hands, not upon a general or running account between them, but for some specific purpose. The decision, however, of questions between the assignees of bankers at the time of the bankruptcy seldom, if ever, turns upon the question of reputed ownership: for it seems to be clear, that the mere possession of bills of exchange by a banker at the time of his bankruptcy, where the property and ownership remain in the customer, does not give the banker the order and disposition of them within the terms of the statute (*e*). So the mere custody by a bailee, for a specific purpose, is not within the statute (*f*).

Reputation and usage.

3dly. Notwithstanding the actual possession by the bankrupt at the time of the bankruptcy, since the fact of reputed ownership is usually a question for the jury (*g*), the defendant may show that the bankrupt was not in fact the *reputed owner:* as for instance, that there is a known usage in the bankrupt's trade to rent on hire the utensils and articles used in the trade, since there the possession and use of such utensils and articles would raise no presumption of ownership (*h*).

Where, by an agreement between the vendor and vendee of a house, it was agreed that formal possession should be given to the vendee, but that the vendor should remain in possession for three months, and the agreement was *notorious* in the neighbourhood, and formal possession was given, and the purchase-money paid, and during the three months whilst the vendor continued in the house he became bankrupt, the court held that the case was not within the statute; for during the three months the bankrupt was in of his own right as owner, and not by permission of the true owner; and because the transfer being notorious, no person was deceived; and that the fact of *reputed ownership* ought to have been found to raise the question (*i*). The defendant may also rebut the evidence to prove that the bankrupt was the reputed owner, by evidence of a contrary reputation of ownership in himself.

(*d*) *Ibid.* See the observations of Lawrence, J. in *Gordon* v. *East India Company* (7 T. R. 237), that the court proceeded on the ground that the bankrupt had possession of the property for a *special purpose* only.

(*e*) The mere custody of such bills, in order that the banker may receive money upon them when due, does not give him the order and disposition of them within the statute. See the observations of Holroyd, J. in *Thompson* v. *Giles*,[1] 2 B. & C. 422.

(*f*) The plaintiff ordered a chariot, and paid for it, and afterwards sent it back for alteration, which being delayed, he sent for it six or seven times, and afterwards ordered it to be sold; whilst standing in the builder's warehouse, the latter became bankrupt; it was held, first, that it was not to be deemed within this clause of the Act, and that the assignees were not protected from an action of trover after three months from the conversion, by the stat. 6 G. 4, c. 16, s. 44; the words "any act done" not applying to the pecuniary arrangement or disposition of the bankrupt's property by the assignees, but to acts done for the purpose of taking possession thereof by the commissioners or others acting under their warrant. *Carruthers* v. *Payne*,[2] 5 Bing. 270.

(*g*) See *Mullar* v. *Moss*, 1 M. & S. 335.

(*h*) See the observations in *Horne* v. *Baker*, 9 East, 215.

(*i*) *Mullar* v. *Moss*, 1 M. & S. 335. And see *Eastwood* v. *Brown*,[3] 1 R. & M. 312; and *Latimer* v. *Batson*,[4] 4 B. & C. 652; and *supra*.

[1]Eng. Com. Law Reps. ix. 127. [2]*Id.* xv. 447. [3]*Id.* xxi. 447. [4]*Id.* x. 432.

2ndly. That the right to particular property vested in the bankrupt by delivery, &c., and passed to his assignees.

The peculiar privilege which the law has conceded to the vendor of goods to a bankrupt, of stopping them in *transitu* before they come, in technical language, to the very touch of the consignee (*k*), frequently imposes upon the *assignees the necessity of proving, not only that there was such a delivery of goods to an agent of the trader as would in ordinary cases vest the property in him absolutely, as by a delivery to a carrier; but also, that the *transitus* of the goods was actually completed. Stoppage in transitu. *163

Whether the stoppage was in *transitu*, or was completely determined, is ordinarily a question of law (*l*). In order to raise that question, it is usually material to prove on whose risk and account the goods were sent; the character and situation of the agent in whose actual possession the goods were at the time of stoppage (*m*); by whom employed, and by whom to be paid; the possession, indorsement, &c. of the bill of lading (*n*); the place and object of destination (*o*), and the nature of the acts exercised upon them in their progress (*p*), with a view to take possession of them. Proof of title in the trader.

In order to show a termination of the *transitus*, it is essential to prove either an actual or constructive delivery (*q*) to the vendee or his representative. Termination of transitus.

(*k*) If a party contract for the purchase of goods on specific credit, and nothing be said as to the time of delivery, both right of property and possession vest in the vendee; but his right is not absolute, but liable to be defeated by his previous insolvency, before actual possession. *Bloxam* v. *Sanders*,[1] 4 B. & C. 941. *Tooke* v. *Hollingsworth*, 5 T. & R. 215; and this is on the ground of fraud upon the vendor; per Lord Kenyon. In such cases, therefore, the assignees cannot maintain trover. *Qu.* Whether default in payment at the time when the credit expires destroys the right of possession. Per Bayley, J.[1] 4 B. & C. 948. *Semble* not, for the payment in such case is not either a precedent or concurrent consideration.

(*l*) See *Feise* v. *Wray*, 3 East, 93; *Mills* v. *Ball*, 2 B. & P. 457: 3 B. & P. 119, 469; 5 East, 175; 14 East, 308; 2 H. B. 504. Part payment does not take away the right of stoppage. (*Hodgson* v. *Loy*, 7 T. R. 440. *Feise* v. *Wray*, 3 East, 93.) Nor does the usage of carriers to insist on a lien on goods for a general balance of account between them and the consignees, at all affect the right. *Oppenheim* v. *Russel*, 3 B. & P. 42.

(*m*) If he was the mere agent of the consignor, at whose risk the goods were sent, the delivery to him would not vest any property in the consignee; and the question, whether the property was divested by a stoppage in *transitu* would not arise. See *Coxe* v. *Harden*, 4 East, 211. *Walley* v. *Montgomery*, 3 East, 585. See, as to the delivery of plate by a silversmith to an engraver, who was to be paid by the vendor, to get the vendee's arms engraved thereon. *Owenson* v. *Morse*, 7 T. R. 64. As to goods delivered by the consignor on board a ship chartered by the consignee, see *Bohtlingk* v. *Inglis*, 3 East, 381; *Inglis* v. *Usherwood*, 1 East, 515; *Coxe* v. *Harden*, 4 East, 211. To a wharfinger, *Mills* v. *Ball*, 2 B. & P. 457.

(*n*) In general, the indorsement by the consignee of the bill of lading for a valuable consideration, will devest the right of stoppage. *Lickbarrow* v. *Mason*, 2 T. R. 63; 2 H. B. 211; 5 T. R. 367. *Feise* v. *Wray*, 3 East, 93. Otherwise, where there is no consideration. *Newsom* v. *Thornton*, 6 East, 17.

(*o*) *Dixon* v. *Baldwin*, 5 East, 175. *Leeds* v. *Wright*, 3 B. & P. 320. *Scott* v. *Petit*, 3 B. & P. 469. The general rule seems to be, that if by appointment, as between the consignor and consignee, the goods are to be sent to a particular place where they are to wait the orders of the vendee as to any further destination, the *transitus* is completed when they arrive there. Vide *infra*, note (*q*).

(*p*) The putting a mark on the goods by the assignee of the consignee, at the inn whither they were sent for the latter, held to divest the consignor's right of stoppage in *transitu*. *Ellis* v. *Hunt*, 3 T. R. 464. And see *Coxe* v. *Harden*, 4 East, 211.

(*q*) As by the delivery of the key of the warehouse in which the goods are deposited. *Ellis* v. *Hunt*, 3 T. R. 464. *Copeland* v. *Stein*, 8 T. R. 199. By payment of rent for the warehouse. *Hurry* v. *Mangles*, 1 Camp. 452; *Harman* v. *Anderson*, 2 Camp. 243. The lodgment of a delivery-note with the wharfinger. (*Ibid.*) By a part delivery, where there is no intention to separate part from the rest (*Slubey* v. *Heyward*, 2 H. B. 505; *Hammond* v. *Anderson*. 1 N. R. 69; *Ex parte Gwynne*, 12 Ves. jun. 379; *Stoveld* v. *Hughes*, 14 East, 308); by delivery at the warehouse of the vendee's agent, where no ulterior or more complete delivery is contemplated. *Leeds* v. *Wright*, 3 B. & P. 320. And see 3 B & P. 127; *Scott* v. *Pettit*, 3. B. & P. 469. As where they are sent to an agent who, under general orders from the vendor, sends them to a packer (*Ibid*); or by an act of ownership, exercised by the vendee whilst the goods are in the hands of his agent, although they have not reached the place of ultimate destination (*Wright* v. *Lawes*, 4 Esp. C. 282); by delivery on board a ship chartered and fitted out by the vendee (*Fowler* v. *Kymer*, cited 7 T. R. 442; 1 East, 552; 3 East, 396); by reaching an expeditor, who holds them till he receives orders for their further destination (*Dixon* v. *Baldwin*, 5 East, 175); by being sent by the vendor to the ultimate place of destination, mentioned by the vendee. *Rowe* v. *Pickford*,[2] 1 Moore, 526. The vendee usually allowed goods

[1]Eng. Com. Law Reps. x. 477. [2]*Id.* iv. 27.

Property in banker.

*Another class in which proof of the bankrupt's title, by a change of property, belongs to the assignees, consists of cases which arise between the assignees of a banker and his customers. For the ordinary rule is, that bills and securities sent to a banker are deposited for a specific purpose, in which case they do not pass to the assignees, and consequently it lies on the assignees to prove a change of property. The general principle of law as between the banker and a customer is, that the banker stands in the situation of a *factor;* that he holds the bills of a customer transmitted before they are due, as the agent of such customer, for the purpose of obtaining payment, and with a right of lien for advances made on the credit of such bills (*r*); consequently, if a customer send bills to a banker, and they remain in specie in the hands of such banker till the bankruptcy, they continue to be the property of the customer, notwithstanding the bankruptcy (*s*).

brought by the defendant, a carrier, to remain at his warehouse until distributed by his orders to his customers, and the jury found that the warehouse was the final destination, held that the *transitus* was at an end, and that the vendor's right of stoppage was also gone. *Allan* v. *Gripper*, 2 C. & J. 218. The plaintiff being previously indebted to the defendants, purchased a butt of sherry of the defendants, which was to remain in the docks undelivered and upon becoming embarrassed he had offered the defendants to take it back, which was refused, and an arrangement for a composition was afterwards entered into with the creditors, the defendants being parties, and a sum set opposite their names including the sherry, and they received the first and largest instalment, but upon demand refused to deliver the wine, or sign the release, although they admitted it to have been included in the composition; held, that having obtained by the agreement security for the whole of their debt, the right of stoppage in *transitu* was gone. *Nichols* v. *Hart*,[1] 5 C. & P. 179.

But such a delivery as would be sufficient in the absence of insolvency to vest the property in the vendee, is frequently insufficient to divest the right of stoppage in *transitu*. It seems to be a general rule, that so long as the goods are in the possession of one who is a mere agent, to forward them, in order to give a more complete possession to the vendee, the *transitus* continues: as where they are delivered to a wharfinger, to be forwarded to the vendee (*Hodgson* v. *Loy*, 7 T. R. 440; *Mills* v. *Ball*, 2 B. & P. 457; *Smith* v. *Goss*, 1 Camp. 282); although the wharfinger be employed by the vendee (*Smith* v. *Goss*, 1 Camp. 282; *Oppenheim* v. *Russel*, 3 B. & P. 42; and see *Snee* v. *Prescott*, 1 Atk. 245; *Lickbarrow* v. *Mason*, 1 H. B. 364; *Hunt* v. *Ward*, cited 3 T. R. 467; *Feise* v. *Wray*, 3 East, 93); or to an agent who purchases for a principal abroad, and informs the vendor, at the time of the purchase, that the goods are to be sent abroad (to Lisbon). (*Coates* v. *Railton*,[2] 6 B. & C. 422); or to a packer, by order of the vendee (*Hunt* v. *Ward*, 3 T. R. 467); provided the vendee does not use the wharfinger's or packer's warehouse as his own, and that he contemplates an ulterior place of delivery (*Wright* v. *Lawes*, 4 Esp. C. 82; per Chambre, J. *Richardson* v. *Goss*, 3 B. & P. 127). So a delivery of plate to an engraver employed by the vendor (*Owenson* v. *Morse*, 7 T. R. 64); of goods to a common carrier (*Stokes* v. *La Riviere*, cited 3 T. R. 466; *Hunter* v. *Beal*, Ibid), so long as the lien of the carrier remains (*Crawshaw* v. *Eades*, 1 B. & C. 181); or on board a general ship (*Ibid.* and 3 East, 397; 7 T. R. 440; *Mills* v. *Ball*, 2 B. & P. 457); though at the risk and expense, and in the name and by the appointment of the vendee, will not divest the right of stoppage in *transitu*. And see *Ruck* v. *Hatfield*,[3] 5 B. & A. 632.

(*r*) *Giles* v. *Perkins*, 9 East, 12. A customer paid bills, not due, into his bankers in the country, whose custom it was to credit their customers with the amount of such bills if approved in cash, charging interest; it was held that the customer was entitled to recover back those bills in specie from the assignees of the bankers, on their bankruptcy; and per Lord Ellenborough, C. J., every man who pays bills, not then due, into the hands of his banker, places them there as in the hands of his agent, to obtain money for them when due. If the banker discount the bill, or advance money on the credit of it, that alters the case; he then acquires the entire property in it, or has a lien *pro tanto* for his advance. The only difference between the practice stated as to London and country bankers in this respect, is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; the country banker, who always takes the bill indorsed, has not only a lien on it if his account be overdrawn, but also a legal remedy upon the bill by the indorsement.

(*s*) *Scott* v. *Surman*, Willes, 400. *Bolton* v. *Puller*, 1 B. & P. 539. *Thompson* v. *Giles*,[4] 2 B. & C. 422. *Ex parte Hippings*, 2 Gl. & J. 93. Where a customer was in the habit of paying in bills on account, which, if approved of, were carried to his account, but entered as bills to his credit to the full amount, and then he was at liberty to draw to that amount by cheques on the bank; it was held that in the absence of proof of any agreement that the bills when they reached the bankers should become their property, the bills remaining in specie in the hands of the bankers at the time of the bankruptcy might be recovered by the customer, the cash balance being in his favour. *Thompson* v. *Giles*, 2 B. & C. 422. And see *Ex parte Armistead*, 2 G. & J. 371; M. & M. 108. The decision of questions between the assignees of bankers and customers, in respect of bills of exchange which remain in possession of the bankers at the time of the bankruptcy, seldom if ever turns upon the clause of the stat. 21 J. 1 (now 6 G. 4, c. 16, s. 72), but upon the question whether the property has passed; or if not, whether the bankers were entitled to a lien.

[1]Eng. Com. Law Reps. xxiv. 265. [2]*Id.* xiii. 223. [3]*Id.* vii. 216. [4]*Id.* ix. 127.

*And though a customer who pays bills into a banker's hands has a right to expect that his drafts will be honoured to the amount of the bills paid in, yet the property in the bills is not altered (*t*).

Such being the general rule, it follows that if it be contended that the banker was more than a mere depositary, with a right of lien, it lies on the assignees to prove it (*u*).

Evidence on the part of the assignees, in such cases, consists in any facts which show that the owner of the bills parted with the property by a sale or discount to the bankers, or that they were the depositaries, subject to a lien (*x*).

It is not sufficient to show that the bankers had a limited authority to discount to a certain amount, or that they had authority to discount to an uncertain amount, where the object is a special one; as to honour the drafts or bills of the customer, or to reduce the cash balance when the bankers should be in advance (*y*).

The best and most direct evidence on this head, consists in the authority or directions given by the customer, especially if they be in writing (*z*).

Proof that the bills were in the hands of the banker, *indorsed* by the customer, is *primâ facie* evidence of a discount, but not conclusive; for they may have been indorsed merely to enable the banker the more effectually to receive payment on behalf of the customer from other parties (*a*).

The mode in which the bills were entered in the banker's books will not affect the question, without proof of assent on the part of the owner (*b*).

*On the other hand, the writing the bills short is merely evidence of the nature of the remittance. If it be accompanied by a letter which directs its application, that cannot be got rid of by the unauthorized act of the banker (*c*). *166

Where the bills are entered short, if it appears from the habits of dealing

(*t*) *Ib.* and per Holroyd, J. 2 B. & C. 431. (*u*) Per Lord Eldon, C. *Ex parte Sargeant*, 1 Rose, 153.

(*x*) Although the customer, when he has deposited bills as a collateral security for the bankrupt's acceptance, has a right to have them returned, on exonerating the estate, yet the holders of those acceptances have no such right; for being strangers to the contract between the banker and his customer, they can claim no lien. If the *customer* in such case also become bankrupt, as the banker's estate cannot be exonerated without discharging such bills, it seems that the Lord Chancellor will order such an arrangement as will make such bills available. *Ex parte Waring* and *Ex parte Inglis*, 2 Rose, 282. Yet *qu.* whether in principle the owners of the bills ought to receive more from such securities, in proportion to their debt, than the other creditors receive from the banker's estate? had the customer remained solvent, the banker's assignees could not, it seems, have claimed more on the securities than they paid to those creditors rateably with the rest; the holders of the bills would have been entitled to have resorted to the customer (being the drawer, &c.) for the remainder of the debt, and he having become bankrupt, they ought not, as it seems, on that account, to receive more from the banker's estate, but to be paid their proportion of the remainder rateably with the customer's creditors.

(*y*) *Ex parte Wakefield Bank*, 1 Rose, 243. *Ex parte Leeds Bank*, Ib. 254. *Qu.* Whether a general authority be sufficient, &c. Lord Eldon, C., in the cases arising on *Boldero's* bankruptcy, seems to have been of opinion that it would.

(*z*) *Ex parte Dumas*, 1 Atk. 232.

(*a*) *Ex parte Towgood*, 19 Ves. 229. *Thompson* v. *Giles*,[1] 2 B. & C. 422.

(*b*) Bills not due and entered *short* in the banker's books, are considered the property of the customer. "The fact that bills were not written short, amounts to nothing, unless there be a concurrence manifested at the time, or to be inferred from the habits of dealing between the parties that they were to be considered *as cash*. If they were there, with the owner's knowledge, *as cash*, and he draws, or is entitled to draw on them, as having that credit in cash, he is precluded from recurring to them specifically, but it lies on the assignees to prove that to be the case; the owner is entitled unless the bills have been carried to his credit with his knowledge or consent. Per Lord Eldon, in *Ex parte Sargeant*, 1 Rose, 153. Bills of exchange having been paid by a customer to his account with a banker, were entered as cash, with a distinct interest account; the customer had credit to the amount of the bills so entered, but did not overdraw the account; there was a custom in the country to circulate short bills, but no express authority was given to circulate the bills in question. The Ld. Chancellor, reversing the decree of the Vice Chancellor, held that the bills did not pass to the assignees. *Ex parte Benson*, 1 Mont. & Bligh, 120.

(*c*) See *Ex parte Damas*, 1 Atk. 232; 1 Rose, 243.

[1] Eng. Com. Law Reps. ix. 127.

between the parties that they were considered as cash, they will pass to the assignees (*d*).

In general, where bills have been deposited by the plaintiff to answer a specific purpose, which has not been answered, and they remain in the hands of the assignees after the bankruptcy, the owner is entitled to recover them from the assignees (*e*), or to hold them against the assignees.

*167 *Where bills are not remitted for a particular purpose, but to be discounted, and are discounted (*f*), or by one trader to another on a running account (*g*), or on an exchange of bills for bills, they pass to the assignees (*h*).

Where it was agreed between four partners as bankers, and a customer, that the latter should indorse bills, and take the notes of the bankers in exchange, and this was done after three of the four had become bankrupt, it was held after the fourth also became bankrupt, that as the consideration for indorsing the bills had failed, the assignees could not retain them (*i*).

Disaffirmance of bankrupt's acts.

3dly. So evidence may be necessary to show the right of the assignees in disaffirmance of some disposition of the property by the bankrupt. As to show that a conveyance in favour of his children was fraudulent (*k*).

(*d*) *Ex parte Thompson*, Mo. & M. 102.

(*e*) As where *A.* remitted bills to *B.*, a banker, for the express purpose of answering other bills drawn by *A.* on the banker, on a particular account, which latter bills had been dishonoured by the banker, and paid by *A.* before the bankruptcy of *B.* Lord Eldon, C. observed, it is clearly settled, that where bills are remitted on a general account, and there is no evidence to the contrary, they cannot be followed in case of bankruptcy; if remitted for a particular purpose, they may. *Ex parte Pease*, 1 Rose, 241. Where *A.* and *B.* had a general running account, consisting of bills drawn by *B.* on *C.* in favour of *A*, and of bills and other securities deposited by *A.* with *B.*, and upon the failure of *B.* and *C.*, *A.* was obliged to take up the bills received by him from *B.*, whereby the balance of accounts was in favour of *A.*, it was held that he could not maintain trover for the bills deposited with *B.* unless they had been specifically appropriated to answer *B.*'s drafts on *C.* in favour of *A.*, and deposited for that purpose expressly. *Bent* v. *Puller*, 5 T. R. 494. Where *A.* sent certain bills of long dates to *B.*, a banker, requesting permission to draw bills of shorter dates without renewals, and sent the long bills indorsed to *B.* in the letter of request, and *B.* answered, that agreeable to *A.*'s request he had discounted the bills, and then specified the amount to be drawn for; it was held that the transaction did not amount to a sale or exchange of bills upon discount, but to a deposit of the long bills, on condition of being allowed to draw shorter bills, and therefore, that *B.* having become bankrupt, whereby *A.*'s bills were dishonoured, the long bills which remained in *B.*'s possession at the time of the bankruptcy did not pass to the assignees. *Parke* v. *Eliason*, 1 East, 544. *Collins* v. *Martin*, 1 B. & P. 649. So where *A.* had transmitted to *B.* his banker, bills to answer outstanding acceptances by *B.* on account of *A.*, upon an agreement by *A.* to make remittances to answer such acceptances when due; and the acceptances were not paid by *B.*, but by *A.* after the bankruptcy of *B.*; it was held, that the bills remitted for the purpose of answering these acceptances were in the nature of goods in the possession of a factor, and that they belonged to *A.*, subject to *B.*'s lien for the balance due at the time of the bankruptcy; and that having been deposited by *B.* with another banker, who had set them short in the bankrupt's book, they were the same as if still in possession of the bankrupt. *Zincke* v. *Walker*, Bl. R. 1154. *A.* and *B.* agreed that *A.* should sell to *B.* light guineas from time to time, and that *A.* should draw upon *B.* from time to time for the money due upon such sales; and that *B.* should accept other bills drawn by *A.* for his own convenience, for which *A.* was to remit value. *B.* being under acceptances to a large amount became bankrupt, and *A.* being ignorant of the bankruptcy, sent light gold and bills to enable *B.* to discharge such acceptances; and it was held that *A.*, who had since paid *B.*'s acceptances, was entitled to the gold and bills so sent against the assignees. *Tooke* v. *Hollingworth*, 5 T. R. 215, affirmed in the Exchcq. Cham. 2 H. B. 501. *A. B. C. & D.* being partners as brokers at Liverpool, and *C. & D.* being partners as merchants at London, *J. S.* having accepted bills payable at the house of *C. & D.*, employed *A. B. C. & D.* to get them paid, and agreed to deposit good bills with them, indorsed by him, to enable them so to do. *A. B. C. & D.* debited *J. S.* in account for his acceptances, and credited him with all the bills which he had deposited; some of the bills so deposited were remitted by *A. B. C. & D.*, to *C. & D.*, upon the general account between the two houses; and before any of the acceptances of *J. S.* became due, both houses failed, and *J. S.* was obliged to pay all his acceptances; and it was held, that the assignees of *C. & D.* were entitled to retain against *J. S.* all the bills which had been remitted by *A. B. C. & D.*; also, that it made no difference that one of the bills remitted did not arrive till after the bankruptcy of *C. & D.* *Bolton* v. *Puller*, 1 B. & P. 539. And see *Collins* v. *Martin*, 1 B. & P. 648.

(*f*) *Carstairs* v. *Bates*, 3 Camp. C. 301; 2 B. & C. 432.

(*g*) *Burt* v. *Puller*, 5 T. R. 494.

(*h*) *Hornblower* v. *Proud*, 2 B. & A. 327; and vide *supra*, *Clarke* v. *Eliason*, 1 East, 554.

(*i*) *Ex parte M'Gae*, 2 Rose, 376.

(*k*) Where the only evidence of insolvency at the time of a bankrupt's executing a voluntary deed in favour of his children, was that he had given two bills which had never been paid, except by renewals, and

The general effect of bankruptcy is to avoid all acts of the bankrupt subsequent to the bankruptcy, by making the right of the assignees to relate to the act of bankruptcy; and therefore the assignees may usually avoid and disaffirm such a transaction by the bankrupt by evidence of a previous act of bankruptcy and petitioning creditor's debt. The very purchasing of goods from a trader, after such an act of bankruptcy, is a conversion (*l*)

Dispositions by process of law stand on the same footing with dispositions by the bankrupt; to be valid, they must be complete before the bankruptcy (*m*).

Evidence in disaffirmance of bankrupt's acts.

If a sheriff seize and sell goods under an execution, after an act of bankruptcy, even without notice, and before the commission, he is liable in trover (*n*), and the assignees are not bound to prove any demand, since the execution was tortious (*o*). Or the assignees may treat the *sale as valid (*p*). And if the creditor assisted in the levying the execution, trover will lie against him, although the money remain in the hands of the sheriff (*q*). But where the sheriff takes goods in execution before an act of bankruptcy, he is not liable for a conversion in selling them afterwards (*r*). Where the sheriff seized the goods in execution, and afterwards, but on the same day, the trader surrendered himself in discharge of his bail, and committed an act of bankruptcy by lying in prison for two months, it was held that the assignees were not entitled to recover (*s*). *168

The assignees cannot recover in trover the amount of a cheque paid by the bankrupt's bankers after the bankruptcy, against a creditor to whom the cheque had been delivered and the money paid (*t*); neither can they recover in trover for bills fraudulently obtained from the bankrupt, after his bankruptcy, for the bankrupt never could have any property in them; but if the party obtaining them receive the proceeds, the assignees may recover for money had and received (*u*).

which, at the time of his bankruptcy, four years after, were still unsatisfied, held to be insufficient to establish a case of insolvency at the time of executing the deed, within the 6 Geo. 4, c. 16, s. 73. Notice of a difficulty to meet particular demands is not notice of insolvency, but it must be of a more general and extensive description, as of a general composition, or paying creditors portions only of their demands, and not in the usual way. *Cutten* v. *Sanger*, 2 Y. & S. 459. And see *Reader* v. *Knatchbull*, 5 T. R. 228. *Bayly* v. *Schofield*, 1 M. & S. 338; Anon. 1 Camp. 135; and *Abraham* v. *George*, 11 Price, 423.

(*l*) *Hurst* v. *Gwennap*,[1] 2 Starkie's C. 306; even although the assignees have demanded payment, *Ibid.* See the late st. *infra*, 172, 173.

(*m*) Per Lord Mansfield, Burr. 32; see 2 B. & A. 38.

(*n*) This has been so decided upon argument in the court of Exchequer. *Assignees of Potter* v. *Starkie*. See *Smith* v. *Mills*, 1 T. R. 475; *Bailey* v. *Bunning*, 1 Lev. 172; *Cole* v. *Davis*, Ld. Raym. 124; *Cooper* v. *Chitty*, 1 Burr. 20; and the cases collected, 1 Montague's B. L. 474. The single question determined in *Bailey* v. *Bunning*, and reserved by the special verdict, was, whether the taking was lawful; and upon that the court determined. B. N. P. 41. And now see *Garland* v. *Carlisle*,[2] 10 Bing. 452;[3] 4 Bing. N. C. 7; *Balme* v. *Hutton*, 2 Y. & J. 101.

(*o*) *Rush* v. *Baker*, B. N. P. 41.

(*p*) Where after notice of bankruptcy the sheriff seized and sold goods to the execution creditor, who afterwards sold them to *F.*, who subsequently became an assignee, held, that though they might have treated the sale as invalid and disposed of the goods, yet that they might suffer *F.* to continue the possession, and claim the value as against the sheriff. *Vaughan* v. *Wilkins*,[4] 1 B. & Ad. 370.

(*q*) *Menkam* v. *Edmonson*, 1 B. & P. 369.

(*r*) *Thomas* v. *Desanges*,[5] 2 B. & A. 586. *Cole* v. *Davis*, Ld. Raym. 124. *Sadler* v. *Leigh*, 4 Camp. 197. And now see the stat. 6 G. 4, c. 16, s. 81, *infra*, 170. If the money be in the hands of the sheriff, and before the return of the writ, the debtor becomes bankrupt, the execution creditor is entitled. *Wymer* v. *Kemble*, 9 D. & R. 511. *Fox* v. *Burbidge*, in K. B.

(*s*) *Thomas and others* v. *Desanges and others*, 2 B. & A. 586; *Sup.* 102. See TIMES.

(*t*) *Mathew* v. *Sherwell*, 2 Taunt. 439.

(*u*) *Walker* v. *Laing*,[6] 1 Moore, 281. A debtor deposited the title-deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party, but this instrument was never registered pursuant to the statute 7 Anne, c. 20. The debtor afterwards became

[1]Eng. Com. Law Reps. iii. 357. [2]*Id.* xxv. 192. [3]*Id.* xxxiii. 264. [4]*Id.* xx. 400. [5]*Id.* xiii. 238. [6]*Id.* ii. 221.

They cannot affirm a transaction as to part and disaffirm it as to the rest, nor disaffirm a transaction after having once affirmed it (*x*). A person after the bankruptcy buys bonds with the bankrupt's money and delivers them to the wife, the assignees cannot seize the bonds as part of the estate, and maintain trover for the money (*y*); so after recovering from a banker money which he paid to a holder of a draft of the bankrupt's after the bankruptcy, they cannot recover from the creditor to whom the money was paid (*z*).

Money had and received.

It has been held, that the assignees may recover from a creditor in England money which he has attached abroad, after the assignment, as money had and received to their use (*a*). So they may recover, in the same form of action, money paid by a trader for the carriage of goods after a secret act of bankruptcy (*b*): money which is the produce of goods pledged by the trader's direction, after being arrested at the defendant's
169 suit, but without his privity, after a secret act of bankruptcy, and paid over to the defendant, although not the identical money raised by the pledge (*c*); money received by the banker of the bankrupt, and paid over to a creditor with knowledge of the bankruptcy (*d*), or to the bankrupt. Money paid by way of voluntary preference (*e*). So where the sheriff, after an act of bankruptcy, seized the bankrupt's goods under a *fieri facias*, and executed a bill of sale of them to the execution creditor, it was held that the assignees might recover the amount (*f*). Where a creditor, knowing the bankrupt's insolvency, induced him to draw bills, and induced the drawees to accept them, it was held, that though neither the bankrupt nor his assignees had any property in the bills, so that the latter could not maintain trover, yet that they might maintain an action for money had and received when the bills were paid (*g*).

Where a trader in prison employed an auctioneer to sell his goods, who returned him the proceeds by the hands of the defendant, who was the mere bearer, it was held that the assignees could not recover the money from him (*h*).

Where a debtor to the bankrupt on policies of insurance, which have

bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt. Held, that although this instrument was void, the rents which the defendant had received as equitable mortgagee, could not be be taken out of his hands by virtue of the registered assignment under the commission. *Sumpter and others* v. *Cooper*,[1] 2 B. & Ad. 223.

(*x*) *Brewer* v. *Sparrow*,[2] 7 B. & C. 310. (*y*) *Wilson* v. *Poulter*, 2 Str. 859.

(*z*) *Vernon* v. *Hanson*, 2 T. R. 287. Even as trustees for the banker, who had no other means of recovering the money.

(*a*) *Hunter* v. *Potts*, 4 T. R. 182. See also *Sill* v. *Worswick*, 1 H. B. 665; *Phillips* v. *Hunter*, 2 H. B. 402.

(*b*) *Bradley* v. *Clark*, 5 T. R. 197.

(*c*) *Allanson* v. *Atkinson*, 1 M. & S. 583.

(*d*) *Vernon* v. *Hankey*, 2 T. R. 115. But they cannot afterwards recover from the creditor. *Vernon* v. *Hanson*, 2 T. R. 287.

(*e*) *Poland* v. *Glyn*,[3] 2 D. & R. 310. In *assumpsit* by assignees for money received to the use of the bankrupt before the bankruptcy, plea, that the money, although in the defendant's possession after the bankruptcy, was in fact received before, and that the bankrupt was indebted to the defendant in a large sum, which he claimed to set off, held bad, as confessing, but not avoiding; as, if received before the bankruptcy, the assignees could only claim it as received under a fraudulent preference, in which case the general issue would be the proper plea. *Wood* v. *Smith*, 4 M. & W. 522; and 7 Dowl. (P. C.) 214.

(*f*) *Reed* v. *James*,[4] 1 Starkie's C. 134; and see *Butler* v. *Carver*,[5] 2 Starkie's C. 433.

(*g*) *Walker* v. *Laing*,[6] 7 Taunt. 568. But where *A.* after his bankruptcy, and to procure his discharge from an arrest at the suit of *B.*, drew and indorsed bills of exchange, which *C.* accepted, under the expectation of receiving goods of *A.*'s, and after receiving and selling the goods, paid the amount to *B.*; it was held that the assignees could not recover the amount from *B.* *Waller* v. *Drakeford*,[7] 1 Starkie's C. 481, *tamen quære.*

(*h*) *Coles* v. *Wright*, 1 Taunt. 498.

[1]Eng. Com. Law Reps. xxii. 61. [2]*Id.* xiv. 50. [3]*Id.* xvi. 88. [4]*Id.* ii. 327. [5]*Id.* iii. 417. [6]*Id.* ii. 221. [7]*Id.* ii. 476.

been deposited by the bankrupt with a creditor as a collateral security after a secret act of bankruptcy, gives his acceptance, which he afterwards pays to the creditor, the assignees cannot recover the amount from the creditor, although the broker who paid the money retained the amount so paid by him on settlement with the assignees, for it was the money of the broker, and not of the bankrupt (*i*).

Where the trader has sold goods at prices very inferior to their value, the assignees cannot recover the difference (*k*).

Proof of disaffirmance of acts by the bankrupt.

Where a bill of exchange was indorsed by the bankrupt after his bankruptcy, and the indorsee received the amount, it was held that the assignees could not recover for money had and received, but must resort to the action of trover for the bill (*l*).

Proof of notice when necessary.

The general relation of the title of the assignees to the act of bankruptcy, is in several instances restricted, in order to relieve those who have dealt *bonâ fide* with a bankrupt without knowing him to be such. In cases within some of the provisions of the statute, it is incumbent on the assignees to prove that the defendant had *notice* of the prior act of bankruptcy.

*170 *The stat. 6 Geo. 4, c. 16, s. 81, enacts, that all conveyances by, and all contracts and other dealings and transactions (*m*) by and with any bankrupt *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied (*n*) more than two calendar months (*o*) before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or

(*i*) *Hovil* v. *Pack*, 7 East, 163; and see *Willis* v. *Freeman*, 12 East, 656.

(*k*) *Hogg* v. *Mitchell*,[1] 1 Starkie's C. 241. (*l*) *Waller* v. *Drakeford*,[2] 1 Starkie's C. 481.

(*m*) Under the stat. 46 G. 3, c. 138, s. 1, it was held, that by *transactions* are meant such as occur between parties in the usual course of business, and not such as are carried on through the medium of legal process (*Blogg* v. *Phillips*, 2 Camp. 129); and therefore that the terms did not extend to the levying under an execution by a creditor after a secret act of bankruptcy, more than two months before the commission. *Ib.* Where a bill was delivered by the trader, with intent to transfer the property, more than two months before the commission, but was not actually indorsed till within the two months, it was held, that the indorsement had relation to the delivery. 1 Camp. 492. Where the bankrupts had transferred wines more than two months before the issuing of the commission, by mistake, into the names of *A. & Co.*, instead of *A. & Son*, being different firms, but the mistake was corrected within two months; held, that the mistake did not defeat the right of *A. & Son*, as at all events *A. & Co.* would be trustees for them; held also, that a prior commission having issued, though not acted upon nor gazetted, was sufficient within the proviso of 6 Geo. 4, c. 16, s. 81, to deprive the defendant of the protection of the statute as to a subsequent transfer. *Peckham* v. *Lashmoor*,[3] 1 M. & M. 251.

(*n*) The seizure is a levying within the Act. *Godson* v. *Sanctuary*,[4] 4 B. & Ad. 255. See *Wray* v. *Lord Egremont*,[5] Ib. 122. Where the execution is on a judgment obtained by default, confession, or *nil dicit*, sec. 108 enacts, that the creditor shall not avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably. An execution on a final judgment, after a judgment by default, was held to be within the provisions of the 6 G. 4, c. 16, s. 108, although obtained before the Act came into operation. *Cuming* v. *Welsford*,[6] 6 Bing. 502. This section applies where, in such a case, the goods have been seized, but the execution is not completed; where the execution has been completed, the case falls within the 81st sect. *Wymer* v. *Kemble*,[7] 6 B. & C. 479, and see *Thomas* v. *Desanges*, 2 B. & A. 586. *Sadler* v. *Leigh*, 4 Camp. 197. This clause, it is held, does not avoid an execution levied by seizure before bankruptcy on a judgment by *nil dicit*, but only provides that the execution creditor shall share rateably with the rest. *Taylor* v. *Taylor*,[8] 5 B. & C. 392; 8 D. & R. 159. By the stat. 1 W. 4, c. 7, s. 7, no judgment signed or execution issued upon cognovit, signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the Court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, to be deemed within the 6 Geo. 4, c. 16, s. 108.

(*o*) On a commission issuing May 14th, a dealing March 14th is valid, *Cowie* v. *Harris*,[9] M. & M. 141. The execution of a *fi. fa.* at 11 o'clock on the 13th of August, is a levying more than two months before the 13th of October. *Godson* v. *Sanctuary*,[4] 4 B. & Ad. 256; 1 N. & M. 52.

[1]Eng. Com. Law Reps. ii. 373. [2]*Id.* ii. 476. [3]*Id.* xxii. 302. [4]*Id.* xxiv. 53. [5]*Id.* xxiv. 37. [6]*Id.* xix. 149. [7]*Id.* xiii. 238. [8]*Id* xi. 259. [9]*Id.* xxii. 270.

on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice (*p*) of any prior act of bankruptcy by him committed: provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment,
*171 shall be valid, unless made, *entered into, executed, or levied more than two calendar months before the issuing the first commission.

Sec. 82 enacts, that all payments (*q*) really and *bonâ fide* (*r*) made, or

(*p*) The issuing of a commission is not in itself notice, and therefore payment after commission issued, but without actual knowledge, &c. is protected. *Sowerby* v. *Brooks*,[1] 4 B. & A. 523. A trader, after an act of bankruptcy, sells goods to *B.*, who *pays for them*, without knowledge of the bankruptcy; the assignees cannot maintain trover for the goods without tendering the money. *Cash* v. *Young*,[2] 2 B. & C. 416; but see *Harst* v. *Gwennap*,[3] 2 Starkie's C. 306. Note, in the latter case the goods had not been paid for.

(*q*) A delivery of goods *bona fide* in part payment of a previous debt, after a secret act of bankruptcy, is protected. *Cannan* v. *Wood*, 2 M. & W. 465. So if cash be given for a bank-post bill, *Willis* v. *Bank of England*,[4] 4 Ad. & Ell. 21. So where a party, within two months before the fiat, pledged goods on an advance of money. *Wright* v. *Fremley*,[5] 5 Bing. N. C. 89. See also *Mayer* v. *Nias*,[6] 1 Bing. 311; and tit. PAYMENT. An assignment as a security for money lent in trust to permit the assignee at the expiration of a time specified to sell them in discharge of the debt, is not protected. A fiat issuing within two months after the assignment on a secret act of bankruptcy, previous to the assignment. *Cannan* v. *Denew*,[7] 10 Bing. 292.

(*r*) This clause is substituted for the provision of the stat. 19 G. 2, c. 32, s. 1, which protects payments to real and *bona fide* creditors of any bankrupt, for or in respect of goods really and *bona fide* sold to such bankrupt, or for or in respect of any bills of exchange really and *bona fide* drawn, negotiated, or accepted by such bankrupt, in the usual or ordinary course of trade and dealing. A payment under an arrest of the bankrupt, as the acceptor of a bill of exchange, has been held to be within the Act. *Cox* v. *Morgan*, 2 B. & P. 398, Chambre, J. *diss.* See also *Holmes* v. *Wennington*, 2 B. & P. 398. *Ex parte Farr*, 9 Ves. 515. That payments on bills not yet due were not within the act (*semble*). *Tamplin* v. *Diggins*, 2 Camp. 312. Nor on *accommodation* bills. *Holroyd* v. *Whitehead*,[8] 3 Camp. 530; 2 Camp. 315; 1 Marsh, 128; 2 H. B. 334; 11 East, 127. An advance of money upon a deposit of goods amounts to no more than a loan, and not a payment protected within the statute, although *bona fide*, and without notice of an act of bankruptcy. *Wright* v. *Fearnley*, 5 Bing. N. C. 89; 6 Sc. 813; and 7 Dowl. (P. C.) 129. And see *Cannan* v. *Denew*, 10 Bing. 292. A payment of a debt by weekly instalments after an act of bankruptcy was held not to be within the statute. *Bolton* v. *Jager*,[9] 1 Ry. & M. 265. Where a factor accepted a bill in favour of his principal, after a *secret* act of bankruptcy, and *after notice* the factor paid the amount to the holder, it was held that the payment was within the protection of the statute. *Wilkins* v. *Casey*, 7 T. R. 711. *Coles* v. *Robins*, 3 Camp. 183. Where a banker, on whom a bill of exchange had been drawn, requested, when it became due, that it might remain in his hands, and promised to pay interest, and afterwards, upon application by the holder, who had no notice of a previous act of bankruptcy, paid the amount, it was held that the transaction amounted to a loan, and was not within the statute. *Vernon and others* v. *Hall*, 2 T. R. 648. Where *A.* having obtained a verdict against *B.*, who afterwards committed a secret act of bankruptcy, instead of entering up judgment and taking out execution, took a bill drawn by *B.* on *C.*, which was paid when due, it was held that the payment was not within the statute. *Pinkerton* v. *Marshall*, 2 H. Bl. 334.

The statute did not extend to a payment by the *debtor* of the bankrupt upon a judgment against him on a foreign attachment, since it mentions payments by the bankrupt only. *Hovil* v. *Browning*, 7 East, 154. Where a factor accepted and paid bills on the strength of goods consigned to him by his principal, after a secret act of bankruptcy, and after a commission, sold the goods and received the money; it was held that he was not protected either by the stat. 1 Jac. 1, c. 15, s. 14, or 19 Geo. 1, c. 32, s. 1. A *bona fide* payment eight days before the commission issued, is protected by 6 G. 4, c. 16, s. 82. The creditor having met the party at an office where he knew he was going to receive money, obtains payment of his debt, not knowing either that his debtor was insolvent or a prisoner; the jury negativing any fraud, such payment is not a fraudulent preference. *Churchill* v. *Crease*,[10] 5 Bing. 177; 2 M. & P. 415. Where the defendant, after an act of bankruptcy unknown to him, and within two months of the issuing of the commission, purchased a lot of books from the bankrupt, a hop-merchant, and paid him for them; held, that such payment was valid, and that the assignees could not rescind the contract and maintain trover for the books, without an offer to return the money; and that the same construction was to be applied in all cases of *bona fide* sales, whether the goods were or not such as the bankrupt usually dealt in. *Hill* v. *Farnell*,[11] 9 B. & C. 45. Where the defendant, after a secret act of bankruptcy, sells goods at so low a price as not to be in the usual course of business, with the knowledge of the purchaser, the transaction is not within the protection of the statute. *Ward* v. *Clarke*,[12] 1 M. & M. C. 497. The defendant, at the request of the bankrupt, after a secret act of bankruptcy, lent him his acceptance for 98*l.*, and at a later period of the same day, in a conversation as to security, the

[1]Eng. Com. Law Reps. vi. 506. [2]*Id.* ix. 127. [3]*Id.* iii. 357. [4]*Id.* xxxi. 19. [5]*Id.* xxxv. 43. [6]*Id.* viii. 330. [7]*Id.* xxv. 139. [8]*Id.* i. 151. [9]*Id.* xxi. 435. [10]*Id.* xv. 409. [11]*Id.* xvii. 330. [12]*Id.* xxii. 369.

*which shall hereafter be made (*s*) by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bankrupt, before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of (*t*) any act of bankruptcy by such bankrupt committed.

Sec. 83 enacts, that the issuing of a commission (*u*) shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing the commission,) if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same.

Sec. 84 enacts, that no person or body corporate, or public company having in his or their possession or custody any money, goods, wares, merchandizes or effects, belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order, provided such person or company had not at the time of such delivery or payment notice that such bankrupt had committed an act of bankruptcy.

Sec. 85 enacts, that if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice.

Sec. 86 enacts, that no purchase from any bankrupt *bonâ fide*, and for valuable consideration, where the purchaser had notice at the time of such

bankrupt agreed to sell horses to the defendant for 70*l*., which were subsequently delivered; held, that the latter transaction was not protected by sect. 82 of 6 Geo. 4, c. 16, it not being a sale of goods with payment of the price, but a sale of goods with an agreement to set off the price against a liability on the part of the bankrupt. *Carter* v. *Breton*,[1] 6 Bing. 617. Where, after an act of bankruptcy by one of two partners, he paid a partnership debt to a creditor who had knowledge of the act of bankruptcy; held, that such payment was not protected by the 82d sect. of 6 Geo. 4, c. 16, as he had himself ceased to have any interest in the partnership funds, and his authority to make any payment for his partner was dissolved. *Craven* v. *Edmondson*,[2] 6 Bing. 734. And see *Hawkins* v. *Penfold*, 2 Ves. 550. Mont. & B. 311. *Carter* v. *Picton*, 6 Bing. 617. Goods delivered in payment of a bill of exchange then overdue, is not a payment within this clause, *Smith* v. *Moon*,[3] 1 M. & M. 458. *Shaw* v. *Batley*,[4] 4 B. & Ad. 801. *Bradbury* v. *Anderton*, 1 C. M. & R. 486. See *Green* v. *White*,[5] 3 Bing. N. C. 59.

(*s*) The expression "payments *made*," contrasted with the following, "henceforth to be made," clearly renders the provisions retrospective, and comprehends payments made at the time, and therefore before the passing of the Act. *Terrington* v. *Hargreaves*,[6] 5 Bing. 489. And see *Churchill* v. *Crease*, 5 Bing. 180.

(*t*) These words are to be construed "notice of an act of bankruptcy by *any* of the bankrupts" committed. *Hawkins* v. *Whitten*,[7] 10 B. & C. 217. A payment by one partner, who has committed an act of bankruptcy, of a partnership debt due before the bankruptcy to a creditor who has notice of the act of bankruptcy, is not protected. *Craven* v. *Edmondson*,[8] 6 Bing. 734. A payment for goods purchased from a bankrupt just before his bankruptcy is not protected if the purchaser knew, or had the means of knowing, the bankrupt's circumstances. *Devas* v. *Venables*,[9] 3 Bing. N. C. 400; and see *Green* v. *White*,[10] 1b. 591. Although notice of a docket struck be not of itself evidence of an act of bankruptcy, yet being connected with the fact of the defendant's requiring security before payment made, a jury may infer notice. *Spratt* v. *Hobhouse*,[11] 4 Bing. 181.

(*u*) By the issuing of a commission is meant its passing under the great seal, whether it be opened, or acted upon, or not. *Watkins* v. *Maund*, 3 Camp. 308.

[1]Eng. Com. Law Reps. xix. 180. [2]*Id.* xix. 219. [3]*Id.* xxii. 356. [4]*Id.* xxiv. 168. [5]*Id.* xxxii. 40. [6]*Id.* xv. 515. [7]*Id.* xxi. 60. [8]*Id.* xix. 219. [9]*Id.* xxxii. 176. [10]*Id.* xxxii. 40. [11]*Id.* xiii. 395.

purchase of an act of bankruptcy by such bankrupt committed, shall be
*173 *impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months after such act of bankruptcy.

Insolvency. Again, in cases within the stat. 6 G. 4, c. 16, s. 73, it would be necessary that the assignees should prove the insolvency of the bankrupt at the time of the transaction which they seek to impeach.

This section enacts, that if any bankrupt, being at the time insolvent (*x*), shall (except upon the marriage of any of his children, or for some valuable consideration,) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same as aforesaid; and every such sale shall be valid against the bankrupt, and such children and persons as aforesaid, and against all persons claiming under him.

By 2 & 3 Vict., c. 29, all contracts made *bonâ fide* with any bankrupt previous to the date and issuing any *fiat* against him, are valid, provided the party had no notice of any prior act of bankruptcy.

Action by assignees. Defence. The defence consists, either, 1st, in the denial of the plaintiff's right to sue in the character of assignees (*y*), or supposing them to be assignees, 2dly, of their particular cause of action against the defendant. Under the first head the defendant may, it has been seen in some instances, dispute and controvert all the facts upon which the bankruptcy is attempted to be supported (*z*). Under the second he may not only controvert the claim of the plaintiff's resting on the proofs already announced (*a*), as by showing that the bankrupt himself could not have supported the action, (in cases where the assignees affirm the acts of the bankrupt, and claim solely through his merits,) but he may also show, that in point of law the interest which the bankrupt had did not pass to the assignees; or he may rely upon a set-off, or discharge by the assignees.

*174 Non-joinder. *In the first place, he may controvert the title of the plaintiffs to sue in the character of assignees (*b*). He may object that there is another as-

(*x*) Compounding with creditors is evidence of insolvency. *Reader* v. *Knatchbull*, 5 T. R. 218. But *insolvency* means a general inability to answer engagements. And in order to invalidate a payment made by the bankrupt two months before the commission, it has been held to be insufficient to show that the creditor has renewed bills for the debtor, in consequence of the inability of the latter to provide for them, 1 Camp. 492. Notice to a creditor that there has been a meeting of the bankrupt's creditors, and that the state of his affairs was such that the demands of creditors could not be paid, except by instalments, although the creditor was assured by the bankrupt's agent that they would come round, was held to be notice of insolvency, (under the stat. 46 G. 3, c. 135, s. 1,) so as to defeat a subsequent payment by the bankrupt to the creditor. *Bayly* v. *Schofield*, 1 M. & S. 330. The plaintiffs to prove an execution creditor's knowledge of the trader's insolvency, proved a letter written by his attorney to the attorney of the execution creditor, stating that he had been embarrassed by the failure of another house, and strongly pressing for time, and offering to pay by instalments; it was held that it did not amount to the kind of insolvency meant by the statute, which being a term used in connection with that of *bankruptcy* was not to be considered as used in its common acceptation, but as meaning insolvency of so decided and unequivocal a character as to be immediately followed by bankruptcy or stopping payment, as a necessary consequence. *Abraham* v. *George*, 11 Price, 423.

(*y*) In trover by assignees, a plea denying that the plaintiffs were assignees, puts in issue the petitioning creditor's debt and act of bankruptcy. *Buckton* v. *Frost*, 1 Perr. & D. 102. And see *Butler* v. *Hobson*,[1] 4 Bing. N. C. 290.

(*z*) Except as to facts proved by the depositions, where they are given in evidence under the stat. 6 G. 4, c. 16, s. 92, for they are made conclusive evidence of those facts.

(*a*) Vide *supra*, 121.

(*b*) An assignment to assignees after an action, well commenced by the provisional assignee, does not defeat the action. *Page* v. *Bauer*,[2] 4 B. & A. 345.

[1] Eng. Com. Law Reps. xxxiii. 358. [2] *Id.* vi. 449.

signee still living, who ought to have been joined (*c*), for this is a ground of nonsuit.

In an action by the assignees under a joint commission against *A.* and *B.*, against the sheriff for levying an execution on the goods of *A.* and *B.*, it appeared that the levy was made after the bankruptcy of *A.* but before that of *B.*; and it was held that the action was not maintainable, since, although the bankruptcy of *A.* was a severance of the joint-tenancy, yet under a joint commission they could not sue for the separate property of one (*d*).

Prior act of bankruptcy.

Although no notice has been given of intention to dispute the commission, it may be shown that it is void, as by reason of infancy (*e*). At one time a defendant might disprove the title of the assignees by proof of an act of bankruptcy committed anterior to the petitioning creditor's debt, and of a sufficient debt to have supported a commission (*f*), although neither the bankrupt himself, nor any one claiming by assignment from him, could have sustained such an objection (*g*). But by the stat. 6 G. 4, c. 16, s. 19, no commission shall be deemed invalid by reason of any act or acts of bankruptcy prior to the debt or debts of the petitioning creditor or creditors, or any of them, provided there be a sufficient act of bankruptcy subsequent to such debt or debts (*h*).

Where the bankrupt was uncertificated under a former commission, and it was proved that all his effects were assigned under it; held, that in an action of trover by the subsequent assignees, the defendant might avail himself of the former commission, without notice to dispute having been given; for although the 94th section dispenses with proof of the facts enumerated, yet the commission must be put in evidence, and its validity in law is still open to examination (*i*).

Petitioning creditor's debt.

Payment of money to the petitioning creditor after the suing out of the commission renders the commission supersedable, but not *ipso facto* void (*k*). The defendant may impeach the petitioning creditor's debt, as by showing that it was due to the petitioning creditor and another, jointly, the latter not concurring in the petition (*l*); or that the petitioning creditors could not have sued upon the bill accepted by the trader upon which the debt is claimed, one of them having engaged to provide for the bill when due (*m*); that one *of the petitioning creditors is resident and carrying on trade in an enemy's country (*n*). *175

The petitioning creditor cannot in an action against him by the assignees dispute the amount of the petitioning creditor's debt (*o*). But it seems

(*c*) *Snelgrove* v. *Hunt*,[1] 2 Starkie's C. 424; 1 Chitty's R. 71. Note that the action was in assumpsit.

(*d*) *Hogg* v. *Bridges*,[2] 2 Moore, 122. See *Stonehouse and another* v. *De Silva*,[3] 3 Camp. 399; and 2 Starkie's C. 17. Note they were not the goods of *A.* and *B.* as alleged.

(*e*) *Belton* v. *Hodges*,[4] 9 Bing. 365.

(*f*) *R.* v. *Bullock*, 1 Taunt. 72, 88; 14 Ves. 67, 452. *Beardmore* v. *Shaw*, 1 N. R. 263. But an act of bankruptcy alone was insufficient. *Parker* v. *Manning*, 2 Esp. 598; 4 Esp. 594; 9 East, 21.

(*g*) *Mercer* v. *Wise*, 3 Esp. 219; 1 Taunt. 80, 86, 94. *Donnovan* v. *Duff*, 9 East, 24. See *Doe* v. *Boulcott*, 2 Esp. C. 595, Eyre, C. J. *Bryant* v. *Withers*, 2 M. & S. 123.

(*h*) The corresponding clause in the stat. 46 G. 3, c. 135, s. 5, contains an exception which is omitted in the late Act, viz. "if such petitioning creditor had not any notice of such act of bankruptcy at the time when the debt was contracted."

(*i*) *Phillips* v. *Hopwood*,[5] 1 B. & Ad. 619.

(*k*) *Garratt* v. *Theophilus Biddulph*, 4 Esp. C. 104.

(*l*) *Brickland* v. *Newsom*, 1 Camp. 474. 1 Taunt. 477.

(*m*) *Richmond* v. *Heapy*,[6] 1 Starkie's C. 102.

(*n*) *M'Connell* v. *Hector*, 3 B. & P. 113. So, *semble*, that one of them is an infant. *Ex parte Morton*, 1 Buck's B. C. 42. *Ex parte Barrow*, 3 Ves. 554.

(*o*) *Harmer* v. *Davis*,[7] 1 Moore, 300.

[1]Eng. Com. Law Reps. iii. 414. [2]*Id.* iv. 70. [3]*Id.* ii. 222. [4]*Id.* xxiii. 309. [5]*Id.* xx. 457. [6]*Id.* ii. 356. [7]*Id.* ii. 223.

that another defendant may show that the debt was merely colourable and conclusive, although the bankrupt himself might have been estopped by the security which he had given from disputing it (*p*).

Act of bankruptcy.

A defendant who was not privy to the transaction may show that the act of bankruptcy which is relied upon was a concerted one (*q*). But neither the bankrupt, nor any one privy to the concert, can insist upon such an objection (*r*). It is no objection that the commission fiat or adjudication was concerted (*s*).

Declarations by the bankrupt before his bankruptcy, with a view to a fraudulent commission, are admissible in evidence to show collusion between the bankrupt and the petitioning creditor (*t*).

To impeach the cause of action.

2dly. The defendant may show that in point of law the right of action did not pass to the assignees. Whether a particular interest does or does not pass to the assignees, is of course a pure question of law; but it is incumbent on the defendant to give in evidence such facts as raise the question of law, where the plaintiff has made out a *primâ facie* case (*u*).

(*p*) See Christian's B. L. 442, 2d edit.

(*q*) See Lord Mansfield's observations, in *Hooper* v. *Smith*, 1 Bl. 441; and see *Bamford* v. *Baron*, 2 T. R. 595, n. *Stewart* v. *Richman*, 1 Esp, C. 108. *Field* v. *Bellamy*, B. N. P. 39. *Cowley* v. *Hopkins*, Co. B. L. 84, 95. *Ex parte Bourne*, 16 Ves. 145. *Ex parte Edmundson*, 7 Ves. 303. But see *Bromley* v. *Mundee*, B. N. P. 39. *Ex parte Milner*, 1 Buck's B. C. 104. *Secus*, where the act of bankruptcy consists in a declaration of insolvency, under the stat. 6 G. 4, c. 16. See sec. 7.

(*r*) *Roberts and others* v. *Teasdale*, Peake, 27; B. N. P. 39, 40. *Cowley* v. *Hopkins*, Co. B. L. 84, 95. *Ex parte Bourne*, 16 Ves. 145. See also *Wilson* v. *Poulton*, 2 Str. 859; *Billon* v. *Hyde & Mitchell*, 1 Atk. 126; *Tuppenden* v. *Burgess*, 4 East, 235.

(*s*) 1 & 2 Will. 4, c. 56, s. 42. See also *Shaw* v. *Williams*,[1] 1 Ry. & M. C. 19. *Ex parte Binmer*, 1 Madd. 250; 1 Mont. & M. 438; 1 Rose, 87. The stat. does not make a concerted act good, to sustain a *fiat*. As where assignment is made for the benefit of all creditors, to which the petitioning creditor is a party. *Marshall* v. *Barkworth*, 4 B. & C. 508. A creditor assenting to an act of bankruptcy, cannot avail himself of it to support a *fiat*. *Ex parte Hall*, 3 Deacon, B. C. 405. A petitioning creditor, party to a deed of assignment for the benefit of creditors, cannot set up the deed as an act of bankruptcy, *Bunn*, *ex parte*, 3 Deac. (B. C.) 119. But it is no defence to show that the commission issued by the desire and at the request of the bankrupt. *Shaw* v. *Williams*, M. & M. 19. This was otherwise before the stat. *Ex parte Grant*, 1 C. & J. 17.

(*t*) *Thomson* v. *Bridges*,[2] 2 Moore, 376. But declarations by the petitioning creditor after suing out the commission, that the commission was concerted, were held to be inadmissible. *Harwood* v. *Keys*, 1 Mo. & R. 204.

(*u*) Bills of exchange obtained by false pretences do not pass. (*Gladstone* v. *Hadwen*, 1 M. & S. 517); nor trust property (*Webster* v. *Scales*, 25 G. 3, B. R. *Winch* v. *Keely*, 1 T. R. 619); nor property equitably assigned before the bankruptcy. *Tibbits* v. *George*,[3] 5 Ad. & Ell. 107. *Carvalho* v. *Burn*,[4] 4 B. & Ad. 382. And see, as to cases under the Insolvent Act, *Best* v. *Angles*, 2 C. & M. 394; 4 Tyr. 256. *A.* agrees to assign to *B.* certain specific goods by way of security for money advanced by *B.* for the purchase of them, and afterwards assigns them under circumstances which would have made the assignment void under the Insolvent Act; the assignees of *A.* under the Insolvent Act are not entitled to the goods, although it would be otherwise if the goods were not ascertained at the time of the agreement. *Mogg* v. *Baker*, 3 M. & W. 195. Nor the property of the bankrupt's wife to her separate use (*Vandernanker* v. *Desborough*, 2 Vernon, 95). *Aliter*, where stock stands in the name of a married woman (*Pringle* v. *Hodgson*, 3 Ves. 617); and the wife can have no assistance in equity where there is no trust created for her benefit (*Ibid.*; and see Christian's B. L. 483, 2d edit.) The assignment passes future personal property (*Kitchen* v. *Bartsch*, 7 East, 53); but a fresh assignment of real property was held to be necessary (*Ex parte Proudfoot*, 1 Atk. 253). The assignment passes contingent interests (*Higden* v. *Williams*, 3 P. Wms. 132); but not a possibility of taking by descent as heir (*Moth* v. *Frome*, Amb. 394. *Carleton* v. *Leighton*, 3 Mer. 667). Particular proceedings are made for the *transfer* of copyhold property by the stat. 2 G. 4, c. 16, s. 86. All *saleable* offices pass by assignment (1 Atk. 210); *secus*, of offices which concern the administration of justice, 5 & 6 Ed. 6, c. 16. (See *Ex parte Butler*, 1 Atk. 210, 215. Amb. 73, 89, 112. Cooke's B. L. 283). So an officer's pay does not pass. *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248. An advowson passes, but the bankrupt must present, if a lapse occur before conveyance to a purchaser. See *Charman* v. *Charman*, 14 Ves. 580. The assignment passes the bankrupt's right to recover what he has paid as a gaming debt. *Brandon* v. *Pate*, 2 H. B. 308. A lease, notwithstanding a covenant not to assign without consent. *Philpot* v. *Horne*, 2 Atk. 219; Amb. 480. *Doe* v. *Carter*, 8 T. R. 7. *Aliter*, where there is a proviso for re-entry in case of the lessee's bankruptcy. *Roe* v. *Galliers*, 2 T. R. 133. An annuity demised to the bankrupt, and payable to *him only*, ceases upon the assignment. *Dommett* v. *Bedford*, 6 T. R. 684; 3 Ves. 150. A debt due to the wife *dum sola*, passes (*Miles* v. *Williams*, 1 P. Wms. 249); so does a debt on mortgage (*Bosvil* v. *Brandon*, 1 P. Wms. 459); but the wife's right of survivorship is good against the assignees, if the husband dies before they obtain possession. *Mitford* v. *Mitford*, 9 Ves. 87. As to the wife's remainder in chattel interest,

[1] Eng. Com. Law Reps. xxi. 372. [2] *Id.* iv. 121. [3] *Id.* xxxi. 293. [4] *Id.* xxiv. 82.

*The assignees being only entitled derivatively from or through the bankrupt, as he could not have maintained an action against the East India *Company for the arrears of his pension, his assignees cannot (*x*). By bringing an action in the form *ex contractu*, where it might have been laid in *tort*, they affirm the act of the bankrupt, and the defendant is entitled to the benefit of a set-off (*y*). For the assignees cannot affirm the same transaction in part, and disaffirm it for the rest. And therefore, where the bankrupt, after a secret act of bankruptcy, had transactions with the defendants, and the assignees brought an action of *assumpsit* to recover what the bankrupt had paid; Lord Hardwicke, C. held that the defendants were entitled to set-off money which they had paid for the bankrupt (*z*); for by bringing an action of *assumpsit* the assignees had elected to consider the bankrupt as their factor, and affirmed his contract, and having done so, must take him as their factor in all things done fairly and without deceit. Set-off. *177

Upon an action by the assignees, the defendant was before, and is now,

see *Doe* v. *Steward*,[1] 1 Ad. & Ell. 300. Goods delivered to the bankrupt on a contract of sale pass to the assignees, although the bankrupt intended to defraud the vendor. *Milword* v. *Forbes*, 4 Esp. C. 171; but see *Gladstone* v. *Hadwen*, 1 M. & S. 517. So does the interest of a tenant for life in his redemption of the land-tax. *Emley* v. *Grey*, 3 Mer. App. 702. Money advanced to the bankrupt, being in prison (the act of bankruptcy), for the special purpose of settling with his creditors, which object fails, may be repaid by the bankrupt to the party advancing the money, and does not pass to the assignees. *Toovey* v. *Milne*, 2 B. & A. 683. Where the defendant delivered a cheque on his banker to two persons, for a specific purpose, and they returned it to him after their bankruptcy, not having used it; held that the assignees were not entitled to recover it in trover. *Moore* v. *Barthrop*,[2] 1 B. & C. 5. Money received by an overseer of the poor, and set apart from the rest of his property, does not pass to the assignees. *R.* v. *Eggington*, 1 T. & R. 370. In general, the product of a substitute for the original follows the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case where the subject is turned into money, and mixed and confounded in a general mass of the same description. Per Lord Ellenborough, *Taylor* v. *Plumer*, 3 M. & S. 563. See *Scott* v. *Surman*, Willes, 400; *Whitcomb* v. *Jacob*, Salk. 650; *Copeman* v. *Callant*, 1 P. Wms. 320. A draft is intrusted to a broker to buy exchequer bills; the broker receives the money and misapplies it, by purchasing American stock and bullion, and absconds, but is apprehended. The principal, who receives the American stock and bullion, is not amenable to the assignees under a commission against the broker, on an act of bankruptcy committed on the day on which he misapplied the money. *Taylor* v. *Plumer*, 3 M. & S. 563. Property passes to the assignees when received by a factor after the act of bankruptcy, although purchased with monies advanced by the factor for the purpose of purchasing the goods to be sold by him to repay himself out of the proceeds. *Copeland* v. *Stein*, 8 T. R. 199; and see *Carter* v. *Barcklay*,[3] 3 Starkie's C. 43. By the stat. 6 G. 4, c. 16, s. 63, the commissioners are to assign all the present and future personal estate of such bankrupt, wheresoever, &c. and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign, as aforesaid, all debts due, or to be due to the bankrupt, wheresoever, &c. to such assignees; and after such assignment, neither the bankrupt nor any other person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof; neither shall the same be attached, &c., but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt. A valid appropriation or equitable assignment of a trader's funds is not revoked by his bankruptcy. *Hatchinson* v. *Heyworth*,[4] 9 Ad. & Ell. 375. A money bond assigned by the trader to secure a debt to a larger amount, does not pass to the assignees. *Dangerfield* v. *Thomas*,[5] 9 Ad. & Ell. 292. Where a sum was bequeathed, subject to forfeiture if the legatee should "mortgage, charge, sell, assign, or incumber;" held, that bankruptcy being an act of law, and not a voluntary assignment by the legatee, which was alone contemplated by the will, the assignees were entitled. *Whitfield* v. *Prickett*, 2 Keene, 608. Where a grantor settled estates on two in succession for life, on condition that the party entitled for the time being should reside in the mansion-house and bear the name and arms of the grantor, the latter becoming bankrupt; held, that having a vested right in remainder in the property at the time of his bankruptcy, it passed, under the bargain and sale, to his assignees, although liable to be defeated by the default of the party to fulfil the condition. *Ex parte Goldney*, 4 Deacon, B. C. 570; 1 Mont. & Ch. 75.

(*x*) *Gibson* v. *East India Company*, 5 Bing. N. C. 262.

(*y*) *Smith* v. *Hodgson*,[6] 4 T. R. 211. In *assumpsit* by assignees on an agreement by the bankrupt for the sale of goods, to be paid for by an acceptance, alleging the refusal to accept, and damage by loss of the benefit of such acceptance, and injury to his estate thereby; held, that the damage resulting in pecuniary loss only, it did not amount to such an allegation of unliquidated damages as to preclude the debtor's right of set-off. *Groom* v. *West*, 1 Perr. & D. 19. And see *Gibson* v. *Bell*,[7] 1 Bing. N. C. 743.

(*z*) *Billon* v. *Hyde & Mitchell*, 1 Atk. 120.

[1]Eng. Com. Law Reps. xxviii. 89. [2]*Id.* viii 5. [3]*Id.* xiv. 156. [4]*Id.* xxxvi. 162. [5]*Id.* xxxvi. 143. [6]*Id.* xxxv. 112. [7]*Id.* xxvii. 562.

under the stat. 6 G. 4, c. 16, s. 50, where there have been mutual credits between the parties, entitled to set off a debt due from the bankrupt to him before the bankruptcy, without giving any notice of set-off; and he may either plead the set-off, or give it in evidence under the general issue (*a*).

Mutual credit.

By the stat. 6 G. 4, c. 16, s. 50, where there has been *mutual* (*b*) *credit* given by the bankrupt and any other person, or where there are mutual debts (*c*) between the bankrupt and any other person, the commissioners

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*shall state the account between them, and one debt or demand (*d*) may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given *to* or the debt contracted *by him*, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate (*e*); provided that the person claiming the benefit of such set-off had not, when such credit was given, notice (*f*) of an act of bankruptcy by such bankrupt committed.

The defendant, before this, must have showed that the debt which he proposed to set off, accrued before the act of bankruptcy (*g*); he could not set off cash notes payable to *J. S.* or bearer, although they were dated before the bankruptcy, without showing that they came to his hands before the

(*a*) *Grove* v. *Dubois*, 1 T. R. 112. *Ryall* v. *Larkin*, 1 Wils. 155; see also *Edmeads* v. *Newman*,[1] 1 B. & C. 418, as to mutual securities held by country bankers. And see, as to the advance of money on the strength of consignments, *Easum* v. *Cato*,[2] 5 B. & A. 861; *Ex parte Deere*, 1 Atk. 228. As to mutual accounts between an insurance broker and underwriter, see 19 Geo. 2, c. 32. *Graham* v. *Russell*, 5 M. & S. 498.

(*b*) These words are not confined to pecuniary demands, but extend to confidential deliveries of goods, likely, under the circumstances, to become productive. *Easum* v. *Cato*,[2] 5 B. & A. 861. So if bankers discount bills yet running, and give credit to the bankrupt, in his account with them, for the amount *minus* the discount. *Arbouin* v. *Tritton*,[3] 1 Holt's C. 408. *Secus*, if the trader deposit a bill with another for a specific purpose, as to raise money upon it, in such case the assignees, after tendering the amount advanced on the bill, are entitled to recover in trover. *Key* v. *Flint*,[4] 1 Moore, 451; *Buchanan* v. *Findlay*,[5] 9 B. & C. 738. This clause extends to mutual dealings *up to the time of the commission*, and therefore extends the protection of the stat. 46 G. 3, c. 135, s. 3. See *Kinder* v. *Butterworth*,[6] 6 B. & C. 42; *Tamplin* v. *Diggins*, 2 Camp. 312. A mutual credit may be constituted although the parties did not mean particularly to trust each other, as where *A.* accepts a bill which gets into the hands of *B.*, who buys goods of *A.* *Hankey* v. *Smith*, 3 T. R. 507. A partner in the house of *M. & Co.* drew bills for the accommodation of *A.*, a customer with the firm, who discount the bill for *A.* and indorse it to *N. & Co.* The bill becoming due after the bankruptcy of *M. & Co.*, *N. & Co.* pay themselves out of the funds of *M. & Co.* in their hands. The assignees of *M. & Co.* sue *A.*; the latter is entitled to set off a debt from *M. & Co.* *Bolland* v. *Nash*, 8 B. & C. 105.

(*c*) The debt due from the creditor to the bankrupt, or the credit given by the latter to the bankrupt, must have existed at the time of the bankruptcy. See *Hankey* v. *Smith*, 3 T. R. 507 (n). *A.* bought of *B.* goods to the amount of 430*l.*, at six months' credit, and afterwards to the amount of 230*l.* at the like credit, and at the expiration of the first six months gave *B.* two bills of exchange on third persons for —*l.*, on an undertaking by the latter to pay the balance when the bills were paid. *A.* having become bankrupt before the credit for the second parcel expired, it was held that *B.* might set off the 170*l.* against the price of the second parcel. *Atkinson* v. *Elliott*, 7 T. R. 378. See *Key* v. *Flint*,[7] 8 Taunt. 21.

(*d*) Notwithstanding these terms, a more extensive sense is given to the terms *mutual credit*, in the earlier part of the clause. See Eden on the Bankruptcy Laws, 194. *Ex parte Marshall*, 1 Mont. & Ayr. 139.

(*e*) And therefore debts may now be set off which could not formerly have been set off as depending upon a contingency. See Eden B. L. 203. The terms are more extensive than *mutual debts*. But they are confined to such credits as must in their nature terminate in debts. *Rose* v. *Hart*,[8] 8 Taunt. 499. *Rose* v. *Sims*,[9] 1 B. & Ad. 521. *Easum* v. *Cato*,[10] 5 B. & A. 861. *Young* v. *Bank of England*, 1 Deac. Bankruptcy Cases, 622. A mere guarantee against contingent damages, which cannot terminate in a debt, is not the subject of mutual credit. *Sampson* v. *Burton*,[11] 2 B. & B. 89. Where a creditor employed his debtor to repair his carriage on a contract to pay ready money for the repairs, it was held that the assignees of the latter had a lien till payment. *Clarke* v. *Fell*,[12] 4 B. & Ad. 404.

(*f*) As to the construction of these words, vide *supra*, 172.

(*g*) *Marsh* v. *Chambers*, Str. 1234.

[1]Eng. Com. Law Reps. viii. 116. [2]*Id.* vii. 282. [3]*Id.* iii. 145. [4]*Id.* iv. 3. [5]*Id.* xvii. 486. [6]*Id.* xiii. 105. [7]*Id.* iv. 3. [8]*Id.* iv. 185. [9]*Id.* xx. 437. [10]*Id.* vii. 282. [11]*Id.* vi. 28. [12]*Id.* xxiv. 87.

bankruptcy (*h*). So where the defendant insisted on acceptances of the bankrupt in his hands, by way of set-off to an action by the assignees, on his own acceptance, he was bound to show either that his obligation to pay the bills subsisted before the bankruptcy, or that the bills originated in mutual credit (*i*).

*Where *B.* agreed to indemnify *A.* his surety, by allowing him to retain out of any debt which he should owe to *B.*, in respect of mutual dealings in trade, as much as he should pay on the bond, and *B.* sold goods to *A.*, and after *B.*'s bankruptcy *A.* paid more than the price of the goods on the bond, it was held that the assignees could not recover for the goods, there being nothing due to the bankrupt's estate on the original contract (*k*). *179

Where *B.*, a broker, was intrusted by *A.*, a merchant, with policies on goods, effected by *B.* for *A.*, and after *A.*'s bankruptcy *B.* received for losses under such policies; and *A.* had before his bankruptcy employed *B.* to sell goods for him as a broker, and *B.* had advanced money to *A.* upon a pledge of such goods and upon *A.*'s general credit; it was held that this was a mutual credit, and that *B.* might retain the sum received for the loss, in liquidation of his advances, and of the money due for premiums (*l*). The defendant having accepted bills for the accommodation of a trader, received money from him after an act of bankruptcy, but before the commission, to take up the bills which became due after the commission, and were then paid by the defendant: held that the defendant was bound to refund; for the statute is confined to mutual debts at any time before such person became bankrupt, and it was not the money of the bankrupt, but of the assignees (*m*). It is not sufficient for the defendant to show that the subject of his set-off was allowed as a debt by the commissioners (*n*). The defendant cannot, in an action by the assignees, set off a debt on a bill drawn by the bankrupt, of which he is the holder, after having set it off against a prior indorser (*o*). The debt must be due in the same right (*p*).

(*h*) *Dickson* v. *Evans*, 6 T. R. 57. Lawrence, J. observed, that if the notes had been payable to the defendant himself, he should have thought it reasonable evidence that they came into his hands at the time hey bore date. Where to an action by the assignees of a bankrupt, for a debt due to the bankrupt's estate, the defendant set off notes in his possession issued by the bankrupt before the bankruptcy; proof that notes to the amount of the set-off came into his hands three or four weeks before the bankruptcy, was held sufficient evidence from which the jury might infer that he was in possession of them at the time of the bankruptcy, without identifying them with the notes produced. *Moore* v. *Wright*,[1] 6 Taunt. 517. Under the above clause, a party who has industriously obtained notes of bankers after they had stopped payment, but who had no notice of any act of bankruptcy committed, is entitled to set them off. *Hawkins* v. *Whitten*,[2] 10 B. & C. 217. See also *Dickson* v. *Cass*,[3] 1 B. & Ad. 343. Bills were drawn by one partner and accepted by the defendant, and discounted by the firm for his convenience, having money in their hands of his at the time; held, that between the parties it constituted a mutual credit, and that the firm could not, by paying away the bills, which were afterwards returned to them, put an end to that mutual credit, so as to deprive the defendant of his right to set off any debt due from the firm to him against the sum claimed by them or their assignees from him, as such acceptor. *Bolland* v. *Nash*,[4] 8 B. & C. 105. The defendant, in consideration of the bankrupt's delivering to him a bill accepted by him, promised to deliver to the bankrupt a bill accepted by *E.*, and indorsed by the defendant, and the latter afterwards proved the former bill under the commission, but refused to indorse the bill of *E.*; held, that it did not constitute a case of mutual credit between the bankrupt and defendant, but was a cause of action, from the non-performance of a contract, for which the assigness might sue. *Rose* v. *Sims*,[5] 1 B. & Ad. 521.

(*i*) *Oughterlony* v. *Easterby*, 4 Taunt. 888. *Southwood* v. *Taylor*, 1 B. & A. 471. And see *Sheldon* v. *Rothschild*,[6] 2 Moore, 43. The bankrupt accepted a bill for 488*l.* for the accommodation of *A.*, but becoming indebted to *A.* for part, drew a bill on *A.* for the balance, and became bankrupt. The latter bill was accepted and paid by *A.* without knowledge of the intervening bankruptcy; and it was held to be a case of mutual credit, although the principal sum was not due at the time of the bankruptcy; it was also held, that an action for money had and received did not lie against the purchaser of the bill, to whom *A.* had paid the amount.

(*k*) *Dobson* v. *Lockhart*, 5 T. R. 133.

(*l*) *Olive* v. *Smith*,[7] 5 Taunt. 56. And see *Arbouin* v. *Tritton*,[8] Holt, 408.

(*m*) *Tamplin* v. *Diggins*, 2 Camp. 312.

(*n*) *Pirie* v. *Mennett*, 3 Camp. 279.

(*o*) *Belcher* v. *Lloyd*,[9] 10 Bing. 310.

(*p*) See tit. SET-OFF. *Fair* v. *M'Iver*, 16 East, (B. C.) 130.

[1]Eng. Com. Law Reps. i. 469. [2]*Id.* xxi. 60. [3]*Id.* xx. 397. [4]*Id.* xv. 157. [5]*Id.* xx. 437. [6]*Id.* iv. 55. [7]*Id.* i. 16. [8]*Id.* iii. 145. [9]*Id.* xxv. 145.

Where a party struck a docket, and afterwards became a trustee under an assignment of all the bankrupt's property in trust for creditors, and after he had incurred some expenses in executing the trust, another creditor issued a fiat, and the assignee seized the property; held, that the assignment being of itself notice of an act of bankruptcy, he could acquire no lien on the property as against the assignees (*q*).

Discharge. A discharge by one assignee, on receiving monies due to the estate, will bind the rest (*r*); but a discharge by one assignee will not be effectual where the others have expressly dissented (*s*). So a release executed by one assignee in the presence of another will bind both (*t*): but if the co-assignee be absent, an express authority by him under seal must be proved (*u*).

Actions against assignees, &c. II. *Actions against Commissioners, Assignees, &c.*—In an action against a *commissioner* the plaintiff must prove notice of action, according to the stat. 6 Geo. 4, c. 16, s. 41 (*x*). And any plaintiff who sues in respect of anything *done in pursuance of the stat. 6 G. 4, c. 16, must (by sec. 44), show that his action was commenced within three calendar months next after the fact committed. In order to compel the defendant to prove the requisites of bankruptcy, the plaintiff must prove notice of his intention to dispute them under the stat. 6 G. 4, c. 16, s. 90 (*y*).

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Evidence that the commissioners made out their warrant of commitment without showing any actual restraint, in consequence of such warrant, the party being previously, and still remaining, in custody for another cause, is not sufficient to support an action of imprisonment against them (*z*).

Where the assignees authorize the bankrupt to carry on the business for the benefit of creditors, they are liable for goods supplied to him, although

(*q*) *Ex parte Swinburne*, 3 Deac. 396; and 1 Mont. & Ch. 119.

(*r*) *Smith* v. *Jameson*, 1 Esp. C. 114. *Contra*, *Carr* v. *Read*, 3 Atk. 695.

(*s*) *Bristow and others* v. *Eastman*, 1 Esp. C. 172, where one assignee had taken 20*l.* in discharge of various sums embezzled by defendant, against the consent of a co-assignee.

(*t*) *Williams* v. *Walsby*, 4 Esp. C. 220. *Lord Lovelace's Case*, W. Jones, 208. *Ball* v. *Dunsterville*, 4 T. R. 313.

(*u*) 4 T. R. 313. *Harrison* v. *Jackson*, 7 T. R. 207.

(*x*) Which enacts, that no writ shall be sued out against, nor copy of any process served on any commissioner, for anything by him done as such commissioner, unless notice in writing of such intended writ or process shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party intending to sue or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same; and such notice shall set forth the cause of action which such party has or claims to have, &c., and on the back of such notice shall be indorsed the name of such attorney or agent, together with the place of his abode.

Sec. 42 enacts, that no such plaintiff shall recover any verdict against such commissioner, in any case where the action shall be grounded on any act of the defendant as commissioner, unless it is proved, upon the trial of such action, that such notice was given, as aforesaid; but in default thereof, such commissioner shall recover a verdict and costs, as hereinafter mentioned; and no evidence shall be permitted to be given by the plaintiff on the trial of any such action, of any cause of action, except such as is contained in the notice.

Sec. 43 enacts, that every such commissioner may, at any time within one calendar month after such notice, tender amends to the party complaining, or to his agent or attorney; and if the same is not accepted, may plead such tender in bar to any action brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea, with leave of the court; and if, upon issue joined thereon, the jury shall find the amends so tendered to have been sufficient, they shall give a verdict for the defendant; and if the plaintiff shall become nonsuit, or shall discontinue his action, or if judgment shall be given for such defendant upon demurrer, such commissioner shall be entitled to the like costs as he would have been entitled to in case he had pleaded the general issue only; and if, upon issue so joined, the jury shall find that no amends were tendered, or that the same were not sufficient, and also against the defendant, on such other plea or pleas, they shall give a verdict for the plaintiff, and such damages as they shall think proper, which he shall recover, together with costs of suit; provided that, if any such commissioner shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, he may, by leave of the court where such action shall depend, at any time before issue joined, pay into court such sum of money as he shall think fit, whereupon such proceedings shall be had in court as in other actions where the defendant is allowed to pay money into court.

(*y*) *Supra*, 89.

(*z*) *Crowley* v. *Impey*,[1] 2 Starkie's C. 261.

[1]Eng. Com. Law Reps. iii. 341.

ordered in his own name (*a*), and to pay him for his trouble. Where they enter and keep possession of the premises, although for the purpose of disposing of the bankrupt's estate, they become liable on the covenants (*b*).

Where a bankrupt had a lease of premises, and also a reversionary interest in them, and the assignees executed an assignment of all the bankrupt's estate and reversionary interest, it was held that they must be taken to have assigned the lease, and consequently to have accepted it (*c*).

Where premises, with fixtures, were mortgaged, but the mortgagor continued in possession, and, becoming bankrupt, his assignees removed the fixtures; it was held, that the mortgagee, as against the defendants as strangers, was entitled to consider the mortgagor as his tenant at will, and maintain an action for the injury to his reversionary interest; and also, *that having the same right to the fixtures as his tenant, he might maintain trover for the fixtures so severed, and that they did not pass to the assignees as goods within the bankrupt's order and disposition (*d*). *181

Defence by Commissioners, Assignees, &c. (*e*).—By the stat. 6 G. 4, c. 16, s. 44, commissioners and others may in all cases justify what they have done under the act under the general issue. In default of notice, under the 90th clause, no evidence need be given of the requisites of bankruptcy (*f*). Where the action is brought in respect of a commitment of the bankrupt or any other under the statute, the whole of the examination of that person shall be read and considered, and the defendant shall have the same benefit from it as if the whole had been recited in the warrant (*g*). Defence by assignees.

(*a*) *Kinder* v. *Howarth*,[1] 2 Starkie's C. 354.

(*b*) In order to protect themselves, they should enter with a protest, that it is not for the purpose of possessing themselves of the premises as assignees. *Hanson* v. *Stevenson*, 1 B. & A. 303. See *Turner* v. *Richardson*, 7 East, 335; *Wheeler* v. *Bramah*, 3 Camp. 340.

(*c*) *Page* v. *Godden*,[2] 2 Starkie's C. 309. See tit. COVENANT.

(*d*) *Hitchman* v. *Walton*, 4 M. & W. 409. And see *Partridge* v. *Bere*,[3] 5 B. & Ald. 604.

(*e*) Upon an application for payment of a dividend against a surviving assignee after a great lapse of time, held that the onus of proving payment lay on the assignee, and that the statute of limitations did not attach to a debt once proved under the commission. *Ex parte Healey*, 1 D. & Ch. 331.

(*f*) The power given by the above clause to persons appointed by the commissioners to break open any house, &c., *of the bankrupt*, and seize upon the body or goods of such bankrupt, is confined to the house of the bankrupt, and does not extend to those of other persons where such party or property may be; the 29th sec., giving the power to search the houses of third persons, requires also the warrant of a justice to be obtained by the party appointed by the commissioners; and therefore, where the *assignees* entered the premises of the plaintiff to seize goods of the bankrupt, it is not an act done in puruance of the stat., and the plaintiff is not limited to his action within three months after the act committed. *Edge* v. *Parker*,[4] 8 B. & C. 697.

Doing an act "in pursuance of" a stat., is applicable only to cases where the party can be considered as founding his act upon the power given him by the legislature. *Ib.* And see *Carruthers* v. *Payne*,[5] 5 Bing. 270; *Worth* v. *Budd*,[6] 2 B. & Ad. 177. The official assignee is not within the protection of the 44th clause. *Knight* v. *Turquant*, 2 M. & W. 101.

In order to justify the commissioners in issuing their warrant to apprehend a party summoned to attend before them as a witness under s. 33 of 6 G. 4, c. 16, there should be a reasonable interval between the service of the summons and the time appointed for his attendance, and it is for a jury to say whether under the circumstances such service be reasonable or not; but in order to justify them in issuing their warrant, it is not necessary they should have before them information on oath of the service of the summons. *Groocock* v. *Cooper*,[7] 8 B. & C. 211.

Where no objection was made by the bankrupt to the course of the examination, but he objected to sign it afterwards, it is not necessary that the examination should be set out in the warrant. *In re Leak*, 3 Y. & J. 46.

Upon a like application in the court of K. B., the court also held it to be unnecessary to set out the examination, but that the bankrupt was entitled to be discharged, the warrant having concluded that "he should be committed until he should sign, and *true* answer make."[8] 9 B. & C. 234.

Where a return to a *habeas corpus* set forth only a part of the warrant, omitting the questions which had been put to the bankrupt, the Court ordered that the gaoler should amend his return, and annex the warrant itself, or that a copy thereof, or the whole, should be set forth in the affidavit of the party opposing the discharge. *In re Power*, 2 Russ. 583.

(*g*) By sec. 40.

[1]Eng. Com. Law Reps. iii. 379. [2]*Id.* iii. 358. [3]*Id.* vii. 204. [4]*Id.* xv. 328. [5]*Id.* xv. 447. [6]*Id.* xxii. 53. [7]*Id.* xv. 198. [8]*Id.* xvii. 366.

Where the action is brought by the bankrupt (*h*) to try the question of bankruptcy, and due notice has been given according to the stat. 6 G. 4, c. 16, s. 90, the defendants must either prove the different requisites of bankruptcy, or some direct or collateral admission by the plaintiff of his
*182 bankruptcy (*i*); as that he obtained his discharge under a Judge's *order (*k*), or solicited votes in the choice of assignees: proof that he surrendered is insufficient, since a surrender is compulsory (*l*).

Assignees, under a plea in trover, denying the property in the plaintiffs, are entitled to show that the goods were in the order and disposition of the bankrupt as the true owner, and that the defendants, as assignees, sold the goods (*m*).

Actions by a bankrupt.

III. *Actions by and against Bankrupts.*—It is no defence, that the debtor has notice of the insolvency of the plaintiff, and that he may be afterwards called upon by the assignees to pay the debt; for payments enforced by coercion of law are valid against the assignees (*n*). In general, it seems to be no defence to prove that the plaintiff is an uncertificated bankrupt, for a cause of action, as goods sold and delivered (*o*); or money lent (*p*); or a contract for the delivery of goods, subsequent to the bankruptcy (*q*), unless the assignees interpose (*r*). He may maintain trover for goods acquired by him after the bankruptcy, against all but his assignees (*s*).

Where the bankrupt was tenant from year to year, and a trespass was committed prior to his bankruptcy, it was held that he might maintain an action of trespass subsequently to his bankruptcy (*t*).

By the stat. 6 G. 4, c. 16, s. 126 (*u*), it is enacted, that any bankrupt

(*h*) When a commission is superseded, all acts done under it are void, and an action lies against the assignees for taking the goods. *Ex parte King*, 2 Ves. J. 40. *Perkins* v. *Proctor*, 2 Wils. 382. Mont. B. L. 613, n., the titles of purchasers are defeated. *Ibid.*

(*i*) See tit. Admission, and *Crafton* v. *Poole*,[1] 1 B. & Ad 568. In order to prove a bankrupt to have been a trader, proof of his having acknowledged that he was in partnership with a trader, and that he spoke of partnership property being their joint property, is evidence of the fact as against him. *Parker* v. *Barker*,[2] 1 B. & B. 9; 1 B. & A. 568. Shortly before the sale of the bankrupt's goods, he consulted with his assignees and the auctioneer as to the best means of disposing of them, and had also, in a notice to his landlord, in which he styled himself "a bankrupt," offered to surrender his lease, which was accepted; held, that the first did not amount to a consent to the sale, so as to estop him from questioning the validity of the commission, being referable to an intention to take care of and see that the most was made of the property, and with respect to his admission of being bankrupt to his landlord, and availing himself of the commission to surrender the lease, that although, as against his landlord, he might be precluded by his admission from denying it, yet that he was not, as against third persons, and that as against the defendants he was at liberty to prove such admissions to be mistaken or untrue. *Heane* v. *Rogers*,[3] 9 B. & C. 586.

(*k*) *Supra*, tit. Admissions, 19. (*l*) *Ibid.*

(*m*) *Isaac* v. *Belcher*, 5 M. & W. (ex.) 139; and 7 Dowl. 516.

(*n*) *Prickett* v. *Down*, 3 Camp. 131; 14 Ves. 557.

(*o*) *Foster* v. *Allanson*, 2 T. R. 479. *Silk* v. *Osborn*, 1 Esp. C. 140. *Chippendale* v. *Tomlinson*, Co. B. L. 446. *Coles* v. *Barrow*, 4 Taunt. 754.

(*p*) *Evans* v. *Brown*, 1 Esp. C. 170. But see *Kitchen* v. *Bartsch*, 7 East, 53.

(*q*) *Cumming* v. *Roebuck*,[4] Holt's C. 172.

(*r*) Where the plaintiff, whilst he was an uncertificated bankrupt, acted as a furniture broker, hiring vans, and employing men, and providing goods, it was held that it was such after-acquired property as the assignees intervening were entitled to recover, and that a payment by the defendant to them, between the writ and the declaration, might be given in evidence under the general issue, and was a good answer to the plaintiff's action. *Crofton* v. *Poole*,[1] 1 B. & Ad. 568.

(*s*) *Webb* v. *Fox*, 7 T. R. 391. *Fowler* v. *Down*, 1 B. & P. 44. See also *Drayton* v. *Dale*,[5] 2 B. & C. 293, as to his right to transfer a note made payable to him since his bankruptcy. Also *Ashley* v. *Kell*, Stra. 1207. Or where he is but a trustee for another. *Fowler* v. *Down*, 1 B. & P. 44. *Coles* v. *Barrow*, 4 Taunt. 754.

(*t*) *Clarke* v. *Calvert*,[6] 3 Moore, 96; and *qu.* whether the assignees could have maintained the action. See *Webb* v. *Fox*, 7 T. R. 391; *Fowler* v. *Down*, 1 B. & P. 44. *Smith* v. *Eustace*, 2 H. B. 444. *Cumming* v. *Roebuck*,[4] 1 Holt's C. 172.

(*u*) The effect of 6 G. 4, c. 16, s. 121, discharging the bankrupt from all debts due by him before the bankruptcy, is to afford relief, not only to the person but to his subsequently acquired property; the Court

[1]Eng. Com. Law Reps. xx. 441. [2]*Id.* v. 4. [3]*Id.* xvii. 449. [4]*Id.* iii. 64. [5]*Id.* ix. 91. [6]*Id.* vi. 266.

who shall, after his certificate (*x*) shall have been allowed, be arrested, or have *any action brought against him for any debt, claim or demand *183
thereby made proveable under the commission against such bankrupt, shall Actions against a bankrupt.
be discharged upon common bail, and may plead in general that the cause Plea of certificate.
of action accrued before he became bankrupt, and may give this Act and the special matter in evidence (*y*), and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate.

A certificate obtained after the commencement of the action is not evidence under the general issue, since it operates merely as a special discharge under the statute, and therefore must be made available, as the statute directs (*z*); but if the defendant plead such certificate it will be evidence (*a*), although obtained after the commencement of the action.

The effect of the certificate in evidence will be to bar all demands which Effect of certificate.
were due at the time of the act of bankruptcy, and which could have been proved under the commission (*b*).

therefore set aside an execution issued against such property, founded on a judgment obtained before his bankruptcy. *Davis* v. *Shapley*,[1] 1 B. & Ad. 54.

The provisions of 6 G. 4, c. 16, s. 127, do not prevent the bankruptcy and certificate being a bar to an action against the bankrupt. *Eicke* v. *Nokes*,[2] 1 M. & M. 303.

(*x*) By the stat. 6 G. 4, c. 16, s. 121, a certificate discharges the bankrupt from all claims proveable under the commission, but does not discharge any partner or other person jointly bound. Sec. 125 avoids all securities given for securing the payment of any money due from the bankrupt, as a consideration, or with intent to persuade a creditor to sign the certificate, and the party sued may give the matter in evidence under the general issue. A certificate obtained after the statute on a commission issued before it is proved by the production of the certificate duly allowed. *Taylor* v. *Welsford*,[3] M. & M. 503. A certificate of conformity under a fiat, must be proved to have been entered of record in the court of bankruptcy. See the 2 & 3 W. 4, c. 114, s. 8, and *supra*.

(*y*) Where the general plea of bankruptcy is pleaded, it concludes to the country, and the plaintiff can reply the *similiter* only. *Wilson* v. *Kemp*, 2 M. & C. 459, 1 B. & A. 22, which admits evidence of all matters which under the st. 6 G. 4, c. 16, s. 130, render the certificate void.

(*z*) *Gowland* v. *Warren*, 1 Camp. 363. *Stedman* v. *Martinnant*, 12 East, 664. *Joseph* v. *Orme*, 2 N. R. 180. A certificate allowed after plea pleaded should be pleaded *puis darrein* continuance. *Langmead* v. *Beard*, cited 9 East, 85. It seems that the Court will take judicial cognizance of the Chancellor's signature of allowance, Eden, 426. Assumpsit against two defendants for goods sold, plea *non-assumpserunt*, and on the 15th June one of the defendants pleaded his bankruptcy *puis darrein continuance*, to which the plaintiff demurred, but the latter proceedings were entered on the *nisi prius* record. The cause was tried on the 29th of June, and a general verdict found against both the defendants. The Court set aside this verdict for irregularity, on the ground that the plaintiffs were not entitled to have an absolute verdict against both the defendants, but contingent only against the one who pleaded his bankruptcy. *Thompson and another* v. *J. Percival and C. Percival*,[4] 2 B. & Ad. 967.

(*a*) *Harris* v. *James*, 9 East, 82.

(*b*) *Bamford* v. *Burrell*, 2 B. & P. 1 P. C. As to what is proveable under the commission, see above, p. 176. The defendant contracted for the purchase of goods to be delivered at stated times, and at prices of the then market day, and became bankrupt and obtained his certificate before the first delivery was to be made; the goods were afterwards tendered and refused; held, that the action was maintainable, notwithstanding the bankruptcy, the contract not being rescinded, as the assignees might have affirmed it if they thought fit, and the amount of damage being incapable of being ascertained until the market price known, was not proveable; held also, that the amount of damage was to be ascertained by the difference between the price contracted to be paid, and that which might have been obtained for the goods on the day when the contract ought to have been completed. *Boorman* v. *Nash*,[5] 9 B. & C. 145. Upon agreement for the purchase of premises, the price was to be paid on a given day, or when a good title should be tendered, and if the purchaser should be desirous, it might remain as a charge on the premises, so as that upon completion of the conveyances, the vendor should have a proper security for the price, with interest, and the purchaser covenanted to pay interest so long as the price remained unpaid, with a proviso, that if the interest were in arrear for thirty days, the purchaser should be considered as a tenant to the vendor, at a stated rent, payable half yearly, and the latter should have power to distrain. The purchaser did require the purchase-money, to remain so charged for five years, was let into possession, and subsequently became bankrupt; the vendor distrained for the stipulated rent, and it was paid by the assignees; upon further arrears becoming due after the bankrupt had obtained his certificate, and an action of covenant brought, to which he pleaded his bankruptcy generally, held that the agreement was in substance an agreement of sale, and could not be deemed to be a lease by reason of the default in paying the interest, but that the unpaid vendor being entitled to

[1]Eng. Com. Law Reps. xx. 344. [2]*Id.* xxii. 314. [3]*Id.* xxii. 369. [4]*Id.* xxii. 225. [5]*Id.* xvii. 344.

*Where a verdict is obtained against the bankrupt in an action for damages before an act of bankruptcy, but judgment is not signed till after, the debt is not barred by the certificate (*c*). If an action be commenced against a bankrupt after the bankruptcy, for a debt due before, and after a verdict for the plaintiff the bankrupt obtain his certificate, the costs of the action, as well as the debt, are proveable under the commission (*d*), for the costs bear relation to the original debt.

have the premises resold, and to prove for the residue, the claim for interest was proveable under the commission and the certificate therefore a bar. *Hope* v. *Booth*,[1] 1 B. & Ad. 498.

A defendant compromised an action for libel, by agreeing to apologize and pay the plaintiff's costs. The apology was made, and a rule of court obtained to pay the costs, amounting to 67*l*. On default made an attachment was issued, and the defendant was committed; while in custody he became bankrupt, and obtained his certificate; held, that the sum named in the rule of court was a debt which might have been proved under the commission, and that the defendant was entitled to be discharged out of custody. *Riley* v. *Burne*,[2] 2 B. & Ad. 779.

A commission of bankruptcy and certificate does not bar a clerk's claim for wages, where the commission issued in middle of year, and service down to time of commission, when clerk, for want of business, ceased to attend. For the bankruptcy does not dissolve the contract of service. The provision in the 48th section of the Bankrupt Act, in favour of clerks and servants, makes no difference in this respect. *Thomas* v. *Williams*,[3] 1 Ad. & Ell. 685.

The plaintiff accepted a bill for a third party, a lessee of the defendant; the latter, on the bankruptcy of his tenant, and with a view of obtaining possession of the premises, undertook to satisfy the balance due on the bill, and deliver it up to the plaintiff, or indemnify him against it; the defendant failed to do either, and became bankrupt; the breach of promise is not proveable either as a debt due at the time of the bankruptcy, or as a contingent debt, or by the plaintiff in the character of a surety, within 6 G. 4, c. 16, s. 56, and the certificate therefore is no discharge. The relation of a party to a bill as principal cannot be converted into that of a surety, by any subsequent agreement to which the payee is no party. *Yallop* v. *Ebers*,[4] 1 B. & Ad. 698; *Laxton* v. *Peat*, 2 Camp. 185, overruled. In an action in tort against a broker for a fraudulent sale of stock, it was held that the bankrupt's *certificate* of the defendant was *no bar* to the action. *Parker* v. *Crole*,[5] 5 Bing. 63; and 2 M. & P. 150. And see *Parker* v. *Norton*, 6 T. R. 695. A bankrupt may plead a certificate under a second commission, to an action for a debt proveable under that commission, although he has not paid 15*s.* in the pound under that commission. *Robertson* v. *Score*,[6] 3 B. & Ad. 338. Upon the question whether a debt is barred by the certificate, see further p. 176. Debts proveable under the commission, and debts discharged by the certificate, are convertible terms; and see *Goddard* v. *Vanderheyden*, 2 B. & P. 8, n. A debt is not discharged which accrued after the bankruptcy, but before the commission. *Ibid.*

(*c*) As in trespass on the case for seduction, judgment not being signed until after the bankruptcy, although the verdict was before it. *Buss* v. *Gilbert*, 2 M. & S. 70. *Ex parte Charles*, 14 East, 197; and see *Parker* v. *Crole*,[5] 5 Bing. 63; *Atwood* v. *Partridge*,[7] 4 Bing. 209.

(*d*) *Willet* v. *Pringle*, 2 N. R. 190. See also *Scott* v. *Ambrose*,[8] 3 M. & S. 326; 5 B. & A. 453. In *Jameson* v. *Campbell*,[9] 5 B. & A. 250, it was held, that although a right of action on a bill, and the costs of the action, were discharged by a commission and certificate, yet that the bond of the defendant to secure the payment of the damages and costs under the stat. 4 G. 3, c. 33, s. 1, given after the bankruptcy, but before the certificate, was not discharged.

Some demands, not proveable under the commission, are barred by the certificate, *e. g.* the costs of an action of contract, where there is no verdict before the bankruptcy, are not proveable under the commission, but are barred by the certificate. *Ex parte Poucher*, 1 G. & J. 386. *Ex parte Hill*, 11 Ves. 646. So where the party becomes bankrupt before costs taxed, on an award against him. *Haswell* v. *Thorogood*,[10] 7 B. & C. 705. Where interlocutory costs ordered to be paid by a bankrupt are taxed before the bankruptcy, the certificate is a discharge. *Jacobs* v. *Phillips*, 1 C. M. & R. 195; 4 Tyr. 652. See further *Parslow* v. *Dearlove*, 5 Esp. 78; 4 East, 438; 1 Camp. 428; 6 Esp. 98; 4 Taunt. 90; 2 M. & S. 551. For cases of mutual acceptances and exchanges of securities. *Rolfe* v. *Caslon*, 2 H. B. 570. *Sarratt* v. *Austin*, 4 Taunt. 200. *Buckler* v. *Buttivant*, 3 East, 172. *Houle* v. *Baxter*, 3 East, 177. *Forster* v. *Surtees*, 12 East, 605. *Cowley* v. *Dunlop*, 7 T. R. 565. Of sureties. *Martin* v. *Court*, 2 T. R. 640. *Brookes* v. *Lloyd*, 1 T. R. 17. *Toussaint* v. *Martinnant*, 2 T. R. 100. *Paul* v. *Jones*, 1 T. R. 599. *Hodgson* v. *Bell*, 7 T. R. 97. *Stedman* v. *Martinnant*, 13 East, 427. Unliquidated damages. *Hammond* v. *Toulmin*, 7 T. R. 612. *Overseers of St. Martin* v. *Warren*, 1 B. & A. 491; 3 Wils. 270; 6 East, 110. Covenant for rent. *Auriol* v. *Mills*, 1 H. B. 433; 4 T. R. 94. And see *Hornby* v. *Houlditch*, 1 T. R. 92, 93. Debt for rent. *Wadham* v. *Marlowe*, 1 H. B. 437; 1 T. R. 91. *Gill* v. *Scrivens*, 7 T. R. 27. In case of a *cognovit* given. *Wyborne* v. *Ross*, 2 Taunt. 68. In cases of tort. *Parker* v. *Norton*, 6 T. R. 695. Of verdicts obtained before the bankruptcy. *Buss* v. *Gilbert*, 2 M. & S. 70. Bills of exchange. *Howis* v. *Wiggins*, 4 T. R. 114. *Brooks* v. *Rogers*, 1 H. B. 640. *Joseph* v. *Orme*, 2 N. R. 180. *Starey* v. *Barnes*, 7 East, 435. *Pottek* v. *Brown*, 5 East, 124; stat. 7 G. 1, c. 31. Of a bond given after bankruptcy to secure a previous debt. *Birch* v. *Sharland*, 1 T. R. 715. See also *Ex parte Douthat*,[11] 4 B. & A. 671. *Macarty* v. *Barlow*, Str. 949. As to bonds, stat. 7 G. 1, c. 31. *Callowell* v. *Clutterbuck*, cited 2 Str. 867. *Ex parte Barber*, 9 Ves. jun. 110. *Cotterell* v. *Hooke*, Doug. 97. *Ex parte Granger*, 10 Ves. jun. 351. *Cockerill* v. *Owston*, 1 Burr. 436. *Boutflower* v. *Coats*, Cowp. 95. *Dimsdale* v. *Eames*,[12] 2 B. & B. 8.

[1]Eng. Com. Law Reps. xx. 433. [2]*Id.* xxii. 183. [3]*Id.* xxviii. 180. [4]*Id.* xx. 475. [5]*Id.* xv. 371. [6]*Id.* xxiii. 89. [7]*Id.* xiii. 403. [8]*Id.* vii. 157. [9]*Id.* vii. 87. [10]*Id.* xiv. 111. [11]*Id.* vi. 354. [12]*Id.* vi. 3.

Where a bankrupt acceptor pleaded his certificate, and it appeared that the commission was sued out after the day of the date of the bill, but before it became due, it was held to be incumbent on the plaintiff, an indorsee, to *show that an act of bankruptcy was committed before the *185
date of the bill (*e*). But that an antecedent act of bankruptcy might be proved by the proceedings under the commission, stating a previous act of bankruptcy (*f*).

If *B.* plead his bankruptcy and certificate, and prove a commission against *A.*, and a certificate under it, he may prove that he was formerly known by the name of *A.*, and that the commission was issued against him, although at the time of the trial he was known by the name of *B.* only (*g*).

If upon the trial it appear that the bankruptcy was subsequent to the commencement of the action, the plea will not be available (*h*).

If a surety for the bankrupt, at the time of the act of bankruptcy, was compelled to pay money as such surety, after the act of bankruptcy, by the stat. 49 G. 3, c. 121, "he was entitled to a dividend under the commission, unless he had notice, when he became surety, of the bankruptcy or insolvency of the trader, of which the issuing a commission, although afterwards superseded, was to be deemed notice."

The plaintiff accepted a bill for the accommodation of the defendant, who became bankrupt before the bill was due, and a commission of bankrupt was *issued, and afterwards superseded; the plaintiff afterwards *186
accepted another bill to take up the former dishonoured bill, and afterwards an effectual commission was sued out on the former act of bankruptcy, under which the bankrupt obtained his certificate, and the plaintiff afterwards paid the second bill; it was held, that the payment by the plaintiff was, in effect, a surety for the defendant upon the first bill, and therefore within the above statute; and that the case was not within the proviso as to notice, since the suretyship commenced before the issuing of the commission, which was afterwards superseded.(*i*).

By the late stat. s. 51, any person who shall have given credit to the bankrupt upon valuable consideration, for any money or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove, as if the same was payable presently, &c. deducting only thereout a rebate of interest.

By s. 52, sureties, and others, however liable for any debt of the bankrupt, at the issuing of the commission, having paid the whole or part in discharge of the whole debt, though after the commission issued, shall be entitled to stand in the place of the creditor, if he has proved or may prove the debt under the commission, provided he had no notice of any act of bankruptcy when he became liable. See tit. SURETY. One of three co-sureties for the payment of an annuity, who has paid money on account of the annuity, after the bankruptcy of another, may sue the latter for contribution, notwithstanding the certificate, for he could not prove the debt under the commission; but he cannot recover more than one-third. *Brown* v. *Lee*,[1] 6 B. & C. 689.

The 56th section enacts, that if a bankrupt shall, before the issuing the commission, have contracted any debt, payable on a contingency, &c., the person with whom the debt is contracted may apply to the commissioners to value the debt, and he may prove for the amount.

The 58th section enacts, that any person who shall have obtained a judgment, &c. for a debt, or demand, in respect of which he shall prove, may also prove for the costs, though they shall not have been taxed at the time of the bankruptcy. The costs of an action brought by the bankrupt are not a debt contracted within the former clause. *Birè* v. *Moreau*,[2] 4 Bing. 57; and see *Walker* v. *Barnes*, 2 Taunt. 778; *Scott* v. *Ambrose*, 3 M. & S. 326. So a covenant by the defendant for the due payment of a premium of insurance by another is not within that clause; the breach necessarily gives a claim for unliquidated damages. *Atwood* v. *Partridge*,[3] 4 Bing. 209. See *Ex parte Adney*, Cowp. 463.

(*e*) *Pearson* v. *Fletcher*, 5 Esp. C. 90. And see *Macartney* v. *Barrow*, where the court said they would not intend that the defendant was a bankrupt before the suing out of the commission, 7 East, 437, n.

(*f*) *Ibid.* (*g*) *Stevens* v. *Elisee*, 3 Camp. 256.

(*h*) *Tower* v. *Cameron*, 6 East, 413. For by the stat. 5 G. 2, c. 30, s. 7, the plea is given in case any bankrupt who has conformed to the law shall *afterwards* be arrested or impleaded for any debt due before such time as he became a bankrupt, and now see the stat. 6 G. 4, c. 16, s. 126, *supra*, 182.

(*i*) *Stedman* v. *Martinant*, 13 East, 427.

[1]Eng. Com. Law Reps. xiii. 294. [2]*Id.* xiii. 340. [3]*Id.* xiii. 403.

Under a joint commission.

A certificate under a joint commission will be evidence in bar of a separate debt (*k*), and *vice versâ*, a certificate under a separate commission in bar of a joint debt (*l*).

Unliquidated damages.

The certificate is no bar where the plaintiff's claim rests in unliquidated damages; as in an action of trespass or trover, although the conversion was before the bankruptcy (*m*).

In *assumpsit*, on a promise to pay a certain sum weekly for the support of an illegitimate child, which the plaintiff had by the defendant, upon plea of a certificate, it was held that the defendant was liable for the arrears which has accrued since the bankruptcy (*n*).

Foreign certificate.

The defendant in an action of *assumpsit* may prove that he obtained his certificate in the country where the debt was contracted, and that by the law of that country the debt was discharged (*o*). Where the defendant in America, gave to the plaintiff also residing there, a bill of exchange on England, which was dishonoured for non-acceptance, and the defendant afterwards, and whilst he resided abroad, became a bankrupt, and obtained his certificate, such certificate was held to be a bar to an action here on the bill; for the bill having been dishonoured here, the implied promise to pay it arose in America, by the law of which country the defendant had been discharged (*p*), such a certificate is no bar where the debt is contracted in this country (*q*).

Proof in answer.

In answer to evidence of a certificate, the plaintiff may show that it was obtained unfairly, and by fraud, and that it is void under the stat. 6 G. 4, c. 16, s. 130, which enacts, that no bankrupt shall be entitled to his certificate, and that any certificate, if obtained, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering (*r*) in one day twenty
*187 *pounds, or within one year next preceding his bankruptcy two hundred pounds; or if he shall, within one year next preceding his bankruptcy have lost two hundred pounds by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract, or shall after an act of bankruptcy committed, or in contemplation of bankruptcy, have destroyed, altered, mutilated or falsified, or caused to be destroyed, altered, mutilated, or falsified, any of his books, papers, writings or securities, or made, or been privy to the making of any false or fraudulent entries in any book of account or other document, with intent to defraud his creditors, or shall have concealed property to the value of ten pounds or upwards; or if any person having proved a false debt under the

(*k*) *Horsey's Case*, 3 P. Wms. 23; *Howard* v. *Poole*, Str. 995, 1157.

(*l*) *Ex parte Yale*, 3 P. Wms. 24, n. But such discharge is personal, and will not relieve the joint-debtor from his liability. See 10 Anne, c. 15, s. 3.

(*m*) *Parker* v. *Norton*, 6 T. R. 695.

(*n*) Per Lord Ellenborough, *Millen* v. *Whettenbury*, 1 Camp. C. 428.

(*o*) *Hunter* v. *Potts*, 4 T. R. 182. *Ballantine* v. *Golding*. Co. B. L. 499, 5th edit. A certificate in England bars creditor in Calcutta, although creditor had no notice. *Edwards* v. *Ronald*, Knapp's C. 259. *Secus*, where the remedy only is barred. *Williams* v. *Jones*, 11 East, 439.

(*p*) *Potter* v. *Brown*, 5 East, 124. It seems that a certificate under a bankruptcy in England is so far a judgment in respect of foreign states, that it may be pleaded in bar to the action of foreign creditors. *In re Odwin* v. *Forbes*, 1 Buck's B. C. 57; in the Cock-pit. And see *in re Stein & Co.* 1 Rose's B. C. 402.

(*q*) *Smith* v. *Buchanan*, 1 East, 6. *Shallcross* v. *Dysart*, 2 Gl. & J. 87. *Lewis* v. *Owen*,[1] 4 B. & A. 654.

(*r*) See the repealed provision, 5 G. 2, c. 30, s. 12, under which it was held that insuring in the lottery is not within that act (*Lewis* v. *Piercy*, 1 H. B. 29); nor the keeping a lottery-office. *Ex parte Richardson*, Co. B. L. 463, 5th edit. Sel. N. P. 238. It was also held that the plaintiff must elect whether he would give evidence of one loss to the amount of 5*l.*, or of several, to the amount of 100*l.* *Hughes* v. *Morley*,[2] Holt's C. 520. A loss by gaming defeats a certificate although the bankrupt on the same day wins more than he loses. *Ex parte Newman*, 3 Glynn. & J. 329.

[1]Eng. Com. Law Reps. vi. 555. [2]*Id.* iii. 173.

commission, such bankrupt being privy thereto (*s*), or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

So the plaintiff may show that it was obtained from one of the creditors under a promise from the bankrupt to pay him his whole debt (*t*). If the plaintiff adduce evidence to prove concealment to the value of 10*l*., the defendant may show that the concealment was not wilful (*u*). By the stat. 6 G. 4, c. 16, s. 127, by a certificate under a second commission the person only of the bankrupt is protected if his effects are not sufficient to make a dividend of 15*s*. in the pound. But this clause, when applicable, does not entitle a creditor to proceed against the bankrupt after a second certificate for a debt which he might have proved under the commission (*x*).

Proof to defeat the certificate.

Previous to that statute it was sufficient in order to defeat a defence by a certificate under a second commission, to produce the former commission, certified as of record, and the proceedings under it, to show that the bankrupt submitted to it without proving the steps of the former bankruptcy in detail (*y*): where there had been no notice to produce the certificate, proof of the affidavit of conformity was held to be insufficient (*a*); but after proof of such notice, it was held (before the late statute) to be sufficient to prove, by the solicitor under the commission, that he was employed by the defendant to obtain his certificate, and had no doubt, from the entries in his books, that it had been obtained (*b*).

The person who had the possession of the former commission and proceedings was served with a *subpœnâ duces tecum* to produce them (*c*). After such proof by the plaintiff, it lay on the defendant affirmatively to prove *that he has paid 15*s*. in the pound under the second commission (*d*); *188
proof that it would *probably* produce so much was insufficient (*e*).

Where the action was brought before a dividend had been made under the second commission, or the period had elapsed under the stat. 5 Geo. 2, c. 30, s. 37, it was held that the certificate would be no bar, if it were shown that it was not probable that the bankrupt would be able to pay 15*s*. in the pound.

Compounding with creditors, &c.

So the plaintiff, under the stat. 6 G. 4, c. 16, s. 127, may show that the defendant has compounded with his creditors (*f*), or delivered to them his estate and effects, and been released by them (*g*). Where the defendant had compounded with his creditors, but afterwards, and before he became bankrupt, paid them the whole of their debt, and did not pay 15*s*. in the

(*s*) In order to prove this, the person who proved the false debt may be called as a witness, or the fact may be proved by presumptive or collateral evidence. *Edmonstone* v. *Webb*, 3 Esp. C. 264.

(*t*) *Phillips* v. *Dicas*, 15 East, 248, under the stat. 5 G. 2, c. 30, s. 11, and now under the stat. 6 G. 4, c. 16, s. 132.

(*u*) *Cathcart* v. *Blackwood*, in Dom. Pro. 1765.

(*x*) *Robertson* v. *Score*,[1] 3 B. & Ad. 338. The stat. does not apply to a bankrupt who has obtained his certificate under a subsequent commission after the statute had passed. *Carew* v. *Edwards*,[2] 4 B. & Ad. 351.

(*y*) *Haviland* v. *Cooke*, 5 T. R. 665. 3 Esp. C. 195.

(*a*) *Graham* v. *Grill*, 4 Camp. 282. (*b*) *Henry* v. *Leigh*, 3 Camp. 499.

(*c*) It seems that the book at the Bankrupt office, in which entries are made of the allowance of certificates by the Chancellor, is not secondary evidence of the allowance of the certificate; for it is not seen or referred to by the Chancellor, and the entries are not made by any officer of the court appointed for that purpose. *Henry* v. *Leigh*, 3 Camp. 499. See the late statute.

(*d*) *Gregory* v. *Merton*, 3 Esp. C. 195.

(*e*) *Coverley* v. *Morley*, 16 East, 225; and *qu.* whether the actual payment of 15*s*. in the pound be not a condition precedent. See the judgment of Bayley, J.; and see *Jelfs* v. *Ballard*, 1 B. & P. 467.

(*f*) Such a clause, it has been held, under the stat. 5 G. 2, c. 30, s. 37, does not contemplate limited compositions with part of a trader's creditors, but general ones only, such as would admit all creditors, of whatsoever description. *Norton* v. *Shakespeare*, 15 East, 619. See *Slaughter* v. *Cheyne*, 1 M. & S. 182.

(*g*) *Jelfs* v. *Ballard*, 1 B. & P. 467.

[1]Eng. Com. Law Reps. xxiii. 89. [2]*Id.* xxiv. 71.

pound under a subsequent commission, his certificate under it was held to be a bar (*h*) to a subsequent action. Under the same section the plaintiff may also show that the bankrupt has been discharged under an act for the relief of insolvent debtors.

The certificate is void if any one of the creditors, although without the privity of the bankrupt, was induced by money to sign the certificate (*i*).

Subsequent promise.

The plaintiff may also reply to the certificate by evidence of an express promise by the bankrupt to pay the debt, and is not bound to declare especially on such subsequent promise (*k*). But it seems that if the promise be special to pay when he is able, the plaintiff should prove his ability at the time of the action brought (*l*); and the promise is not binding unless it be precise and positive (*m*), and in writing (*n*).

A promise made by a bankrupt before he has obtained his certificate will revive the debt, although the certificate be obtained afterwards (*o*). A mere admission of the debt is insufficient (*p*), though accompanied by an unaccepted offer to pay the debt by instalments (*q*).

*189 *A bankrupt sued by his surety, who paid the debt subsequently to the bankruptcy, cannot avail himself of his certificate without having specially pleaded it (*r*).

By the stat. 6 Geo. 4, c. 16, s. 59, the proving by a creditor under the commission is an election by him not to sue at law; but it seems that such an election cannot either be pleaded or given in evidence in bar of the action (*s*).

(*h*) *Read* v. *Sowerby*, 3 M. & S. 78.

(*i*) *Holland* v. *Palmer*, 1 B. & P. 95.

(*k*) *Williams* v. *Dyde*, Peake's C. 68. *Trueman* v. *Fenton*, Cowp. 548; but see *Penn* v. *Bennett*, 4 Camp. 206. *Leaper* v. *Tatton*, 16 East, 420.

(*l*) *Besford* v. *Saunders*, 2 H. B. 116. [2 Serg. & R. 208, *Kingston* v. *Wharton*.] *Qu.* whether payment of interest after bankruptcy, on a bond for the payment of money forfeited before bankruptcy, will render the bankrupt liable on the bond. *Alsop* v. *Brown*, Doug. 191. *Semble*, not.

(*m*) *Lynbury* v. *Weightman*, 5 Esp. C. 198, where the bankrupt said that his effects would pay 20*s.* in the pound, and that he would pay every body, it was held that he was not bound.

(*n*) By the stat. 6 G. 4, c. 16, s. 131, no bankrupt after being discharged by a certificate shall be liable to pay any debt, &c., discharged by such certificate upon any promise made after the suing out of the commission, unless it be in writing, signed by the bankrupt, or by some person authorized by him.—But the plaintiff in such case need not declare specially. *Williams* v. *Dyde*, Peake's C. 68. *Russell* v. *Hardman*, Ibid. The initial of the defendant's surname is not a signature within the statute. *Hubert* v. *Moreau*,[1] 2 C. & P. 528.

(*o*) *Roberts* v. *Morgan*, 2 Esp. C. 736. And see *Ernst* v. *Sciaccaluga*, Cowp. 527.

(*p*) *Fleming* v. *Hayne*,[2] 1 Starkie's C. 370. *Bailey* v. *Dillon*, 2 Burr. 736. *Besford* v. *Saunders*, 2 H. B. 116. *Alsop* v. *Brown*, Doug. 182.

(*q*) *Ibid.*

(*r*) Under the stat. 49 Geo. 3, c. 121, s. 8; for that statute discharged the bankrupt, having his certificate, of all such demands, at the suit of every such person, in *like manner* to all intents and purposes as if such person had been a creditor before the bankruptcy. *Stedman* v. *Martinnant*, 12 East, 664. The stat. 6 Geo. 4, c. 16, s. 121, discharges a certificated bankrupt from all claims proveable under the commission.

(*s*) The proving a debt under the commission is no defence to an action at law for the same debt; and the election of the creditor under the stat. 49 Geo. 3, c. 121, s. 14, is confined to the debt actually proved, and does not extend to distinct debts, though *ejusdem generis*, and due at the same time. *Harley* v. *Greenwood*,[3] 5 B. & A. 95. *Watson* v. *Medex*, 1 B. & A. 121; and see *Bridget* v. *Mills*,[4] 4 Bing. 19. But see *Reed* v. *Sowerby*, 3 M. & S. 78. So it was held that the statute did not exclude a creditor who had proved a joint debt under a commission against one from suing the rest. *Heath* v. *Hall*, 4 Taunt. 326. See also *Young* v. *Glass*, 16 East, 252. So it was held that the drawer of a bill of exchange, who had paid the amount to the holder, after a commission of bankruptcy against the acceptor, might sue the acceptor before he had obtained his certificate, and arrest him on the bill, although the holder had proved the bill under the commission. *Mead* v. *Braham*, 3 M. & S. 91. A bankrupt lessee is discharged by the statute, not only from the lease, but from all covenants to be performed as lessee. *Kearsey* v. *Carstairs*,[5] 2 B. & Ad. 716. But the statute does not put an end to the lease, but merely discharges the bankrupt from payment of rent or observance of the covenants. *Manning* v. *Flight*,[6] 3 B. & Ad. 211. The bankruptcy of the lessee does not discharge a surety on a bond for the performance of covenants in a lease. *Inglis* v. *M'Dougall*,[7] 1 Moore, 196. Lease of a mill, with covenants that on the determination of the lease, the machinery should be again

[1] Eng. Com. Law Reps. xii. 248. [2] *Id.* ii. 430. [3] *Id.* xii. 38. [4] *Id.* xiii. 327. [5] *Id.* xxii. 175. [6] *Id.* xxiii. 58. [7] *Id.* iv. 396.

The stat. 6 Geo. 4, c. 16, s. 75, enacts, that where any bankrupt is entitled to any lease or agreement for a lease, if the assignees accept the same, he shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance of the conditions, covenants, and agreements therein contained; and if the assignees decline the same, shall not be liable in case he deliver up such lease or agreement to the lessor or person agreeing to grant such lease, within fourteen days after notice that the assignees have declined (*t*). Discharge from lease accepted by assignees.

*IV. Upon an indictment against a bankrupt for a felonious embezzlement of his effects, &c., the steps of his bankruptcy must be strictly proved (*u*). *190 Indictment against a bankrupt.

Where the petitioning creditor's debt was alleged to be due to *A. B.* and *C.*, surviving executors of the last will and testament of *D.*, after proof that *A. B.* and *C.* were the executors, and were directed by the will to carry on the business, it was held to be necessary to prove that they all acted in discharge of the trust (*x*).

An allegation, that the commission issued under the great seal of Great Britain, is proved by evidence of an instrument issued under the great seal of the United Kingdom of Great Britain and Ireland (*y*).

Upon an indictment against a bankrupt for perjury, alleged to have been committed in his examination before the commissioners, it was held to be necessary to prove the bankruptcy in strict detail, and that the declaration of his bankruptcy by the commissioners was not sufficient (*z*); for if he was not a bankrupt at the time, the commissioners had no jurisdiction to administer an oath and examine him. The case of a person who makes a deposition, on which the judgment of the commissioners is to be founded, as to the bankruptcy itself, falls under a different consideration; the perjury may consist in the falsely swearing that the party was a bankrupt, so that if it were necessary to prove the bankruptcy, the perjured party could not be punished at all. In such a case the offence of perjury seems to be complete, independently of the question of bankruptcy, for a false oath is taken before commissioners duly authorized to administer the oath (*a*).

valued, and the difference between that and the former valuation paid by the lessor or lessee, as it was greater or less than the former, the lessee becoming bankrupt, his assignees repudiate the lease, and the lessor declines to pay the difference, the assignees may (after demand and refusal), recover the value in trover. *Fairburn* v. *Eastwood*, 6 M. & W. 679; and see *Kearsey* v. *Carstairs*,[1] 2 B. & Ad. 716.

(*t*) The statute does not apply to a lessee and his *assignees* of a lease. *Taylor* v. *Young*,[2] 3 B. & A. 521, under the statute 49 G. 3, c. 121. By the clause 6 G. 4, c. 16, s. 75, assignees may be compelled to elect and deliver up the lease if they decline to accept it. Where the lessee covenanted not to assign, became bankrupt, and after acceptance of the lease he came in again as assignee, it was held that he was discharged. See *Doe* v. *Smith*,[3] 5 Taunt, 795, as to proof of acceptance, vide *supra*, 131. The chancellor has no authority to decide whether the assignees *have elected* or not; it is a question of fact for a jury. *Ex parte Quantock*, Buck. 189. It has been held, that the mere advertising a lease for sale, without taking possession, and without stating themselves to be the owners or possessors, did not amount to an assent. *Turner* v. *Richardson*, 7 East, 335. But if a bidder had been accepted, and a deposit received, it would have been evidence of an acceptance. *Hastings* v. *Wilson*,[4] 1 Holt's C. 290. Where they allowed the bankrupt's goods to remain on the premises nearly a twelvemonth, and then to avoid a distress paid the rent, but informed the landlord that they did not mean to take the lease unless it could be advantageously disposed of, and afterwards put it up to sale, when there was no bidder, and omitted to return the key for near four months afterwards, but never took possession, Lord Ellenborough held that they were not liable. *Wheeler* v. *Bramah*, 3 Camp. 340. So though they have released an under-tenant of the lessees. *Hill* v. *Dobie*,[5] 8 Taunt. 325.

(*u*) See the form of the indictment, and the necessary allegations, Criminal Pleadings; and see the stat. 6 Geo. 4, c. 16, s. 112.

(*x*) *R.* v. *Barnes*,[6] 1 Starkie's C. 243. (*y*) *R.* v. *Bullock*, 1 Taunt. 71.

(*z*) *R.* v. *Punshon*, 3 Camp. 96, *cor.* Ellenborough, C. J.

(*a*) See *R.* v *Raphael*, *cor.* Abbott, J. Devon Spring Assize. 1818, Manning's Index, 2d edit. 232; where it is stated to have been ruled, that on an indictment against a third person examined before the commissioners, their declaration that the party is a bankrupt is sufficient. It is not stated whether the examination in this case was preparatory or subsequent to the adjudication.

[1]Eng. Com. Law Reps. xxii. 175. [2]*Id.* v. 364. [3]*Id.* i. 270. [4]*Id.* iii. 107. [5]*Id.* iv. 116. [6]*Id.* ii. 374.

The indictment against a bankrupt, on 5 Geo. 2, c. 30, for not making a full and true disclosure, &c., stated a notice requiring him *personally to appear*, &c., according to the several statutes then in force concerning bankrupts, and particularly the statute passed in the 5th Geo. 2, stating its title, but upon the notice being produced it set forth the title of the 49th Geo. 3; held that the variance was fatal. It seems also, that the averment *of personal service of the notice should state* whether the party was at large or in prison, the statute pointing out modes of service in each case (*b*).

Competency of witnesses.

V. It is an inveterate and universal rule, that the bankrupt himself (*c*) is not a competent witness to prove any fact to support or impeach the commission, either on an issue to try the bankruptcy, or in an action by the assignees to recover a debt due to the estate, even though he shall have obtained his certificate, and have released the assignees, for he is interested

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*in the certificate which is founded upon the bankruptcy (*d*). And it

Competency of bankrupt.

makes no difference whether the question be asked upon an examination in chief, or upon his cross examination (*e*); neither can he be asked questions with a view to establish an antecedent act of bankruptcy (*f*), or to explain an act relied on by the adversary as an act of bankruptcy (*g*). Accordingly, upon the trial of issues out of Chancery, to try whether *Herbert* and *Ryton* were bankrupts, and whether they owed the petitioning creditor 100*l.*, *Ryton*, who had obtained his certificate, was produced to prove the debt; but Ryder, C. J. was of opinion that he was not competent to prove that he and *Herbert* were jointly indebted to the petitioning creditor, or that they were partners, or that *Herbert* was a bankrupt, since each of those facts *tended* to support the commission; and if that were not good the certificate would become bad (*h*). Neither can he be examined to explain an equivocal act of bankruptcy (*i*). But the rule is restricted to evidence affirming or disaffirming the bankruptcy. He is competent, in an action by the assignees against a creditor who has levied under an execution, to prove the defendant's knowledge of his insolvency (*j*).

An *uncertificated bankrupt* is not a competent witness in actions by the assignees, for he is interested in procuring funds (*k*) for the discharge of his

(*b*) *R.* v. *Barraston*, 1 Gow. C. 210. Where the bankrupt did not surrender, being detained in prison, it was held, that he was not bound to apply to the commissioners to be brought up to surrender, nor to the chancellor to enlarge the time, although he was privileged so to do, and the omitting to take those steps could not make him guilty of felony, under the 6 G. 4, c. 16, ss. 113, 119. *R.* v. *Mitchell*,[1] 4 C. & P. 251.

(*c*) Neither can his wife be examined for that purpose. *Ex parte James*, 1 P. Wms. 611; 12 Vin. Ab. 11, pl. 28.

(*d*) *Field* v. *Curtis*, 2 Str. 829. *Flower* v. *Herbert*, 2 H. & B. 279. *Chapman* v. *Gardiner*, 2 H. B. 279, n. *Ewens* v. *Gold*, B. N. P. 41. In *Oxlade* v. *Perchard*, 1 Esp. C. 287, it was held that the bankrupt was competent to explain a doubtful act of bankruptcy. But this was overruled in *Rabbett* v. *Gurney*, 1 Montague, 489, and is contrary to *Chapman* v. *Gardiner*, 2 H. B. 279. *Qu.* whether this rule is not to be regarded, in some, instances at least, as a rule of policy rather than as a rule founded on the ordinary principle of exclusion on the score of interest; where, for instance, the bankrupt has obtained his certificate, and released his assignees, he has no immediate interest in the event of an action brought by the assignees, for the result would not affect his certificate. See Christian's B. L. 444, 2 edit. *Binns* v. *Tetley*, 1 M'Clell. & Y. 397. Raymond, C. J. admitted a bankrupt to give evidence as to the *time* of an act of bankruptcy, although he refused him as a witness to prove the act, 12 Vin. Ab. 11, pl. 28.

(*e*) *Elsom* v. *Bailey*, Sitt. after Mich. T. 50 Geo. 3, *cor.* Lawrence, J. 1 Sel. N. P. 271. *Binns* v. *Tetley*, 1 M'Clell. & Y. 397.

(*f*) *Wyatt* v. *Wilkinson*, 5 Esp. C. 187.

(*g*) *Sayer* v. *Garnett*,[2] 7 Bing. 103.

(*h*) *Flower* v. *Herbert*, cited 2 H. B. 276; and see *Cross* v. *Fox*, Ibid.

(*i*) *Hoffman* v. *Pitt*, 5 Esp. C. 22. *Sayer* v. *Garnett*, 7 Bing. 103.

(*j*) *Reed* v. *James*,[3] 1 Starkie's C. 134. It is necessary, however, that he should have obtained his certificate, and released his assignees.

(*k*) *Kennet* v. *Greenwollers*, Peake's C. 3. *Evans* v. *Gold*, B. N. P. 41. *Langden* v. *Walker*, Cowp. 70. *Butler* v. *Cooke*, Ibid. In an action to recover money paid to a creditor out of voluntary preference, it was held that the wife of the bankrupt was a competent witness for the assignees, on the ground of indifference, since, if the assignees recovered, the defendants would recover to the same amount under the commission.

[1] Eng. Com. Law Reps. xix. 370. [2] *Id.* xx. 63. [3] *Id.* ii. 327.

debts; but he is a competent witness against the assignees to diminish the *fund (*l*). Neither would he be a competent witness for his surety in a joint bond to prove payment, whether the obligees had made their election to prove under the commission (*m*), for the plaintiffs, if defeated, could no longer sue him; but if they succeeded, he would be liable to his surety. *192

But he is a competent witness for a defendant, his surety (the acceptor of an accommodation bill), who has released him in the usual form, for the defendant cannot prove against his estate (*n*).

Upon an action against the assignee of a bankrupt to recover the penalty upon an usurious loan of money to the bankrupt, it was held that the latter, who had not obtained his certificate, or repaid the money, was not a competent witness to prove the offence, although he was ready to release to the assignee all benefit which might arise from the discharge of that debt in particular, and also all claim to surplus and allowance (*o*) (1), and although the defendant had proved under the commission; because (as it was said) the creditor might still bring an action at law, and arrest the bankrupt for the whole of the debt. But now, by the stat. 6 G. 4, c. 16, s. 59, the creditor after proving the debt could not afterwards in such a case sue the bankrupt; and even if he could, yet, as the verdict would not be evidence for the bankrupt in an action afterwards brought by the assignee, it seems that he would not be an incompetent witness on that ground (*p*).

A *certificated bankrupt* having *released* his surplus and allowance to the assignees, or executed a general release to them, is a competent witness in actions by the assignees to increase the divisible fund, for he is no longer interested in the amount (*q*). In such case he is competent to identify the proceedings under the commission, to establish them in evidence for the

Certificated bankrupt.

Jourdaine v. *Lefevre*, 1 Esp. C. 66, *cor.* Ld. Kenyon. But see *infra*, 134 (*p*). In an action by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt is not competent to prove the payment of a sum of money to the defendant by the bankrupt, after the bankruptcy, for malt supplied before the bankruptcy, although the bankrupt has released his assignees, he not having obtained his certificate. The objection, however, is not that if the plaintiff failed the costs of the suit would be paid out of the estate, and so diminish the general fund; because that is not a *certain necessary* legal consequence, but is to depend on the judgment of the commissioners; the main ground of objection is, that the bankrupt has an interest in the assignees recovering the amount claimed, and that there not being yet a definite surplus, it is not a releasable interest. And although it was suggested, that if the assignees recovered the amount claimed, the creditor would recover for his demand against the uncertificated bankrupt, yet this is not a countervailing interest; for the liability of the bankrupt is not the result of the present action; a verdict for the plaintiff would not create or forward his liability to the creditor, nor would the verdict be evidence of it. Neither, as it seems, would a verdict against the assignees relieve him from liability to the creditor; it would be no answer to say, that he had been already paid; the answer would be, that it was the money of the assignees. *Williams* v. *Williams*, 6 M. & W. 170.

(*l*) *Langden* v. *Walker*, cited Cowp. 70. *Butler* v. *Cooke*, Ibid.

(*m*) *Townsend* v. *Downing*, 14 East, 565.

(*n*) *Cartwright* v. *Williams*,[1] 2 Starkie's C. 340. See Vol. I. tit. Interest, and below, tit. Bill of Exchange. The drawer and acceptor of a bill having had mutual dealings, were in ignorance of the state of the account, which was in fact in favour of the acceptor (the defendant); and before the bill became due, the drawer had become insolvent, and whilst avoiding other creditors, upon being pressed by the plaintiff, a creditor, indorsed the bill to him after an act of bankruptcy, upon which a commission was afterwards sued out; the bankrupt having been called, and the judge having directed the jury to say whether, under the circumstance, the transfer was a *bona fide* transfer, they found for the defendant; it was held, that such a bill could not be considered an accommodation bill, and therefore there was no implied undertaking to indemnify the acceptor, and the bankrupt, therefore, was a competent witness for him. *Bagnall* v. *Andrews*,[2] 7 Bing. 217.

(*o*) *Masters* v. *Drayton*, 2 T. R. 497.

(*p*) See tit. Interest.

(*q*) *Nares* v. *Saxby*, cited 2 T. R. 497. See *Carlisle* v. *Eady*,[3] 1 C. & P. 234. He may, it seems, show his certificate, and release by oral evidence on the *voir dire*. *Carlisle* v. *Eady*, 1 C. & P. 284. *Wandless* v. *Cawthorne*,[4] M. & M. 321. But see *Goodhay* v. *Henry*,[5] M. & M. 319; ib. 121.

(1) [*Sed vide Smith* v. *Prager*, 7 T. R. 60.]

[1] Eng. Com. Law Reps. iii. 374. [2] *Id.* xx. 107. [3] *Id.* xi. 378. [4] *Id.* xxii. 322. [5] *Id.* xxii. 321.

assignees (*r*); yet it has been held that he is not in such case a competent witness for his assignees against the Crown (*s*). But a certificated bankrupt under a second commission is not competent for the assignees, unless he has paid 15*s.* in the pound under that commission (*t*).

A certificated bankrupt who has released his assignees is still incompetent to be a witness for the assignees, if it appear that he has done any
*193 *act which avoids the certificate, for then his future effects remain liable. And therefore, in an action by an assignee to recover money lost by the
Competency. bankrupt at play, he is not a competent witness for the plaintiff (*u*). But even in such a case he may be rendered competent by releases from all his creditors and his assignees (*x*). And where such a release was executed a year after the issuing the commission, by all the creditors who had proved under the commission, it was held that the release was sufficient.

Though he has pleaded his certificate he is not, it is said, a competent witness for a co-defendant (*y*). Otherwise if as to him a *nolle prosequi* has been entered (*z*).

It has been said, that if in an action by assignees the defendant calls the bankrupt as a witness, he waives all objections to his competency, and he may then be cross-examined as to the requisites of bankruptcy (*a*).

Where the assignees sought to recover money paid to a creditor by way of voluntary preference, it was held that the wife of the bankrupt was a competent witness for the plaintiffs, on the ground that she stood indifferent in point of interest (*b*); since, if the assignees recovered the amount, it would be proved under the commission by the creditor. This decision, however, seems to be questionable, since it is obvious that unless the estate be sufficient to pay 20*s.* in the pound, the dividend to the rest would be diminished by allowing any one creditor his whole debt; and so would the allowance to the bankrupt.

Creditors. A petitioning creditor is in general incompetent to support the commission (*c*), since he enters into a bond to the Chancellor, conditioned to establish the facts on which the commission depends, and to cause it to be effectually executed; but he is competent to cut it down (*d*).

A creditor is in general an incompetent witness to increase the estate (*e*). It has been doubted whether he is not competent where he has not proved his debt under the commission (*f*). But it seems to be now held that he

(*r*) *Morgan* v. *Pryor*,[1] 2 B. & C. 14. (*s*) *Craufurd* v. *The Attorney-General*, Price, 5.

(*t*) *Kennet* v. *Greenwollers*, Peake's C. 3. A bankrupt who, having obtained his certificate, takes the benefit of an Insolvent Act, and then releases his assignees under the commission, is not a competent witness for those assignees, for he could not bind the assignees of his estate under the Insolvent Act. Per Bayley, J., York Lent Ass. 1826.

(*u*) *Carter* v. *Abbott*,[2] 1 B. & C. 444. (*x*) *Ibid.*

(*y*) *Raven* v. *Dunning*, 3 Esp. C. 25. *Emmett* v. *Bradley*,[3] 1 Moore, 332; Peake's L. E. Append. 87. *Currie* v. *Child*, 3 Camp. 283.

(*z*) *M'Iver* v. *Humble*, 16 East, 171. (*a*) *Fletcher and another* v. *Woodmass*, Sel. N. P. 253.

(*b*) *Jourdaine* v. *Lefevre*, 1 Esp. C. 66.

(*c*) *Green* v. *Jones*, 2 Camp. 411. *Reed* v. *James*,[4] 1 Starkie's C. 136.

(*d*) Per Lord Ellenborough, 2 Camp. R. 411. *Lloyd* v. *Stretton*,[5] 1 Starkie's C. 40. In an action against a sheriff, for a false return to a *fi. fa.*, the defence being the bankruptcy of the debtor, the petitioning creditor is, it seems, a competent witness. *Wright* v. *Lainson*, 2 M. & W. 739.

(*e*) *Egglesham* v. *Haines*, 12 Vin. 11. *Ambrose* v. *Clendon*, C. T. Hardw. 267. *Koopes* v. *Chapman*, Peake's C. 19. *Adams* v. *Malkin*, 3 Camp. 534. *Crooke* v. *Edwards*,[6] 2 Starkie's C. 302. *Ex parte Osborn*, 1 Rose, 287. 392. So if being a creditor under a first commission, the bankrupt, before his certificate, promises full payment, he is not competent to support a second commission. *Roberts* v. *Morgan*, 2 Esp. C. 736. But now see the stat. 6 G. 4, c. 165, as to promises made by the bankrupt. Where parties claiming debts were summoned to attend for examination before commissioners, held that they were not to be deemed "witnesses" within the 6 G. 4, c. 16, s. 20, to entitle them to an auxiliary commission for their examination. *Ex parte Kirby*, 1 Mont. & M. 440.

(*f*) *Williams* v. *Stevens*, 2 Camp. 300.

[1] Eng. Com. Law Reps. ix. 8. [2] *Id.* xiii. 124. [3] *Id.* iv. 397. [4] *Id.* ii. 327. [5] *Id.* ii. 286. [6] *Id.* iii. 355.

is incompetent in all cases, so long as he remains a creditor, whether he has or has not proved his debt, and whether an action be brought by the assignees to recover a debt, or the question be tried on an issue, for a creditor has an interest in the preferable remedy for recovering his debt under the commission (*g*). But he is a competent witness for the assignees after *he has assigned his debt (*h*). He is not a competent witness upon an *194
issue to try whether the bankrupt has lost more than 5*l.* at one sitting by gaming (*i*); he would be entitled to a share of the bankrupt's allowance forfeited by the gaming. A creditor who has assigned his debt, although by parol only, is competent (*k*). It was held that he was *ex necessitate* competent to prove an act of bankruptcy under the stat. 4 Geo. 3, c. 33 (*l*).

In an action by a creditor against the defendant for inducing him by misrepresentations to trust a bankrupt, another creditor of the bankrupt is a competent witness for the plaintiff, for a recovery by the plaintiff would not discharge his claim on the bankrupt's estate (*m*). A release by a creditor to the assignees is sufficient, without a release to the bankrupt (*n*).

A creditor is competent to negative the petitioning creditor's debt (*o*).

Assignee. An assignee is a competent witness in actions relating to the bankrupt's estate, where he is not a party, for as assignee he is a mere trustee (*p*).

A commissioner called to support the commission under which he had acted was allowed to be examined (*q*).

Production of documents. Where the act of bankruptcy consists in the execution of a deed by the bankrupt, the Chancellor will order the person who has the possession of it to attend before the commissioners (*r*). If the petitioning creditor be called by the assignees, merely for the purpose of producing a promissory note on which the debt is founded, he is not liable to be cross-examined by the defendant (*s*). After the death of a witness his examination entered of record is evidence under the stat. 5 Geo. 2, c. 30, s. 41 (*t*). A deposition

(*g*) *Ex parte Malkin, in re Adams, cor.* Gibbs, C. J. Sitt. after Hil. Term, 1814, 2 Christian's B. L. 453. 3 Camp. 515. See *Ex parte Osborn*, 2 Ves. Beames, 177; 1 Rose, 377. 392; *Crooke* v. *Edwards*,[1] 2 Starkie's C. 302; *In re Gould*, 2 Schoales & Lefroy, 116, per Lord Redesdale; *contra*, *Williams* v. *Stevens*, 2 Camp. 301. Where the adjudication was founded upon the examination of a party, a creditor, who at the time stated he did not consider himself a creditor, and should make no claim, the court refused to supersede the commission. *Ex parte Hills*, 1 Mont. & M. 272. And see *King* v. *Hullock*, 1 Taunt. 78.

(*h*) *Granger* v. *Tudor*, Bl. 1272. Where a creditor had sold his debt, held that he was a competent witness to support the *fiat*. *Pulling* v. *Meredith*,[2] 8 C. & P. 763.

(*i*) *Shuttleworth* v. *Bravo*, Str. 507.

(*k*) *Heath* v. *Hall*, 4 Taunt. 326. *Granger* v. *Furlong*, 2 Bl. R. 1273.

(*l*) Which adjudges a member of parliament to be a bankrupt who does not pay or secure the debt, as prescribed by the statute, within two months after personal service of summons. Per Ld. Eldon, C. *Ex parte Harcourt*, 1 Rose's B. C. 203, and now see the stat. 6 G. 4, c. 14, s. 10.

(*m*) *Burton* v. *Lloyd*, 3 Esp. C. 207.

(*n*) *Ambrose* v. *Clendon*, C. T. H. 267. *Koopes* v. *Chapman*, per Ld. Kenyon, Peake's C. 19; and he is competent to prove the act of bankruptcy, although the bankrupt be plaintiff in the action. Ibid. And see *Sinclair* v. *Stevenson*,[3] 1 C. & P. 582.

(*o*) *In re Cadd*, 2 Sch. & Lef. 116.

(*p*) In an action by an execution creditor of the bankrupt against a sheriff for a false return to a writ of *fieri facias*, it was held, that an assignee who had released his claims on the bankrupt's estate, was a competent witness to establish an antecedent bankruptcy. *Tomlison* v. *Wilkes*,[4] 2 B. & B. 397.

(*q*) *Crooke* v. *Edwards*, 2 Starkie's C. 302, the objections were that he had received fees and would be liable to an action of trespass in case the commissioners were to be questioned. Ld. Ellenborough observed, that he would not be called on to return the fees, but said that he would not then pronounce upon the question. It has been observed on this case, that the interest of the witness in future fees was not noticed.

(*r*) *Ex parte Treacher*, 1 Buck's B. C. 17; and now see the stat. 6 G. 4, c. 16, s. 24.

(*s*) *Reed* v. *James*,[5] 1 Starkie's C. 136. *Qu.* whether he is compellable by a court of law to produce the document. Ib.

(*t*) See *Jansen* v. *Wilson*, Dougl. 257. The statute directs that the Chancellor shall appoint a proper person to enter the proceedings of record. An examined copy of a record so made would therefore be evidence. The provisions of this statute, as to recording proceedings, are confirmed by the stat. 6 G. 4, c. 16, s. 95. See further as to Enrolment, *Ex parte Robson*, Ambler, 180. The commissioners have no estate given them

[1] Eng. Com. Law Reps. iii. 355. [2] *Id.* xxxiv. 625. [3] *Id.* xi. 480. [4] *Id.* vi. 168. [5] *Id.* ii. 327.

*formerly made by a very old witness may be read to him in order to refresh his memory (*u*.)

Declarations.

A declaration by a petitioning creditor since deceased, made after the commission, is not evidence against the assignees upon an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney (*x*).

In an action on a promissory note against three partners, one of whom pleaded his bankruptcy, and proved it on the trial, the court would not allow a verdict to be taken for him pending the trial, to enable him to prove an alteration in the note to defeat the action (*y*).

The examination of a party before the commissioners is evidence against him, although the whole of it was not taken down, having been signed by him after it had been read over to him (*z*).

A declaration by a bankrupt before his bankruptcy as to his acts or property is evidence against his assignees (*a*), and such evidence is adducible although the bankrupt himself has been called and examined (*b*).

Where the defence was that goods had been delivered in payment of an antecedent debt, and that the payment was protected by the 82d clause in the Bankrupt Act, and it was contended by the plaintiffs that such delivery was by way of fraudulent preference, and was not a *bonâ fide* payment under that clause, Lord Denman admitted evidence of declarations by the trader on his arrest at the suit of the defendants after the delivery of the goods, and after *primâ facie* evidence of an act of bankruptcy committed previous to the delivery, in order to show that the delivery was under pressure. The plaintiff had a verdict (*c*).

For the evidence in an action of covenant by or against the assignee of a bankrupt, see tit. COVENANT.

BARGAIN AND SALE. *Vide* INDEX, VOL. I.

BARON AND FEME. *See* HUSBAND AND WIFE.

BARRATRY. *See* POLICY OF INSURANCE.

BARRATRY.

UPON an indictment for this offence, the prosecutor must give the defendant notice before the trial of the particular instances of barratry intended to be proved (*d*).

BARRISTER. *See* CONFIDENTIAL COMMUNICATION.

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*BASTARDY (*e*).

THE law, in its anxiety to protect the rights of children born of women

in the bankrupt's real property, but only a *power* to be executed by deed indented and enrolled. *Perry* v. *Bowers*, T. Jones, 196. The enrolment has no relation to the date of the deed. *Elliott* v. *Danby*, 12 Mad. 3. *Bennett* v. *Gaudy*, Carth. 178; 1 Vent. 360. A writ of *supersedeas* is evidence that a commission issued on the day mentioned in the writ. *Gervis* v. *Grand Western Canal Company*, 5 M. & S. 76.

(*u*) *Vaughan* v. *Martin*, 1 Esp. C. 440.

(*x*) *Harwood* v. *Keys*, 1 R. & M. 204. In answer to the cases of *Dowden* v. *Fowle*, 4 Camp. 38, *Young* v. *Smith*, 6 Esp. C. 121, Patteson, J. observed, that the latter were loosely stated, and that the declarations must have been made before the commission, and that the former was probably decided by Mr. J. Dampier on the principle of the petitioning creditor's having indemnified the sheriff.

(*y*) *Currie* v. *Child*, 3 Camp. 283. (*z*) *Milward* v. *Forbes*, 4 Esp. C. 172.

(*a*) *Supra*, II. 26, 104.

(*b*) —— v. *Shackles*, *cor.* Parke, B. York Spring Assizes, 1835, where in an action by the assignees to recover deeds, the property of the bankrupt before his bankruptcy, which were alleged to have been deposited by way of lien, a declaration by the bankrupt before his bankruptcy was admitted, although the bankrupt had been called by the plaintiffs.

(*c*) *Dixon* v. *Sanderson*, York Spring Assizes, 1836. (*d*) 5 Mod. 18; 1 T. R. 754.

(*e*) Where the issue is upon the general bastardy of a party to an action, whether real or personal, depending on the validity of the marriage of the parents, the trial is by the certificate of the ordinary (2 Roll. 584, l. 35, 586, l. 7, 20, 3 Leo. 11). And as the certificate is peremptory, provided judgment be afterwards given,

in a state of wedlock, presumes their legitimacy, unless the contrary be satisfactorily established by those who deny it. It has indeed, in some instances, been held that the presumption of legitimacy from non-access could not be overcome by any proof less than that of the absence of the husband *beyond seas* previous to and during the whole time of gestation (*f*) (1). But it seems to be now settled, that if such non-access be proved as plainly shows that the husband could not in the course of nature have been the father of the child, the proof will suffice to bastardize the child (*g*) (B); as, where it is proved that the husband had no access for more than two years previous to the birth of the child, until about a fortnight previous to the birth (*h*).

Evidence to prove bastardy. Of a child born in wedlock.

or the party alleging bastardy be nonsuited, proclamations are to be made in the court and in Chancery, in order that all persons may have notice to attend the bishop (9 Hen. 6, 11). But where bastardy is alleged on special grounds not involving the marriage (2 Roll. 586, 3 Leo. 11), or where general bastardy is not directly in issue (Ibid.) as in an action for calling the plaintiff a bastard, where the defendant justifies (2 Rol. 586. Hob. 179), or where the party alleged to be a bastard is a stranger, is dead, or is an infant, or if the issue arise on a plea in abatement, the issue is to be tried by the country; and the reason of this is, that the certificate of the ordinary would be peremptory, and in such instances the party or his representatives ought not to be concluded. See 2 Com. 584. Com. Dig. tit. BASTARD, [D.] 2. For decisions depending on the effect of a foreign marriage, see tit. HEIR.—MARRIAGE.—PEDIGREE.

An unborn illegitimate may take by particular description before its birth. *Dawson* v. *Dawson*, 6 Mad. 292.

The testator being at the date of the will married, and having no legitimate children, after providing for his wife, and devising certain premises to *A. L.* for life, gave certain lands, upon trust for the children which he might have by *A. L.*, and living at his decease or born within six months after; upon the death of his wife he duly republished his will, and upon clear proof of his having acknowledged and treated the children of *A. L.* as his own, and that they had acquired the character of reputed children, held that they took an estate under such devise. *Adam* v. *Wilkinson*, 12 Pri. 471; affirming the decree in the court below. 1 Ves. & B. 422.

An order of filiation not expressly *adjudging* the defendant to be the father, but only that the Court was satisfied of that fact, was held to be sufficient; so the stating generally the child to be chargeable, by reason of the mother's inability, without going on to state the circumstances. *R.* v. *Lewis*, 1 Perr. & D. 112.

An order of filiation at sessions upon the evidence of the mother, and corroboration thereof, not stating it to be in some material particular, was held to be bad. *Reg.* v. *Read*, 1 Perr. & D. 413. (A.)

(*f*) 4 Vin. Ab. 21, [B.] pl. 3, 4, 5, and 6.

(*g*) *Pendrell* v. *Pendrell*, 2 Stra. 925. *R.* v. *Bedall*, Str. 1076. B. R. H. 379. Stra. 51.

(*h*) *R.* v. *Luffe*, 8 East, 193. In the case of the Banbury claim of peerage, the following questions were

(A) (In Connecticut, where the mother of a bastard prosecutes the father for its maintenance, her evidence cannot be received, unless she has also been examined during her travail, and her testimony shall be fortified by such examination. *Warner* v. *Willey*, 2 Root, 490. *Chaplin* v. *Hartshorne*, 6 Conn. R. 44. So in Massachusetts. *Bacon* v. *Harrington*, 5 Pick. 63. *Commonwealth* v. *Cole*, 5 Mass. R. 517.)

(1) [In North Carolina, a married woman may make the oath required by the statute of 1741, ch. 14, accusing a man of being the father of a bastard child begotten before her marriage. *Wilkie* v. *West*, 1 Murphey, 319. And in Tennessee, if a single woman charges A. as father of a child with which she is *enseinte*, and before the child is born, she marries B., A. is nevertheless chargeable with its maintenance. *State* v. *Ingraham*, 2 Hayw. Tenn. Rep. 221.]

(B) (The law is now universally understood to be settled, that a child, born during marriage, may be proved to be a bastard in various ways; such as,—First, evidence of the husband's inability;—Secondly, proof of non-access to his wife, which is certainly equal to any physical inability; Thirdly, proof that the child was born out of due time; or Fourthly, that it was born during her open cohabitation with another man, and was considered illegitimate by the family. Both in civil and criminal suits, the rule is the same; the parent is not a witness to prove non-access. But parents are competent witnesses both as to the legitimacy and illegitimacy of their children, either by proving or disproving a marriage. *Commonwealth* v. *Stricker*, 1 Browne's App. xlix. The mere *probability* of non-access by the husband is not sufficient to repel the presumption of law in favour of the legitimacy of a child born in wedlock; but it is not necessary for the party objecting to the legitimacy, to prove that access was impossible. *Stigall* v. *Stigall*, 2 Brock. 256. Where however, a man and his wife live together as married persons usually do, a third person may be convicted of fornication with the wife, but not of bastardy, unless the bodily impotence of the husband be clearly and fully established. *Commonwealth* v. *Wentz*, 1 Ashm. 269. *Commonwealth* v. *Shepherd*, 6 Binn. 283. And though it has been held, that the law will presume access, and that the husband is the father of the child even in a case of a voluntary separation, unless there be some physical impossibility. *Tate* v. *Renne*, 7 Martin, (N. S.) 553. Yet where the husband and wife live separate and apart, it may be shown either from facts or circumstances, that the husband had not access to the wife. *Commonwealth* v. *Wentz*, 1 Ashm. 269. And testimony of the resemblance of the child to the alleged father or of the want of it not being matter of fact, but merely of opinion, is not admissible. *Keniston* v. *Rowe*, 16 Shepley, 38.)

*Access is not to be conclusively presumed merely because the parties are within such distance as to render it possible under circumstances (*i*).

Where however a husband and wife are proved to have been together at a time such that in the order of nature the husband might have been the father of the child, if sexual intercourse did then take place, intercourse is to be presumed, and it lies on those who dispute the legitimacy of the child to disprove the fact of such intercourse having taken place by evidence affording an irresistible presumption that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact (*k*).

If there be a separation by consent, the presumption of law will still be in favour of access and of legitimacy till the contrary be proved (*l*); but if there be a divorce *a mensâ et thoro*, non-access will be presumed, for (as it is said) it will be intended that the parties obeyed the sentence of the Court (*m*).

It has been held, from very early times, that issue born during wedlock might be bastardized by proof of a natural impossibility that the husband could have been the natural father. In *Foxcroft's Case*, 10th of Edw. 1 (*n*), where the husband was an infirm, bedridden man, a child born within twelve weeks after the marriage was held to be a bastard. So it was held, where the husband was shown to be within the age of puberty (*o*). So where a husband was under the age of fourteen (*p*). But evidence that a

proposed to the judges:—First, whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child, the husband not being impotent, except such proof as goes to negative the fact of generating access. Secondly, whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact.

On the 4th July, 1811, the Lord Chief Justice of the Common Pleas delivered the following unanimous answers:—First, "That in every case where a child was born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse was presumed to have taken place between the husband and wife, until that presumption was encountered by such evidence as proved to the satisfaction of those who were to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could according to the laws of nature be the father of such a child."—Secondly, "That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, could only be legally resisted by evidence of such facts, or circumstances, as were sufficient to prove to the satisfaction of those who were to decide the question, that no sexual intercourse did take place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child. That where the legitimacy of a child in such a case was disputed on the ground that the husband was not the father of such a child, the question to be left to the jury was, whether the husband was the father of such child: and the evidence to prove that he was not the father must be of such facts and circumstances as were sufficient to prove, to the satisfaction of the jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse the husband could by the laws of nature be the father of such child."

(*i*) *Clark* v. *Maynard*, 6 Madd. 364.

(*k*) By Sir J. Leach, *Head* v. *Head*, 1 Sim. & Stu. 154; S. C. 1 Turner, 139; and see *Morris* v. *Davis*,[1] 3 C. & P. 427. And if the husband have access, legitimacy will be presumed although other persons are at the same time carrying on criminal intercourse with the wife. *Cope* v. *Cope*, 1 Mo. & R. 269;[2] 5 C. & P. 608. *Secus* (it is said) where although the husband has opportunity of access, but where the wife is living in open and notorious adultery. For then it is said that if the husband on one single occasion only had opportunity of access, and then at a time and under circumstances rendering it extremely improbable that he availed himself of the opportunity, those facts *might perhaps* be urged as a legal ground for concluding that sexual intercourse did not take place. The case of *Morris* v. *Davis* was decided on that principle, per Alderson, B. 1 Mo. & R. 275.

(*l*) *St. George and St. Margaret*, Salk. 123. (*m*) *Ibid.*

(*n*) 1 Roll. Ab 359 It does not appear, from the abridged note of the case in Rolle, whether the inability existed at the time of conception; but it must necessarily be presumed that it was so proved, for the inability at the time of marriage, twelve weeks only before the marriage, would be perfectly immaterial.

(*o*) 1 Roll. Ab. 358. In *Lomax* v. *Holmden*, Str. 940, evidence of inability from a bad habit of body was admitted; but the evidence amounting to *improbability* only, and access being presumed from the visits of the husband, the evidence was deemed to be insufficient.

(*p*) Year-book, 1 Hen. 6, 3, b.

[1]Eng. Com. Law Reps. xiv. 378. [2]*Id.* xxiv. 475.

husband was divorced from his first wife for impotence does not prove the bastardy of a child born during the second marriage (*q*).

*Where the husband is within the realm, it is not incumbent on the party alleging bastardy to prove that the husband could not by any possibility have had access to the wife; it is sufficient to adduce such circumstantial evidence as satisfies the minds of the jury (*r*) (1). *198

The removal of the husband to a place distant from the wife, her cohabiting with another man, and the fact that the son, whose legitimacy is questioned, took the name of the latter from his birth, which he and his descendants afterwards retained, is strong evidence to prove the illegitimacy (*s*). So it may be proved that the mother was a woman of ill fame (*t*).

In *Lomax* v. *Holmden*(*u*), the marriage being proved, and evidence given that the husband was frequently in London, where the mother lived, so that access must be presumed, the defendants were admitted to give evidence of his inability from a bad habit of body, but the evidence showing an improbability only, the plaintiff had a verdict (*x*).

Where the birth occurs so soon after the marriage as to show that the conception was *ante*-nuptial, that circumstance will not affect the legitimacy; but that case stands upon its own peculiar ground. The marriage of the parties is then the criterion of legitimacy; at least it raises a presumption that the husband was the father of the child (*y*). In this respect our law adopts the rule of civil law, according to which the offspring was legitimate if the parents married at any time before the birth (*z*). It seems, however, that in such case it is competent to prove that it was impossible that the husband could have been the father, for a stronger presumption cannot arise in such a case than is made in favour of a child conceived after wedlock (*a*) (A). It is held, that although the wife was pre-contracted, or within the prohibited degrees of consanguinity or affinity, yet if she be not afterwards divorced, the issue will not be bastards (*b*); and after the death of the parties the marriage cannot be drawn into question to bastardize the issue (*c*).

Although there has been an actual marriage, the issue may be bastardized by proof that the marriage was actually null and void; as by evidence that one of the parties had a wife or husband still living (*d*); or by proof of a divorce *a vinculo matrimonii* (*e*). But a divorce cannot be prosecuted

(*q*) Com. Dig. Bastard [B.] 5 Co. 98, b.; 2 Leo. 169, 173; Dy. 179, a. For as is said, a man may be *habilis & inhabilis diversis temporibus*, and this whether the divorce was *causâ impotentiæ quoad hanc*, or *propter perpetuum impotentiam* (Mo. 227), 1 And. 105; 2 Lev. 169. [The law seems formerly to have been different. See Lord C. J. Treby's note to 2 Dyer, 179, a.]

(*r*) *Goodright* v. *Saul*, 4 T. R. 356. And see *R.* v. *Bedall*, Str. 1076.

(*s*) 4 T. R. 356. And a new trial was granted, the judge on the first having informed the jury that the *possibility* of access must be negatived.

(*t*) *Pendrell* v. *Pendrell*, 2 Str. 925; B. N. P. 113. (*u*) B. N. P. 113.

(*x*) *Lomax* v. *Holmden*, 6 Geo. 2, at Bar. Str. 940; B. N. P. 113.

(*y*) See the observations of the Judges in *R.* v. *Luffe*, 8 East, 193.

(*z*) See 8 East, 210.

(*a*) And see *Foxcroft's Case*, above cited, 1 Roll. Ab. 359. But see 1 Roll. 358, l. 20.

(*b*) 1 Roll. 357, l. 42, 45.

(*c*) Ibid: and Com. Dig. Bastard [B]. But the marriage may, after the death of the parties, be proved to be void.

(*d*) See Marriage.—Pedigree.—Polygamy.

(*e*) 2 Roll. 586, l. 20. For the causes of such a divorce, see Com. Dig. Baron and Feme, [C.] 1., & *supra*, V. I. Ind. tit. Judgment, as to the effect of a judgment in the spiritual court.

(1) [The legitimacy of a child will be presumed, on slight proof, after the lapse of thirty years, and the death of the parents and the child. *Johnson* v. *Johnson*, 1 Desauss. 595.]

(A) (If a man marries a woman in such an advanced state of pregnancy, that her situation must have been known to him, it must be considered as a recognition of the child afterwards born as his own. *Stigall* v. *Stigall*, 2 Brock. 256.)

after the death of the parties (*f*). Nor can a marriage be drawn in question upon any collateral surmise after the death of either of the parties, such as that it was incestuous (*g*), in order to bastardize the issue. The effect of sentences in the ecclesiastical courts has already been considered (*h*).

*199 Posthumous child.

*In the case of a posthumous child (*i*), its legitimacy appears to be a question of fact to be tried by a jury (*k*), unless it appear to be manifestly impossible, according to the course of nature, that the child can be legitimate.

A case is mentioned in the books (*l*), where the child was found to be born eleven days *post ultimum tempus legitimum mulieribus pariendi constitutum*, and because of that fact, *et quia per veredictum juratorum invenitur quod prædictus Robertus* (the husband), *non habuit accessum ad prædictum Beatricem per unam mensem ante mortem suam per quod magis præsumitur contra pradictum Henricum* (the issue,) therefore the brother and heir of Robert had judgment to recover in assize; and L. C. J. Rolle adds a note to that case, that the jury found that the husband languished of a fever long before his death (*m*). Hence it appears, that in addition to the mere presumption, from the interval which elapses between the death of the husband and birth of the child, other circumstances are admissible to confirm that presumption. And in *Pendrell* v. *Pendrell* (*n*) it was held that the party who disputed the legitimacy might show that the mother was a woman of ill fame.

Where a woman marries so soon after the death of the first husband that it is uncertain which of the two husbands is the father, it is a question of fact to be tried by a jury (*o*).

Competency.

Either of the parents is competent to prove the bastardy of a child for want of legal marriage, although such evidence is open to much observation *(*p*). It has been said, that the mother being a married woman, is

(*f*) 1 Roll. 360, H.; 1 Salk. 21; Com. Dig. Baron and Feme, [C.] 6.

(*g*) Carth. 271; Comb. 200; 4 Mod. 182. (*h*) *Supra*, Vol. I. Ind. tit. Judgments.

(*i*) *Alsop* v. *Stoney*, 17 J.—B. R. Co. Litt. 123, b. by Hargrave and Butler, in the note. The wife, who was, it seems, a lewd woman, was delivered of a child forty weeks and ten days after the death of the husband, and it was held to be legitimate (Hale's MSS.) So where the child was born forty weeks and eleven days after the death of the first husband. 18 Rich. 2, Hale's MSS. See Cro. Jac. 541; Godb. 281; Palm. 9.

(*k*) It has been quaintly said that the law does not appoint any certain time for the birth of a child, and that it is sufficient for the purpose of legitimacy if it be born within a few days after the forty weeks, if it can be proved by circumstances to be the issue of the husband (1 Rol. 356, l. 10; 2 Cro. 541; Pal. 9). The Roman law was very liberal in this respect. The Decemviri allowed that a child might be born in the tenth month; and although a law in the digest excluded the eleventh, yet the emperor Adrian, after consulting with *philosophers* and physicians, decreed even to this extent, where the mother was of good and chaste manners (Dig. 1, 4, 12). See the note by Hagr. & Butler, 2 Inst. 132, b. from which it appears that the judges of Friesland in one instance allowed to the extent of twelve lunar months, *minus* three days. It is not probable that an English jury would go quite so far.

The very learned editors of Lord Coke's Institutes procured the following information from Dr. Hunter. —"1. The usual period of gestation is nine calendar months; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months, but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time; at six months it cannot be. 3. I have *known* a woman bear a living child in a perfectly natural way fourteen days later than nine calendar months, and believe two women to have been delivered of a child alive in a natural way above ten calendar months from the hour of conception."

Lord Coke lays it down as a peremptory rule, that forty weeks is the longest time to be allowed for gestation (Co. Lit. 132); this, however, seems to be without foundation. See the note by Hagr. and Butler, Co. Lit. 123, b.

(*l*) Roll. Ab. 356. (*m*) Roll. Ab. 356. (*n*) 2 Str. 925.

(*o*) Hale's MSS. Cro. J. 615; Winch. 71; Litt. R. 177. Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb; Duncomb, within three weeks after the death of Thecar, marries her. 281 days and 16 hours after his death she was delivered of a son; and it was agreed, that though it was possible that the son might be begotten after the husband's death, yet being a question of fact it was tried by a jury, and the son was found to be the issue of Thecar.

(*p*) 6 T. R. 330, 331. Or to prove the legitimacy (Ibid.). It is said that the sole evidence of the mother, a married woman, shall not be sufficient to bastardize her child. Ca. T. H. 79. *R.* v. *Rook*, 1 Wils. 340. See also *Standen* v. *Standen*, Peake's C. 32; *Standen* v. *Edwards*, 1 Ves. jun. 133.

not competent to prove the non-access of the husband (A), as it seems, upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter which affects his interest or character, unless in cases of necessity (*q*); and on that account it is at all events allowable to examine her as to the fact of her criminal intercourse with another, since it is a fact which must probably be within her own knowledge and that of the adulterer only (*r*).

But the parents are competent witnesses to prove the legitimacy of their children (*s*).

So the mother is competent to prove the access of the husband (*t*).

The declarations of the wife during her lifetime are not admissible in evidence, except for the purpose of contradicting her (*u*). Such declarations are not admissible to prove her son not to be the son of her husband, but of another man (*x*) (B).

As cohabitation and repute are evidence to prove the fact of marriage, so declarations by deceased parents, as to their being or not being married, are evidence as accompanying and explaining such cohabitation, and the presumption arising from cohabitation is either strengthened or destroyed by such declarations (*y*). So such declarations are admissible to prove whether the child was born before or after marriage (*z*), but they are not admissible to prove the illegitimacy of a child born in wedlock (*a*).

(*q*) *R.* v. *Sourton*,[1] 5 Ad. & Ell. 180. *R.* v. *Bedall*, 2 Str. 941. 1076; R. T. Hardw. 379. In the case of *Goodright* v. *Moss*, Cowp. 591, Lord Mansfield says it is a rule founded in decency, morality, and policy, that the parties shall not be permitted after marriage to say that they had *no connection*. See *R.* v. *Reading*, 1 East, 180; B. N. P. 112. The rule is the same, though the husband be dead at the time of giving her testimony. *R.* v. *Inhab. of Kea*, 11 East, 132.

(*r*) See Lord Ellenborough's observations, *R.* v. *Luffe*, 8 East, 202, where an order of bastardy was stated to be made upon the oath of the wife as *otherwise*, it was held to be good, since it was to be presumed that the non-access of the husband was proved by other witnesses, or if proved by her also, that the judgment of the justices was founded on the other proof. *R.* v. *Luffe*, 8 East, 193. And see *R.* v. *Lubbenham*, 4 T. R. 251.

(*s*) In *Lomax* v. *Lomax*, (*cor.* Ld. Hardwicke.) C. T. H. 380, the mother was admitted to prove the marriage; and in an ejectment against *Sarah Brodie*, Hereford, 1744, Wright, J. admitted the father to prove the daughter legitimate, her title being as heir-at-law to her mother. And see *Stapleton* v. *Stapleton*, Ca. T. Hardw. 277; *Lord Valentia's Case*, in D. P. Cowp. 593; *Sacheverell's Case*, B. N. P. 241.

(*t*) *Pendrell* v. *Pendrell*, *cor.* Ld. Raym. Str. 925; B. N. P. 287.

(*u*) 2 Str. 925; B. N. P. 113. (*x*) *R.* v. *Cope*, 1 Mo. & R. 275.

(*y*) B. N. P. 294, where it is said that such declarations are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief one way or other. In *May* v. *May*, B. N. P. 112, on a trial at bar on an issue out of Chancery, the preamble of an act of parliament, reciting that the plaintiff's father was not married, to the truth of which he had sworn, was given in evidence; yet, upon proof of constant cohabitation, and of his having always acknowledged her to be his wife, the marriage was established. But where, in a settlement case, there was no evidence either as to the parentage, place of birth, or illegitimacy, except the testimony of the father, who denied any marriage, the court of K. B. held, that however difficult it might be to admit his evidence to bastardize a reputed legitimate child, yet, as all depended upon his testimony, the whole must be taken together. *Parish of St. Peter, Worcester*, v. *Old Swinford*, B. N. P. 112.

(*z*) *Goodright* v. *Moss*, Cowp. 591. *R.* v. *Bramley*, 6 T. R. 330.

(*a*) *Ibid.*

(A) (On an indictment for fornication and bastardy, a married woman is a competent witness to prove the criminal connection with her, but not the non-access of her husband. *Commonwealth* v. *Shepherd*, 6 Binn. 283. *Commonwealth* v. *Stucker*, 1 Browne, App. xix.)

(B) (A child born during marriage cannot have its condition affected by the declaration of either the husband or wife. *Tate* v. *Renne*, 7 Martin (N. S.) 553. And the unsworn declarations of the mother, that her son, born six months after marriage, is the son of another man, are not admissible to prove his illegitimacy, and *a fortiori*, the declarations of that man are not admissible; if their evidence is proper, their depositions should have been taken. But the general report of the neighbourhood on the question of legitimacy is not to be disregarded. *Stegall* v. *Stegall*, 2 Brock. 256. So [a husband's declaration that a child born in wedlock is not his, is not sufficient evidence to prove it illegitimate, notwithstanding it was born only three months after the marriage, and a separation between his wife and him took place by mutual consent. *Bowles* v. *Bingham*, 2 Munf. 442.])

[1] Eng. Com. Law Reps. xxxi. 312.

The declaration by a deceased husband that his wife was a legitimate child is evidence; for it is probable, that although not connected with her
*201 by *blood, he would know the fact (*b*). And so would the declarations of members or relations of the family, or perhaps of others living in habits of intimacy with them (*c*).

One charged as a reputed father of a bastard cannot be compelled to give evidence tending to prove the fact (*d*).

Where one or more justices have power to examine in a case of bastardy, they have incidentally power to compel the woman to answer (*e*).

In the case of the *King* v. *Ravenstone* (*f*), it was held, that the examination of a woman pregnant of a bastard, was admissible evidence after her death against the party whom she charged as the putative father, although the proceeding was *ex parte*, the party charged not being present (*g*). This decision, however, conflicts with general principles, and the cases of depositions before magistrates under the stat. of Philip & Mary, upon which the court are reported to have relied in the above case, are in direct opposition to it.

As to the competency of inhabitants of a parish in cases of bastardy, see tit. INHABITANT.—INTEREST.

BILLS OF EXCEPTIONS. *See* Vol. I. and INDEX.

BILLS OF EXCHANGE.

Under this head may be considered,

I. THE EVIDENCE IN AN ACTION ON A BILL OR NOTE, p. 202.
II. THE EVIDENCE IN DEFENCE, p. 241.
III. THE COMPETENCY OF WITNESSES, p. 257.
IV. THE EFFECT OF A BILL OR NOTE IN EVIDENCE, p. 261.

I. ACTIONS on bills of exchange (*h*) differ from actions upon parol contracts, principally in these circumstances; 1st, it is in general unnecessary for the plaintiff to prove the consideration for which the bill or note was
*202 *given, the bill or note being in itself *primâ facie* evidence of a sufficient consideration; and 2dly, because the interest in the bill, and the right of action consequent upon it, is of a transferable nature; so that in addition to the undertaking of the defendant, which is usually a consequence of his

(*b*) *Vowels* v. *Young*, 15 Ves. jun. 148.

(*c*) 3 T. R. 723; B. N. P. 295; 1 M. & S. 689. *Supra*, Vol. I. Index, tit. HEARSAY.

(*d*) *R.* v. *St. Mary's, Nottingham*, 13 East, 58, in note.

(*e*) *R.* v. *Jackson*, 1 T. R. 655. And if she refuse, may commit until she answer. *Ibid.* But *one* justice has no such power under the stat. 6 G. 2, c. 31. See *R.* v. *Beard*, 5 T. R. 373. *R.* v. *West*, 6 Mod. 180; *Billings* v. *Trinn*, 2 W. Bl. 1017.

(*f*) 5 T. R. 373. *Infra*, tit. DEPOSITIONS.

(*g*) In the subsequent case of *The King* v. *Clayton*, 3 East, 58, the case of *The King* v. *Ravenstone* was referred to by Ld. Ellenborough, C. J. as an authority. In the case of *R.* v. *Clayton*, which was one of an order of bastardy made by two justices, which had been confirmed *on an appeal* to the sessions, it appeared that the original order had been made on the oath of *R. T.* and the examination of *Mary Cole* (the mother) taken before another justice. The title of the original order recited that *Mary Cole* was since deceased. And the court held the order to be good, by intendment that the examination of *M. C.* had been taken in writing, and that the examination had been verified by the oath of *R. T.* Note, that stress was laid on the fact that the second order was made on appeal to the sessions, where the objection for want of appearance, and for want of proof that the woman was dead at the time, might have been proved if well founded. The same reason, it is obvious, would apply to the objection that the examination took place in the absence of the party charged.

(*h*) Upon the question, whether a bill of exchange be joint or several, see *Collins* v. *Prosser*,[1] 1 B. & C. 682. A note not payable at all events, but intended as a set-off, is not a promissory note. *Clarke* v. *Percival*,[2] 2 B. & Ad. 660. An instrument, whereby the party promises to pay a sum with interest, "and all fines according to rule," cannot be declared on as a note. *Ayrey* v. *Fearnsides*, 4 M. & W. 168; and 6 Dowl. 654.

[1]Eng. Com. Law Reps. viii. 183. [2]*Id.* xxii. 159.

being a party to the bill, it is in many instances necessary to prove the plaintiff's title to sue.

Actions brought in respect of bills of exchange or promissory notes are either founded on the instrument itself, or upon a collateral liability.

Where the action is founded on the instrument itself, the liability of the defendant is either, 1st, primary and immediate upon his direct undertaking, where it is brought against the acceptor of a bill or maker of a note; or, 2dly, it is a secondary and conditional liability of a drawer or indorser consequent upon the default of the acceptor or maker; or, 3dly, the liability is consequent upon the party's own default in not paying the bill according to his undertaking; as, where the action is brought by a drawer or indorser who has been compelled to take up the bill against the acceptor, or by the acceptor, who has paid the bill against the drawer.

The proofs will be considered in the following order:

Primary liability.

1. Proofs in an action by a payee or bearer (*i*) - - - - - - } *v.* { An acceptor of a bill or maker of a note.
2. - - - by an indorsee (*k*) - - - }

Secondary liability.

3. - - - by a payee (*l*) - - - *v.* The drawer of a bill.
4. - - - by an indorser (*m*) - - *v.* { The drawer of a bill. An indorser.

Collateral liability.

5. Presumptive evidence (*n*).
6. Proofs by a drawer or indorser (*o*) *v.* An acceptor.
7. - - - by an acceptor (*p*) - *v.* A drawer.
8. Proof of damage (*q*).
9. Proofs in defence (*r*); want of consideration (*s*); or of value given (*t*). illegality of consideration (*u*); discharge by satisfaction, release, &c. (*x*); laches (*y*); giving time (*z*); waver (*a*); indorsement of bill after it is due (*b*); alteration of bill (*c*).
10. Competency of witnesses, declarations, &c. (*d*).
11. Effect of bill, or note in evidence in payment, &c. (*e*).

In an action by the payee against the maker of a note or acceptor of a bill, the direct proofs (*f*) are, 1st. By the production of the note or bill, or proof of its destruction, &c. 2dly. Proof of the making of the note, or of the drawing and acceptance of the bill. 3dly. In some instances proof of the performance of conditions precedent or presentment. 4thly. In some cases of the identity of the payee, or title of bearer.

Production or proof of destruction.

1st. By the production of the bill or note. The ordinary proof of loss, in order to warrant the introduction of parol evidence of an instrument, is in *this case frequently insufficient (*g*), the instrument being of a negotiable nature, such proof must be given, where it is not produced, by evidence of its destruction (*h*), or otherwise, as shows that the defendant cannot afterwards be compelled to pay the amount again to a *bonâ fide* holder (A). In *203

(*i*) 202. (*k*) 214. (*l*) 221. (*m*) 233.
(*n*) 237. (*o*) 239. (*p*) 239. (*q*) 240.
(*r*) 241. (*s*) 242. (*t*) 243. (*u*) 245.
(*x*) 249. (*y*) 250. (*z*) 250. (*a*) 252.
(*b*) 253. (*c*) 254. (*d*) 257. (*e*) 261.

(*f*) Under the new rules the general issue cannot be pleaded, and of course no part of the ordinary proof of title need be proved which is not put in issue by some traverse.

(*g*) See 1 Esp. C. 50. 2 B & P. 93. 1 Atk. 446. Ld. Raym. 731. For the usual proof to warrant the introduction of secondary evidence, see above, Vol. I. Ind. tit. Secondary Evidence.

(*h*) As that the defendant tore his own note of hand, 1 Ld. Ray. 731.

(A) (Parol evidence is admissible to prove the contents of promissory notes which are lost. Such may be proved by the evidence of the person in whose custody it was. *Jones* v. *Fales*, 5 Mass. R. 101; *Snyder* v. *Wolfley*, 8 Serg. & R. 331; and for this purpose the plaintiff himself will be a competent witness. *Meeker* v. *Jackson*, 3 Yeates, 443. [Secondary evidence of the contents of a written instrument is not admissible,

the absence of such proof the plaintiff cannot recover on the special count, or on the money counts, or upon the original consideration for which the bill or note was given, even although he has tendered to the defendant a bond of indemnity, for it may be still in existence, and the defendant may again be called upon to pay it (*i*). But where a bill has been specially indorsed to the plaintiff, (and for the same reason, where it is made payable to the plaintiff specially,) the plaintiff may prove that it has been stolen, without having been indorsed by him, and recover on giving parol evidence of the contents (*k*).

Foreign bill.

In the case of a foreign bill drawn in sets, both the sets should be produced.

Proof of the making and accepting.

2dly. The next step is to prove the making of the note, or the acceptance, (and in some cases the drawing) (*l*) of the bill.—Where the instrument has been signed by the defendant, and is unattested, the usual proof is by evidence of his hand-writing, or by evidence of his acknowledgment that it was signed by him (*m*). If the instrument has been attested by a subscribing witness, that witness must be called (*n*). Where the declaration alleges that the note was made, or bill accepted by a party, his proper hand being thereunto subscribed, it has been said that proof of the hand-writing of the party cannot be dispensed with, and that a precise allegation is essential, in order that the party may be prepared to show, if such be the fact, that

(*i*) *Pierson* v. *Hutchinson*, 2 Camp. 211; 6 Esp. C. 126; 3 Camp. 324; 4 Taunt. 602. *Dangerfield* v. *Wilby*, 4 Esp. 159. *Hansard* v. *Robinson*,[1] 7 B. & C. 90. Although the bill was lost after it became due. Ib. *Poole* v. *Smith*,[2] Holt, 144. The remedy of the loser of the note is in equity (1 Ves. 341. 6 Ves. 812. 16 Ves. 430); and in general the holder of a bill cannot insist on payment from the acceptor without offering to deliver up the bill (*Hansard* v. *Robinson*,[1] 7 B. & C. 90. *Champion* v. *Terry*,[3] 7 Moore, 130. *Powell* v. *Roach*, 6 Esp. C. 76); and cannot, having lost the bill, though after it has become due, recover upon it, although an indemnity has been offered. Ib. An express promise to pay the contents of a lost bill, without some new consideration, is void. (*Davis* v. *Dodd*, 4 Taunt. 602.) An indorser in blank cannot recover, even where the bill has been lost after notice of trial given, although more than six years have elapsed since the bill became due. *Poole* v. *Smith*,[2] Holt's C. 144. So though the half of a bank-note has been lost. *Mayor* v. *Johnson*, 3 Camp. 324. Where the defendant had admitted that he owed money on the bill, which was in his own possession, Abbott, C. J., held that it was evidence under the common counts without notice to produce the bill. *Fryer* v. *Browne*,[4] R. & M. 145.

(*k*) *Long and others* v. *Baillie*, Guild. Dec. 1805, *cor.* Ld. Ellenborough, 2 Camp. 214, (n). And see *Smith* v. *Clarke*, Peake's C. 225.

(*l*) The acceptance admits the hand-writing of the drawer, and also the procuration, if the bill be drawn by procuration. *Porthouse* v. *Parker*, 1 Camp. 82. *Robinson* v. *Yarrow*,[5] 7 Taunt. 455. And this excludes the acceptor from insisting that a bill purporting to be drawn by a firm, was drawn by a single person. *Bass* v. *Clive*, 4 M. & S. 13. Or that the drawer's name is forged, Ib.; and *Smith* v. *Chester*, 1 T. & R. 655. Or that he is an infant. *Taylor* v. *Croker*, 4 Esp. C. 187; and see *Shultz* v. *Astley*,[6] 7 C. & P. 99.

(*m*) See tit. Admissions. In an action by the indorsee against the acceptor, the witness negativing the hand-writing to be that of the drawer, held that some proof of the hand-writing ought to be given, notwithstanding the defendant had acknowledged it to be his acceptance. *Allport* v. *Meek*,[7] 4 C. & P. 267.

(*n*) *Supra*, Vol. I. Ind. tit. Attesting Witness. A note for less than 5*l*., if not attested, is void by the stat. 17 Geo. 3, c. 30, s. 31. If the note appear to have been attested, the attesting witness must be called, the adversary is entitled to have any writing on the face of it read. *Richards* v. *Frankum*, 9 C. & P. 221.

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when the original is within the control or custody of the party. *Sebree* v. *Dorr*, 9 Wheat. 558. But secondary evidence is admissible whenever it appears that the original is destroyed, or lost by accident, without any fault of the party. *Rener* v. *Bank of Columbia*, 9 Wheat. 581. In the case of a lost note, it is not necessary that its contents should be proved by a notarial copy—all that is required is, that it should be the best evidence the party has it in its power to produce. Ibid. The English practice of requiring a special count in the declaration, as upon a lost note, in order to let in secondary evidence of its contents, has not been adopted in the United States. Ibid. Of the evidence to prove a lost note, see *Peabody* v. *Denton & al.* 2 Gallison, 351. A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer. *Wright* v. *Hancock & al.* 3 Munf. 521. See *Pintard* v. *Tackington*, 10 Johns. 104. *Holmes* v. *D'Camp*, 1 Johns. 34. *Angel* v. *Felton*, 8 Johns. 149. *Smith* v. *Lockwood*, 10 Johns. 366.] See also *Swift* v. *Stevens*, 8 Conn. R. 431. *M'Nair* v. *Gilbert*, 3 Wend. R. 344. *Rowley* v. *Ball*, 3 Cow. 303. *Freeman* v. *Boynton*, 7 Mass. R. 483. See also Vol. I. tit. Written Evidence. *Anderson* v. *Robson*, 2 Bay, 495.)

[1] Eng. Com. Law Reps. xiv. 20. [2] *Id.* iii. 55. [3] *Id.* vii. 443. [4] *Id.* xxi. 401. [5] *Id.* ii. 173. [6] *Id.* xxxii. 453. [7] *Id.* xix. 378.

no authority* or procuration has been given (*o*). Some evidence as to the identity of the defendant with the party whose hand-writing, or whose authority to sign the note, is proved, is also necessary (*p*). Proof of acceptance.

An acceptance (*q*) of a bill in blank without the name of a payee is an authority to a *bonâ fide* holder to insert a name (*r*).

By the stat. 1 & 2 Geo. 4, c. 78, s. 2, no acceptance of any inland bill (*s*) of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if they be more than one part of such bill, on one of the said parts. The defendant, by the act of acceptance (*t*) admits the signature of the drawer, and his ability to draw the bill (*u*); but where the acceptance is made without sight of the bill, it is necessary to prove the drawer's hand-writing (*x*).

An allegation that a bill was drawn by certain persons using the firm of *A. & Co.* is satisfied by a bill drawn by *A.* in the name of such a firm, payable to *our order*, although *A.* has no partner (*y*).

If the action be against *several* as makers or acceptors, the hand-writing of each must be proved (*z*); or if it be signed by one only in the name of the firm, it must be proved that they were partners (*a*) at the *time* of the acceptance. Acceptance by several.

(*o*) *Levy* v. *Wilson*, 5 Esp. C. 180. But where the drawer's name had been indorsed by the wife, Ld. Ellenborough was inclined to think that such allegation would be satisfied by proof that the name had been written by an authorized agent (*Helmsley* v. *Loader*, 2 Camp. 450); and where the declaration alleged that the defendants made a note in their own hands, &c. and the note had in fact been subscribed by one in the name of the firm, Ld. Ellenborough refused to nonsuit the plaintiffs. *Jones* v. *Mars*, 2 Camp. 305. Where the defendant's name had been signed by his wife, it was held that it was not sufficient to show that she had managed his business as an innkeeper, and applied the proceeds in discharge of debts incurred in the business, and that three months afterwards she had signed other notes, the amount of which was paid to his creditors. *Goldstone* v. *Tovey*, 6 Bing. N. C. 98.

(*p*) *Middleton* v. *Sandford*, 4 Camp. 34; B. N. P. 171. See *Nelson* v. *Whittal*, 1 B. & A. 19.

(*q*) Vide *supra*, 141. In an action against the acceptor of a bill for 46*l.*, with the common counts; plea, that the defendant accepted a bill drawn on him for 60*l.* in satisfaction of the plaintiff's demand; held, not sustained by evidence that the defendant transmitted to the plaintiff a blank acceptance, with 60*l.* in the margin, but which when produced had been altered to 46*l.* *Baker* v. *Jubber*, 1 Sc. N. S. 26; and 8 Dowl. (P. C.) 538.

(*r*) *Cruchley* v. *Clarence*, 2 M. & S. 90. *Atwood* v. *Griffin*,[1] 1 Ry. & M. 425.

(*s*) In the case of foreign bills a collateral acceptance is still sufficient.

(*t*) Str. 442, 668, 946. *Taylor* v. *Croker*, 4 Esp. C. 187. *Robinson* v. *Yarrow*;[2] 7 Taunt. 445; 1 Moore, 150; Burr. 1354; Chitty, O. B. 286; 1 T. R. 655. But where the bill is payable to the drawer's order, proof of acceptance is no evidence of indorsement by the drawer (Peake's C. 20). The acceptor is concluded by his acceptance as to the hand-writing of the drawer, although the bill be forged. *Smith* v. *Chester*, 1 T. R. 654.

(*u*) Consequently it is no defence on the part of the acceptor to show that the bill was drawn by an infant (*Taylor* v. *Croker*, 4 Esp. C. 187); or that the bill is forged (6 Taunt. 83; 4 M & S. 15; *Leach* v. *Buchanan*, 4 Esp. C. 226); or by one without the authority of his supposed principal (*Porthouse* v. *Parker*, 1 Camp. C. 82); or by a single person, when it purports to have been drawn by several persons composing a firm (*Bass* v. *Clive*, 4 M. & S. 13). So if the party acknowledge the acceptance to be in his hand-writing he cannot afterwards set up a forgery of the bill as a defence. *Leach* v. *Buchanan*, 4 Esp. C. 226.

(*x*) Peake's L. E. 220; Bayley, O. B. 219. It seems that the word accepted written on the bill is sufficient without the acceptor's signature. *Dufaur* v. *Oxenden*, 1 M. & R. 90. And an acceptance in blank, the bill being afterwards drawn in pursuance of the acceptor's authority, is sufficient. *Leslie* v. *Hastings*, 1 M. & R. 119.

(*y*) *Bass* v. *Clive*, 4 M. & S. 13.

(*z*) Peake, 18; Chitty, 627, 9th edit. *Gray* v. *Palmers*, 1 Esp. C. 135; B. N. P. 279.

(*a*) Every partner has an implied authority to bind his co-partners by the drawing, accepting, and indorsing of bills for commercial purposes (7 T. R. 210; 10 East, 264; 13 East, 175). Hence an acceptance by one partner in the name of the firm, is *primâ facie* evidence of the assent of all (13 East, 175. *Pinkney* v. *Hall*, 1 Salk. 126). But this presumption, arising from the relative situation of the parties (see tit. Admissions), is liable to be rebutted, by proof that the party insisting upon the usual presumption, knew that the partner had no authority, as by proof of express notice to that effect. Where one partner gave express notice that he would not be responsible for bills signed in the name of the firm, it was held that he was not bound by a security given to the party to whom such notice was given, although the latter advanced money upon it for the payment of partnership debts, and although part was so applied (*Lord Galloway* v. *Matthew*, 10 East, 264); or by proof of covin between the partner who signs the bill or note, and the party who takes it (*Ridley* v. *Taylor*, 13 East, 175). To prove fraud, it is not, it seems, sufficient to show that the

[1] Eng. Com. Law Reps. xii. 176. [2] *Id.* ii. 173.

*The implied authority of one to draw or accept a bill in the name of the firm may be rebutted by proof of fraud, or of notice to the party, that the other partners would not be responsible for bills so drawn or accepted (*b*).

Where the action is against *A.* and *B.* as acceptors of a bill, and *A.* suffers judgment by default, the signature of *A.* must be proved as well as that of *B.* (*c*).

An admission by one defendant that he accepted the bill will not be evidence against the co-defendants, without previous proof that they were partners at the time (*d*), and then his admission of the acceptance in the name of the firm will be evidence against all, even although the partnership was dissolved previous to making the admission.

Where all the partners except the defendant have been outlawed, it is still necessary to prove a joint acceptance by all; but in such a case Lord Ellenborough held, that a letter written by that defendant, in which he admitted the partnership, was evidence of the fact, for in an action by him against the rest for contribution, the record in the present action would not be evidence against the rest to prove the partnership, and it would be necessary to prove the fact *aliunde* (*e*).

The provisions of the bank-act do not apply to a note issued by a mere commercial firm, though consisting of more than six members (*f*).

*206 *Where the acceptance is by means of an agent, the authority of the agent must be proved (*g*). A letter of attorney from *A.* as executor, ena-

holder took the bill in payment of the separate debt of the partner (*Ibid.*) See *Golding* v. *Davis*, 2 Gl. & J. 218; *Ex parte Husbands*, 2 Gl. & J. 4. But the giving a bill in payment of the debt of two partners, contracted previously to their partnership with a third, has been held to be fraudulent as against the third (*Shirreff* v. *Wilkes*, 1 East, 48. See *Swann* v. *Steele*, 7 East, 210; *Ex parte Bonbonus*, 8 Ves. jun. 542; *Williams* v. *Thomas*, 6 Esp. C. 18; 15 Ves. 286; 15 East, 10; *Pinkney* v. *Hall*, Salk. 126; 1 Camp. 108, 384, 403). Where a partner accepted a bill in the name of the firm, but not in a partnership transaction, it was held at *Nisi Prius* that an indorsee could not recover on that acceptance against a dormant partner whose name did not appear, who was not known to be a partner, or where the bill was not taken on his credit[1] (*Lloyd* v. *Ashley*, 2 C. & P. 138). In the case of a bill drawn on several partners, an acceptance by one need not be in the name of the firm (*Ibid.*); but a promissory note drawn by one of several partners in his own name cannot be declared on as drawn by the firm, although given for a debt due to the partnership. *Siffkin* v. *Walker and another*, 2 Camp. 308.

(*b*) See the preceding note. See also, *Wells* v. *Masterman*, 2 Esp. C. 731. *Ex parte Ayrer*, 2 Cox, 312. It lies on a separate creditor, who takes a partnership security for payment of his separate debt, if it be so taken, and there is nothing more in the case, to prove that it was given with the consent of the other partners. Per Master of Rolls, in *Frankland* v. *M'Garty*, 1 Knapp, 301. One partner having become bankrupt, a solvent partner may still bind the firm by accepting a bill for a debt previously due to the firm, such bill being in the hands of a *bona fide* indorsee. *Ex parte Robinson*, 1 Mont. & Ayr. 18. See *Wadbridge* v. *Swann*,[2] 4 B. & Ad. 633. A member or director of a joint stock company has no implied authority to accept bills on the part of the directors. See tit. PARTNERS, and *Bramah* v. *Boberts*,[3] 3 Bing. N. C. 972; *Ex parte Ellis*, Mont. & B. 249.

(*c*) Bay. O. B. 227; 1 Esp. C. 135.

(*d*) *Gray* v. *Palmer*, 1 Esp. C. 135. *Wood* v. *Braddick*, 1 Taunt. 104.

(*e*) *Sangster* v. *Mazzaredo and others*,[4] 1 Starkie's C. 161.

(*f*) *Wigan* v. *Fowler and others*,[5] 1 Starkie's C. 459, and afterwards by the Court of K. B. But a corporation not established for trading purposes cannot accept bills of exchange payable at a less period than six months from the date (*Broughton* v. *Manchester Waterworks Company*,[6] 3 B. & A. 1). It was there observed that in *Wigan* v. *Fowler* it did not appear on the face of the bill to be accepted by more than six persons. And *semble*, a corporate body not established for trading purposes cannot without express authority bind itself but by deed (*Ibid.*); and see *Starke* v. *The Highgate Archway Company*,[7] 5 Taunt. 792.

(*g*) 1 Esp. C. 90; Chitty, O. B. 28. As to proof of agent's authority, see tit. AGENT. A secretary to a joint stock company has no implied authority to accept bills. *Neale* v. *Turton*, 4 Bing. 149. Where the declaration on a bill alleged it to have been drawn by one *Hannah P.* on, and accepted by the defendant, and afterwards indorsed by the said *H. P.* to the plaintiffs, the bill appeared to be indorsed "for *H. P.*," in the hand-writing of one *J. P.*, and a witness stated that his employers had dealings with a Mrs. *P.* and that he had seen bills drawn and indorsed in the same form and hand-writing, which had been paid, and held that upon a question of authority, the statements of the witnesses were admissible, without the production of such bills; and the Court after a verdict for the plaintiff, upon an affidavit that the real name was *Hannah*, and that the bill was drawn and indorsed by her son *J. P.*, by her authority, refused a new trial. *Jones* v. *Turnour*,[8] 4 C. & P. 204.

[1]Eng. Com. Law Reps. xii. 59. [2]*Id.* xxiv. 130. [3]*Id.* xxxii. 404. [4]*Id.* ii. 338. [5]*Id.* ii. 468. [6]*Id.* v. 215. [7]*Id.* ii. 268. [8]*Id.* xix. 344.

bling *B.* to transact the executorship affairs, gives him an authority to accept bills of exchange drawn by a creditor relating to a debt due from the testator, so as to make *A.* personally liable (*h*). The agent who accepted the bill by the authority of another, is a competent witness to prove his authority (*i*). If the authority was in writing, the instrument must be produced and proved (*k*). Proof of acceptance by an agent.

Proof of an acceptance after the bill became due is sufficient (*l*). Where an executor declares upon promises to the testator, he must prove an acceptance in the lifetime of the testator. Time of acceptance.

A collateral acceptance (*m*) may be proved either in writing (*n*), or by evidence of an oral assent (*o*) (1); and it is not necessary that the holder should be privy to such parol acceptance (*p*). What amounts to proof of an acceptance is a question of law, and not of fact (*q*). If the acceptance be by parol, the witness must be produced who heard the defendant accept the bill; and if it be in writing, it must be produced and proved; and if attested, must be proved by the attesting witness. In general, a promise to accept an *existing* bill, if made upon an executed consideration, or if it influence any person to take or retain the bill, is a complete acceptance as to the person to whom the promise is made in the one case, and the person influenced on the other (*r*), and all the subsequent parties in each (*s*). Proof of collateral acceptance.

Where the acceptance is by a letter collateral to the bill, the letter must be produced, and the hand-writing proved; and evidence is also requisite to identify the bill in question with that mentioned in the letter.

An assurance by a collateral letter that the bill shall meet with due honour, *is an acceptance (*t*); and so is an assurance of the drawee, by letter, that the bill shall be duly honoured (*u*). So a letter by the drawee, stating that the holder might rest satisfied as to payment, written after the bill was drawn, is an acceptance (*x*). But a promise to accept a non-existing bill is no acceptance (*y*). An indorsee may avail himself of that as an acceptance of which the drawer could not avail himself; as where *A.* to give credit to *B.* made an absolute promise to accept his bill, and *B.* showed the letter upon the Exchange (*z*) (A). *207

(*h*) 2 H. B. 218. But see 6 T. R. 591. (*i*) *Supra*, 41. (*k*) Ibid. (*l*) 5 East, 514.

(*m*) No such acceptance of an inland bill subsequent to the first of August, 1821, is valid. See the stat. 1 & 2 G. 4, c. 78, s. 2, *supra*, 204. (*n*) 1 T. R. 182, 186. *Pillans* v. *Van Mierop*, 3 Burr. 1663.

(*o*) *Lumley* v. *Palmer*, 2 Str. 1000. C. T. Hardw. 74.

(*p*) *Powell* v. *Monnier*, 1 Atk. 611. *Wynne* v. *Raikes*, 5 East, 514. *Fairlee* v. *Herring*,[1] 3 Bing. 625.

(*q*) 1 T. R. 182, 186. But see *Rees* v. *Warwick*,[2] 2 Starkie's C. 411. *B.* undertakes to guarantee *A.*'s debt, and draws a bill on *A.*, which *A.* accepts; *B.* also writes an acceptance. *B.* is not liable as an acceptor; it is a collateral undertaking for the debt of *A.*, which must be specially declared on. 2 Camp. 447; Beawes, L. M. 422.

(*r*) *Milne* v. *Prest*, 4 Camp. 393.

(*s*) Bayley on Bills, 78. 5 East, 514. *Pierson* v. *Dunlop*, Cowp. 571. *Mason* v. *Hunt*, Doug. 284. *Clarke* v. *Cock*, 4 East, 75.

(*t*) *Clarke* v. *Cock*, 4 East, 57. So, this I accept, and you may call for it when you like. *Canissa* v. *Lanos*, 2 Knapp, 276. The drawer of foreign bills being arrested, said he would have accepted them when presented, but he had not the funds from France; that when he got the funds he would have paid them, but for some expression of the indorsee, adding, that he told the clerk of the indorsee, that when he got the funds from France the bills should be paid. It was held, that this was a good conditional acceptance, on which the defendant having got funds from France was liable. *Mendizabel* v. *Machado*,[1] 6 C. & P. 218. 3 M. & S. 831.

(*u*) *Powell* v. *Monnier*, 1 Atk. 611; 5 East, 520.

(*x*) *Wilkinson* v. *Lutwidge*, Str. 648. See also *Wynne* v. *Raikes*, 5 East, 514; *Clarke* v. *Cock*, 4 East, 57.

(*y*) *Johnson* v. *Collins*, 1 East, 98.

(*z*) Per Ld. Mansfield, in *Mason* v. *Hunt*, Dougl. 284. Cowp. 571. Le Blanc, J. in *Johnson* v. *Collins*, 1 East, 105. *Clarke* v. *Cock*, 4 East, 70. But see *Milne* v. *Prest*, 4 Camp. 393.

(1) [See *Havens* v. *Griffin*, N. Chipman's Rep. 42. *Mahew & al.* v. *Prince*, 11 Mass. Rep. 54.]

(A) (An agreement to accept a bill to be afterwards drawn is valid in the United States, even if it be by

[1]Eng. Com. Law Reps. xiii. 78. [2]*Id.* iii. 407. [3]*Id.* xxv. 365.

Where the plaintiff, being unable to prove the acceptance of the defendant upon the bill, proved, that when the bill was taken to the defendant's house for acceptance, a clerk in the defendant's banking-house answered that the bill would be taken up when due, (the defendant not being at home,) it was held that the proof was insufficient, without showing that the answer was given by the drawee, or his authority (*a*).

A direction on the bill to another to pay the sum out of a particular fund is an acceptance (*b*). So any words written upon the bill which do not negative its request, as "accepted" (*c*), "presented," "seen," or the day of the month, are *primâ facie* a complete acceptance. Even a refusal to accept written on a bill, will amount to an acceptance, if it be shown to have been done with intent to deceive the party who presented it, and to delude him into the belief that the bill had been accepted (*d*).

Where the drawee said on presentment of the bill, "there is your bill, take it, it is all right," it was held to be no acceptance (*e*).

Where the drawee stated in his letter, "your bill shall have attention," the court held that the phrase was too ambiguous to amount to an acceptance, in the absence of evidence to show that in mercantile acceptation the phrase amounted to an unequivocal acceptance (*f*).

Presumptive evidence of acceptance.

Where there is no direct evidence of acceptance, presumptive evidence may be resorted to in proof of the fact; for this purpose, the conduct of the parties, especially if it be explained by mercantile usage and understanding, is frequently very important. The fact that a bill sent to the drawee for acceptance has been *detained* by him, may be evidence of an acceptance; but according to the usual course of commercial dealings, the mere neglect and silence of the drawee, or even a refusal to return the bill, or its actual destruction, does not *necessarily* make the drawee liable as acceptor (*g*).

*208 *The acceptance of a bill of exchange imports a *contract*, which requires the *assent* of the party; and acts of detention, disfiguring, cancellation, or even destruction, do not necessarily and conclusively prove such

(*a*) *Sayer* v. *Kitchen*, 1 Esp. C. 209. (*b*) *Moor* v. *Withy*, B. N. P. 270.

(*c*) See *Pillans* v. *Van Mierop*, 3 Burr. 1663; *Mason* v. *Hunt*, *Powell* v. *Monnier*, 1 Atk. 611; 5 East, 220; *Pierson* v. *Dunlop*, Cowp. 571.

(*d*) Bayley O. B. 78. Ann. 75. But it is no acceptance if the drawee apprize the party at the time that what he had written was no acceptance.

(*e*) Per Ld. Kenyon, 1 Esp. C. 17. (*f*) *Rees* v. *Warwick*, 2 B. & A. 113.

(*g*) See the case of *Jeune* v *Ward*, 2 Starkie's C. 326; 1 Camp. 435; Bayley O. B. 81; *Mason* v. *Barff*, 2 B. & A. 26. One who without authority accepts a bill as by procuration, is guilty of a fraud in law. *Polhill* v. *Walter*,[2] 3 B. & Ad. 114; but is not liable as acceptor.

parol. *Townsley* v. *Simrall*, 2 Peters, 182. *Ontario Bank* v. *Worthington*, 12 Wend. 593. *Dougal* v. *Cowles*, 5 Day, 515. The rule laid down by the Supreme Court of the United States is, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise. *Boyce* v. *Edwards*, 4 Peters, 111. *Townsley* v. *Simrall*, 2 Peters, 181. *Schimmelpennick* v. *Bayard*, 1 Peters, 265. *Payson* v. *Coolidge*, 2 Wheat. 66, s. c. 2 Gallis. 233. [In *Wilson* v. *Clements*, 3 Mass. Rep. 1, the Supreme Court of Massachusetts held that a promise to accept a non-existing bill, would not operate as an acceptance, unless it were in writing, and shown to the person who took the bill on its credit, within a reasonable time: And that a bill drawn *two years* afterwards in favour of one who took it on the credit of the promise, was not binding on the drawee. See the observations of Kent, C. J. in *M'Ewers* v. *Mason*, 10 Johns. 214, and of Spencer, J. in *Weston* v. *Baker*, 12 Johns. 284. See also *M'Kim* v. *Smith & al.* 1 Hall's Law Journal, 486. *Goodrich & al.* v. *Gordon*, 15 Johns. 6. *Storer* v. *Logan & al.* 9 Mass. Rep. 55.] *Kennedy* v. *Geddes*, 8 Porter, 263. *Williams* v. *Winans*, 11 Greene, R. 339. *Vance* v. *Ward*, 2 Dana, 95. *Parker* v. *Greele*, 2 Wend. 545. The principles of all decisions in *Bunorgee* v. *Hovey*, 5 Mass. R. 22. *Van Reimsdyke* v. *Kane*, 1 Gallis. 630, and *Dougal* v. *Cowles*, 5 Day, 111—would seem to render it unnecessary that the promise to accept should be specifically descriptive of a bill or bills to be drawn in pursuance of such promise.)

[1]Eng. Com. Law Reps. iii. 367. [2]*Id.* xxiii. 38.

assent, but are capable of explanation, by evidence of the usual course of dealing (*h*), and the conduct of the parties.

Evidence is admissible to show that a bill with a cancelled acceptance upon it has been accepted by mistake (*i*). So proof may be given that a cheque has been cancelled by mistake, and it may be returned unpaid (*k*). Proof of acceptance by mistake.

By the custom of London, the drawee of a cheque coming through another banking-house, may retain it till five in the afternoon (*l*); but if a cheque be cancelled by mistake, it may be returned unpaid (*m*).

Where the defendant's notice to produce, in an action on the bill, described the bill as accepted by the defendant, it was held that proof of the attorney's hand-writing to the notice was sufficient *primâ facie* evidence of acceptance (*n*).

3dly. The performance of conditions precedent:—

Whether an acceptance be absolute or conditional is a question of law (*o*). Where it is conditional, the plaintiff must allege that the condition has been performed; as, where the condition is that a house shall be given up to the acceptor on a day specified (*p*); or if the condition has not been performed, a legal excuse must be averred (*q*) and proved accordingly; and *matter of excuse cannot be proved under an allegation of presentment (*r*), or that the event has happened upon which it is to become absolute (*s*) (A). Conditional acceptance. *209

(*h*) *Mason* v. *Barff*, 2 B. & A. 26. Where the usage was to return the bills accepted, provided the goods had been delivered and the carrier's receipt sent, and the parties had made a second application to have the bill accepted which they had before sent, and an answer was returned that the invoice had not been received, but was expected shortly, the Court held that they could not afterwards treat the detention of the bill as an acceptance. Where a bill was drawn on the defendant, an executor, by a minor, to whom a legacy was to be paid by the defendant in a few days, and the bill being left at the executor's for acceptance, he detained it for a considerable time, and afterwards destroyed it, Lord Ellenborough ruled that the detention and destruction of the bill amounted to an acceptance; but the Court of K. B. (Ld. Ellenborough *dissent.*) afterwards, on a motion to set aside the verdict, held, that inasmuch as it appeared from the plaintiff's conduct that he did not rely upon the detention of the bill as an acceptance, but had used other means to intercept the money, the defendant could not be considered to be liable as an acceptor. *Jeune* v. *Ward*,[1] 2 Starkie's C. 326; 1 B. & A. 653. Where the writing on the bill returned by the drawee is illegible, it has been doubted whether it should be declared on as an accepted or defaced bill. Bayley O. B. 88, 89. *Trimmer* v. *Oddie*, Ibid. *Paton* v. *Winter*, 1 Taunt. 420. And see *Thornton* v. *Dick*, 4 Esp. 270; Marius, 29, 30; *Bentinck* v. *Dorrien*, 6 East, 199; *Harvey* v. *Martin*, 1 Camp. 425, n.

(*i*) *Bentinck* v. *Dorrien*, 6 East, 199, *semble*. And see Bayley O. B. 88, 89; *Jeune* v. *Ward*,[1] 2 Starkie's C. 326; *Paton* v. *Winter*, 1 Taunt. 420, 3; *Raper* v. *Birkbeck*, 15 East, 17; *Fernandez* v. *Glynn*, 1 Camp. 426, n. *contra.*; *Thornton* v. *Dick*, 4 Esp. C. 270; *Trimmer* v. *Oddie*, Bayley O. B. 88. In *Cox* v. *Troy*,[2] 5 B. & A. 474, the Court held that a drawer might erase his acceptance previous to any communication of his acceptance of the bill.

(*k*) *Fernandez* v. *Glynn*, 1 Camp. 426, n. (*l*) 1 Camp. 426, n.; Str. 415, 416, 550.

(*m*) 1 Camp. 425; Bayley, O. B. 81, n. (*n*) *Holt* v. *Squire*,[3] 1 Ry. & M. 282.

(*o*) *Sproat* v. *Matthews*, 1 T. R. 182. Where *A.*, the joint consignee of goods in London, on being applied to accept a bill for the amount, refused to accept, because he did not know whether the ship would arrive at London or Bristol; on which *B.*, the holder, agreed to leave it, reserving the liberty of protesting in case *A.* did not accept; and on a second application *A.* said he would accept the bill even if the ship were lost; held, that this was a conditional acceptance, depending on two events, the ship's arrival in London, or being lost; and that *B.* having the liberty of refusing such conditional acceptance, could not afterwards note the bill for non-acceptance.

(*p*) See *Swan* v. *Cox*,[4] 1 Marsh, 176.

(*q*) *Leeson* v. *Pigott*, Bayley, O. B. 187. *Bowes* v. *Howe*,[5] 5 Taunt. 30.

(*r*) Ibid.

(*s*) Bayley, O. B. 44, n. c. *Sproat* v. *Matthews*, 7 T. R. 182. *Mason* v. *Hunt*, Doug. 299. *Smith* v. *Abbott*, Str. 1152. *Julian* v. *Shobrooke*, 2 Wilson, 9. *Pierson* v. *Dunlop*, Cowp. 571. Where the drawee of a bill on account of a cargo consigned to him, says it will not be accepted till the ship with the wheat arrives; upon arrival, it is an absolute acceptance. *Milne* v. *Prest*, 4 Camp. 393.

(A) (If a bill is accepted, "to be paid when in funds," the acceptor will not be bound until he shall be put in funds. *Andrews* v. *Baggs*, Minor, 173. *Campbell* v. *Pettengill*, 7 Greenl. 126. A drawee who has accepted a bill on condition that he can sell the drawer's goods before the bill becomes due, is not bound thereby, if before that time the drawee's goods are attached by his creditors. *Brown* v. *Coit*, 1 McCord, 408.

[1]Eng. Com. Law Reps. iii. 367. [2]*Id.* viii. 163. [3]*Id.* xxi. 439. [4]*Id.* iv. 333. [5]*Id.* i. 8.

The payee or other holder of a bill may consider a qualified acceptance as a nullity, and cause the bill to be noted; but if he note for non-acceptance he is precluded from afterwards insisting upon the transaction as an acceptance (*t*).

Where the purchaser of goods requested *A.* to accept a bill drawn in favour of the seller, and to draw on *B.* for the amount, and *A.* accordingly drew upon *B.* for the amount, and *B.* refused to accept the bill, it was held that the drawing the bill by *A.* upon *B.* did not amount to an acceptance by *A.* of the former bill, since he did not mean to make himself liable unless the bill he drew was accepted and paid (*u*).

The date written above the acceptor's signature upon a bill payable after sight is *primâ facie* evidence of the time of acceptance, although the date be in a different hand-writing; for it is usual for a clerk to write upon the bill the word "accepted," and the date, and for the drawee to write his name under the date (*v*).

In the case of *Rowe* v. *Young*, in the House of Lords, where a bill of exchange was specially accepted, payable at a particular place, proof of presentment there was held to be essential, though no place of payment was mentioned in the body of the bill (*w*).

But by the stat. 1 & 2 Geo. 4, c. 78, from and after the 1st day of August 1821, if a person shall accept a bill (*x*) payable at the house of a banker, or other place, without further expression in his acceptance, it shall be taken to be a general acceptance; but if the acceptor shall in his acceptance (which by sec. 2 must be in writing on the back of the bill) express that he accepts it at a banker's house or other place *only*, and not otherwise or elsewhere, such acceptance shall be taken to be a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place.

Under this statute, where a bill was accepted payable at a banker's, without exclusive words, the acceptor was not discharged by the omission to present it there, though the banker failed in the meantime (*y*); and it

(*t*) *Bentinck* v. *Dorrien*, 6 East, 199, 200.
(*u*) *Smith* v. *Nissen*, 1 T. R. 269.
(*v*) *Glossop* v. *Jacob*, 4 Camp. 227.
(*w*)[1] 2 B. & B. 165.
(*x*) A bill drawn in Ireland upon a person in England is not an inland bill, and may therefore be accepted without writing on such bill, notwithstanding the above statute. But that section, as well as 9 Geo. 4, c. 24, s. 8, applies to bills drawn in Ireland upon persons there. *Mahoney* v. *Ashlin*,[2] 2 B. & Ad. 478.
(*y*) *Tower* v. *Hayden*,[3] 4 B. & C. 1.

Where drafts drawn by a mail contractor on the Postmaster-General were accepted "on condition that the contracts be complied with," and were afterwards discounted for value, it was held that the terms were not retroactive, but referred to the subsequent performance of the contractor. It matters not what an acceptor means by a cautious and precise phraseology, if it be not expressed as a condition, nothing out of the expressed condition can be inferred. *The United States* v. *The Bank of the Metropolis*, 15 Peters, 377. A memorandum affixed at the bottom of a promissory note, "one half payable in 12 months and the balance in 24 months" before its delivery is a part of the contract. *Heywood* v. *Perrin*, 10 Pick. 228. As against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, no demand of payment at the place designated is necessary to sustain an action upon the instrument. *Bank of the United States* v. *Smith*, 11 Wheat. 171. *Foden* v. *Sharp*, 4 John. R. 183. *Walcott* v. *Van Santvoord*, 17 John. R. 248. *Caldwell* v. *Cassedy*, 8 Cow. 271. *Adm'rs. of Conn* v. *Ex'rs. of Gano*, 1 Ohio, R. 484. *McNairy* v. *Bell*, 1 Yerger, 502. See also *Fleming* v. *Potter*, 7 Watts, 380. Contra *Palmer* v. *Hughes*, 1 Blackf. 329. But the demand in such a case need not be shown to have been made on the precise day on which the note fell due; it should however appear to have been made before the commencement of the suit. *Ibid.* See also *Erwin* v. *Adams*, 2 Louis, R. 318. So in *Picquet* v. *Curtis*, 1 Sumner, 481, it was held that in the case of foreign bills of exchange, payable at a particular place, no action could be maintained against the acceptor, until after a demand and dishonour. *Semble*, that the same principle would embrace inland bills. *Ibid.* It would seem, however, that in every case the want of such demand is matter of defence to be averred and proved by the defendant, the affirmative of which need not be averred or shown by the plaintiff. *Foden* v. *Sharp; Walcott* v. *Van Santvoord.*)

[1]Eng. Com. Law Reps. vi. 53. [2]*Id.* xxii. 127. [3]*Id.* x. 259.

has been held, subsequently to the above statute, that though a place of payment be mentioned in the body of a bill of exchange, as where the bill is drawn payable to the drawer's order in London, no proof of presentment is necessary (*z*).

If a promissory note be made payable at a particular place, presentment there is still necessary (*a*).

*If a note be made payable at a particular house, a demand there is a demand upon the maker (*a*). *210

4thly. Where a bill is drawn with the payee's name in blank, and the plaintiff inserts his own name as payee, he must adduce evidence to show that he was intended as the payee (*b*). Identity of payee.

If a note be payable to *A.* in trust for *B.*, *A.* is the legal owner, and may sue upon the bill (*c*).

Where a note or bill is payable to the *bearer*, or where it has been indorsed in blank, the mere possession of the bill or note is *primâ facie* evidence of the property in it (*d*).

(*z*) *Fayle* v. *Bird*,[1] 6 B. & C. 531. *Selby* v. *Eden*,[2] 3 Bing. 611. *Gibb* v. *Mather*, 2 C. & J. 254.

(*a*) *Sanderson* v. *Judge*, 2 H. B. 509. *Jamieson* v. *Bowes*, 14 East, 500, (*a*). *Dickenson* v. *Bowes*, 16 East, 110. Previous to the decision in *Rowe* v. *Young*,[3] 2 B. & B. 165, in the House of Lords, where no place of payment was specified on a bill of exchange, a special acceptance of the bill, making it payable at a particular place, was regarded by the Court of K. B. as a mere memorandum inserted for the purpose of apprizing the holder where he might apply for his money, and not as a condition restricting the general liability of the acceptor. *Fenton* v. *Goundry*, 13 East, 459; 2 Camp. 656. *Lyon* v. *Sundius*, 1 Camp. 423. But the contrary had been decided in the Common Pleas. *Ambrose* v. *Hopwood*, 2 Taunt. 61, and *Callaghan* v. *Aylett*, 2 Camp. R. 549; where it was held, that in case of a special acceptance, a presentment at the particular place was necessary. See *Huffan* v. *Ellis*, Bay. O. B. 98. See also *Sanderson* v. *Bowes*, 14 East, 500; Bay. O. B. 96; *Sanderson* v. *Judge*, 2 H. B. 509. In *Gammon* v. *Schmoll*,[4] 5 Taunt. 344; 1 Marsh. 80, it was held, that if a drawee accept a bill payable at a particular place, the holder is not bound to receive it, but may resort to the drawee, as in case of non-acceptance; but that if the holder accept it, the acceptance interposes a condition precedent.

Where the bill or note is payable at a particular place, a presentment and demand must be alleged, unless a discharge be shown on the face of the declaration. *Bowes* v. *Howe*,[5] 5 Taunt. 30. And an allegation that the makers of a note had become insolvent, and had ceased, and wholly declined and refused to pay at the place specified any of their notes, does not show a discharge of presentment and demand. Ibid. 34. But see *Howe* v. *Bowes*, 16 East, 112; where it was held, that if the makers had become insolvent, and shut up and abandoned their shop, it was evidence of a declaration to all the world of their refusal to pay their notes there.

A promissory note, promising to pay so much at the defendant's banking-house, must be presented there. *Dickenson* v. *Bowes*, 16 East, 110. By the acceptance of the bill the drawee recognizes and adopts the place of payment specified in the bill. *Gray* v. *Milner*,[6] 3 Moore, 90.(A)

(*a*) *Saunderson* v. *Judge*, 2 H. B. 509. In an action against the maker of a note payable at Guildford, a presentment at a banking-house at Guildford is a presentment to the defendant, although he lived in London. *Hardy* v. *Woodroofe*,[7] 2 Starkie's C. 319. Notice to the acceptor is unnecessary, even although the banker at whose house the note is payable has effects of the acceptor in his hands. *Smith* v. *Thatcher*,[8] 4 B. & A. 200. *Teacher* v. *Hinton*,[9] 4 B. & A. 413. *Edwards* v. *Dick*,[10] 4 B. & A. 212. So in an action by the drawer against the acceptor of a bill payable at a banker's, presentment there is unnecessary, and the omission to present affords no defence. *Rhodes* v. *Gent*,[11] 5 B. & A. 244. The acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and a refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. *Hoare* v. *Cazenove*, 16 East, 391.

(*b*) *Crutchley* v. *Mann*,[12] 1 Marsh, 29. And held, that a letter from the acceptor, promising to accept the bill, with the address torn off, was not evidence to prove the fact. (*Ibid.*) And held also, that the letter, had it been efficient, would have required a stamp. And see *Parkins* v. *Hawkshaw*,[13] 2 Starkie's C. 239; B. N. P. 171; *Myddelton* v. *Sandford*, 4 Camp. 34. *Corfield* v. *Parsons*, 1 C. & M. 730; *Bulkely* v. *Butler*,[14] 2 B. & C. 441; *Roach* v. *Oastler*, 1 Man. & B. 120.

(*c*) *Smith* v. *Kendal*, 1 Esp. C. 231; 6 T. R. 112. *Evans* v. *Cramlington*, Carth. 5; 2 Show. 507; 2 Vent. 309; Skinner, 264.

(*d*) Per Lord Mansfield, Doug. 632; Bayley, 116; Chitty, 278, 289. *King* v. *Milsom*, 2 Camp. 5. See 2 Saund. 47. *Blackham's Case*, 1 Salk. 290. *Paterson* v. *Hardacre*, 4 Taunt. 115; 13 Ves. 49.

(A) [See cases, English and American, collected by Mr. Howe, in a note to *Roche* v. *Campbell*, 3 Camp. 248. See also *Carley* v. *Vance*, 17 Mass. Rep. 389. 2 Phillips on Ev. 26, 27—and American Editor's notes.]

[1]Eng. Com. Law Reps. xiii. 246. [2]*Id.* xiii. 70. [3]*Id.* vi. 53. [4]*Id.* i. 128. [5]*Id.* i. 8. [6]*Id.* iv. 265. [7]*Id.* iii. 363. [8]*Id.* vi. 400. [9]*Id.* vi. 468. [10]*Id.* vi. 405. [11]*Id.* vii. 84. [12]*Id.* i. 179. [13]*Id.* iii. 332. [14]*Id.* ix. 133.

Proof of a promissory note payable to *A. B.* generally, is *primâ facie* evidence of a promise to *A. B.* the father, and not to *A. B.* the son, their names being the same; but *A. B.* the son, although described in the declaration *as *A. B.* the younger, bringing the action, and being in possession of the note, is entitled to recover upon it (*e*). *211

If a payee annex a condition to his indorsement before acceptance, the drawee who afterwards accepts the bill is bound by the condition; and if the condition be not performed, the right of action reverts to the payee, and he may recover against the acceptor (*f*).

A bill payable to the order of *A.*, is payable to *A.* if he make no order, and none is to be presumed (*g*).

Admissions. A promise to pay the amount of a bill, or part-payment of it, is an admission of the acceptance (*h*). An acknowledgment by one of several acceptors, of his own liability, is not evidence against the rest (*i*); but it is of his own, although made during a treaty for negotiation (*k*). Although the defendant on being applied to for payment, but without seeing the bill, desired the holder of the bill to call again, it was held that he might still prove that his acceptance had been forged; but on proof that he had on former occasions paid several similar bills drawn by the same person, *Taylor*, upon which, *Taylor*, who was connected with the defendant in business, had, it was supposed, written the defendant's name, it was held that the defendant had adopted the acceptance, and was liable on the bill (*l*).

If the acceptance of a bill appear on the face of it to have been cancelled, the plaintiff may still show that it was cancelled by mistake (*m*).

Stamp. Before the bill is read the defendant may object the want of a proper stamp (*n*); or that the note or bill appears to have been cancelled, so as to throw upon the plaintiff the burthen of giving evidence in explanation; as to show that the apparent cancellation was accidental, or resulted from mistake (*o*). The defendant cannot insist on reading an indorsement upon the note, which is no part of the note itself (*p*); and a witness called to prove the hand-writing of a maker of a note cannot be cross-examined as to an indorsement to which there is an attesting witness (*q*).

Variance. In general, an allegation descriptive of the bill must be precisely proved, because a variance shows that the instrument produced is a different one from that declared on; but it is sufficient if an averment, according to the substance and effect, be substantially proved (*r*).

Where a bill or note appears to have been altered, it lies on the party producing it to show that the alteration was not improperly made (*s*).

(*e*) *Sweeting* v. *Fowler*,[1] 1 Starkie's C. 106. (*f*) *Robertson* v. *Kensington*, 4 Taunt. 30.
(*g*) *Smith* v. *M'Clure*, 5 East, 476. (*h*) *Jones* v. *Morgan*, 2 Camp. 474.
(*i*) 2 T. R. 613; 3 Esp. 360; 4 Esp. C. 226; Doug. 651; 1 Esp. C. 135; B. N. P. 273; Str. 640. 1051; 12 Mod. 309.
(*k*) 1 Esp. C. 143, B. N. P. 236. Vide *infra*, PRESUMPTIVE EVIDENCE.
(*l*) *Barber* v. *Gingell*, 3 Esp. C. 60.
(*m*) *Raper* v. *Birkbeck*, 15 East, 17. And see below, ALTERATION, &c. {See *Bogart* v. *Nevins*, 6 Serg. & Rawle, 361.}
(*n*) See tit. STAMP.
(*o*) See *Raper* v. *Birkbeck*, 15 East, 17; and see Ind. tit. CANCELLATION. As to the question whether a drawee can cancel his acceptance before re-delivery, see *Bentinck* v. *Dorrein*, 6 East, 199.
(*p*) *Stone* v. *Metcalf*,[2] 1 Starkie's C. 53. (*q*) *Ibid.*
(*r*) See tit. VARIANCE. And see the late stat. Where the declaration alleged a special acceptance, payable at a certain place, "and not elsewhere," which latter words were not on the bill; it was held to be an allegation of a special acceptance, and the variance fatal, but that the sheriff was bound to have allowed the record to be amended as to such variance, and a new trial was granted. *Higgins* v. *Nicholls*, 7 Dowl. (P. C.) 551.
(*s*) *Henman* v. *Dickenson*,[3] 5 Bing. 183. Where it was left to the jury to say, from the nature of a blot appearing on the alteration, whether the alteration was made at the time of making the note, and the jury

[1] Eng. Com. Law Reps. ii. 316. [2] *Id.* ii. 292. [3] *Id.* xv. 409.

*In the case of a note payable by instalments, where the days of payment are described in the declaration, a variance in one of the days of payment is fatal (*t*). In date.

If the bill be alleged to have been *made* on the 3d, and the bill produced bear date on the 6th, the variance is not material; and it is unnecessary to prove that the bill was really made on the 3d (*u*). But a variance from the date of the bill, as alleged in the declaration, is fatal (*x*).

A variance as to the names of parties is fatal, where the allegation operates as a description of the bill; but otherwise, as it seems, where it merely relates to the names of the parties to the action, who might have pleaded the misnomer in abatement, provided the identity be proved (*y*). Where a bill was alleged to have been drawn by *Crouch*, (no party to the action,) and the bill itself appeared to have been drawn by *Couch*, the variance was held to be fatal (*z*). And where in an action against three as the makers of a note, the declaration alleged it to have been made by William Austin, Robert Strobell, and William *Shutliff*, of whom, the two latter were outlawed in the action, and the bill, on the trial against the third, appeared to have been drawn by William Austin, *Samuel* Strobell, and William *Shirtliff*, the variance was held to be fatal. In this case no evidence was given to prove the identity of the parties (*a*). But where the declaration was against *Thomas Ray* and others, as the joint makers of a note, and Thomas Ray suffered judgment by default, and the note was proved to have been signed by J. Hodgson for Rowes, J. Hodgson, *Ray* & Co., and the real name of the partner was *John Rey*, it was objected that Thomas Ray the party sued was not a partner; but proof being given that *John Rey*, the party intended to be sued, had actually been served with process, and was a co-partner with the other defendants, the variance in the christian names was held to be immaterial, and the variance in the surnames Ray and Rey was held to be immaterial, their pronunciation being similar (*b*). In names.

Where an action was brought by Willis, as the payee of a note, and on production the note was payable to Willis*on*, evidence was admitted on the part of the plaintiff to show that she was the party really meant, and to explain the mistake (*c*).

Where a bill is drawn with the payee's name in blank, and it is stated in the declaration that *A. B.* (a *bonâ fide* holder, who has inserted his own name) was the payee, it is no variance (*d*).

finding that it was so made, the Court directed a nonsuit to be entered. *Knight* v. *Clements*, Q. B. T. T. 1838. Roscoe on Ev. 201.

(*t*) *Wells* v. *Girling*,[1] 3 Moore, 79; 1 Gow. 21.

(*u*) 1 Camp. 307. And see *Pasmore* v. *North*, 13 East, 517, where the note was issued and indorsed by the payee, who died before the day of the date.

(*x*) *Coxon* v. *Lyon*, 2 Camp. 308; Fitz. 130.

(*y*) See tit. VARIANCE; and see *Boughton* v. *Frere*, 3 Camp. 29. *Mayor, &c. of Stafford* v. *Bolton*, 1 B. & P. 40. *Jowett* v. *Charnock*, 6 M. & S. 45. The general rule seems to be, that if the identity of the parties be proved, a variance in their names is immaterial. A description of the plaintiffs as executors and trustees of *A. B.* is mere surplusage, the bill being payable to them in the name of a firm which they had assumed. *Aguttar* v. *Moses*,[2] 2 Starkie's C. 449. [See Mr. Howe's note to *Boughton* v. *Frere*, 3 Camp. 30.] (1)

(*z*) *Whitwell* v. *Bennett*, 3 B. & P. 559.

(*a*) *Gordon* v. *Austin*, 4 T. R. 611.

(*b*) *Dickenson* v. *Bowes*, 16 East, 110.

(*c*) *Willis* v. *Barrett*,[3] 2 Starkie's C. 26. Note, the declaration alleged a promise to pay Willis by the name of Willison. As to the admissibility of parol evidence to remove a latent ambiguity, see tit. PAROL EVIDENCE.

(*d*) *Atwood* v. *Griffin*, R. & M. 425. A variance between the real name of a payee and indorser, and that alleged in the declaration, and which appears on the bill, is immaterial. *Forman* v. *Jacob*,[4] 1 Starkie's C. 47.

(1) See the examples put by Duncan, J. *Conner* v. *Gillespie*, 7 Serg. & Rawle, 479.

[1]Eng. Com. Law Reps. iv. 264. [2]*Id.* iii. 488. [3]*Id.* iii. 229. [4]*Id.* ii. 288.

In parties to the bill.

A declaration, alleging a note to have been made by *A.* and *B.* is not satisfied by evidence of a note given by *A.* alone, to secure a partnership *213 *debt (*e*); but it would be otherwise if *A.* had prefixed to his signature, "for *A.* and *B.*" (*f*). Proof that others joined with the defendant in drawing, accepting, or indorsing the bill, is immaterial under the general issue, but is pleadable in abatement (*g*).

An undertaking to provide for the acceptance of a bill is not a promissory note (*h*).

An allegation that a bill is payable to *A.*, is proved by a bill payable to the order of *A.* (*i*).

If a bill be made payable at a particular place, it is a variance to state it without that qualification (*k*).

But it is no variance when the place of payment is merely mentioned at the foot of the note (*l*). And in such case it has been held, that an allegation of being payable there was a variance (*m*).

In legal effect.

It is essential that the bill read in evidence should agree in *legal effect*, as well as in words, with that specified in the declaration; and therefore, where the bill proved was drawn in Dublin for payment in currency, but there was nothing in the declaration to show that Irish currency was meant, the variance was held to be fatal (*n*). The omission of the word sterling is immaterial (*o*). A memorandum indorsed on a note after it has been signed, stating it to have been given on a condition mentioned in an agreement referred to in the memorandum, is a mere ear-marking of the note, and does not incorporate the agreement (*p*). Where the variance arises in consequence of any artifice in framing the bill, as by the introduction of some words in small characters, or by the use of illegible marks (*q*) for the purpose of deceit, the variance is almost immaterial (*r*).

Where the declaration was on a bill of exchange, and the instrument given in evidence contained the word *at*, inserted before the drawee's name, it was held that it was no variance (*s*).

An allegation that the defendant made the note, "his own proper handwriting being thereunto subscribed," may be rejected as surplusage, and proof that it was made by another with his authority is sufficient (*t*).

Where the declaration stated the making and acceptance, and it appeared that the acceptance had been written before the bill was drawn, it was held to be no variance (*u*).

Direction.

An allegation that the bill was directed to the defendant is not supported by proof of a bill drawn payable to the drawer's order at a certain place named, although the defendant, when it was presented there, wrote his name upon it as the acceptor (*x*).

(*e*) 2 Camp. 308; 15 East, 7. (*f*) 1 Camp. 403. {See *Rossiter* v. *Marsh*, 4 Conn. Rep. 196.}

(*g*) *Mountstephen* v. *Brooke*, 1 B. & A. 224. And see *Richards* v. *Heather*, 1 B. & A. 29; and *Evans* v. *Lewis*, 1 Will. Saund. 291, *d.* n.

(*h*) Peake's C. 24. (*i*) *Smith* v. *Maclure*, 5 East, 476.

(*k*) Bayley on Bills, 310. *Roche* v. *Campbell*, 3 Camp. 247. *Hodge* v. *Fillis*, 3 Camp. 463.

(*l*) *Williams* v. *Waring*,[1] 10 B. & C. 2. *Price* v. *Mitchell*, 4 Camp. 200. Where the memorandum at the foot of the note was printed, Ld. Ellenborough considered the place to be part of the contract. *Trecothick* v. *Edwin*,[2] 1 Starkie's C. 468.

(*m*) *Exon* v. *Russel*, 4 M. & S. 585. But see *Sproule* v. *Legg*,[3] 3 Starkie's C. 157. *Hardy* v. *Woodroofe*,[4] 2 Starkie's C. 319.

(*n*) *Kearney* v. *King*, 2 B. & A. 301. *Sproule* v. *Legg*,[5] 1 B. & C. 18. (*o*) *Ibid.*

(*p*) *Brill* v. *Criche*, 1 M. & W. 232. (*q*) *Allan* v. *Mawson*, 4 Camp. 115.

(*r*) Where the word *at* was inserted before the drawer's name, the instrument was held to have been properly described as a bill of exchange. *Shuttleworth* v. *Stevens*,[6] 1 Camp. 402. And see *Edis* v. *Bury*, 6 B. & C. 433. (*s*) Dougl. 651; and see note (*r*).

(*t*) *Booth* v. *Grove*,[7] 1 Mood. & M. 182, and 3 C. & P. 335. This was formerly doubted. 2 Camp. 305.

(*u*) *Molloy* v. *Delves*,[8] 7 Bing. 428; 4 C. & P. 492. (*x*) *Gray* v. *Milner*,[9] 2 Starkie's C. 336.

[1]Eng. Com. Law Reps. xxi. 11. [2]*Id.* ii. 470. [3]*Id.* xiv. 174. [4]*Id.* iv. 363. [5]*Id.* viii. 11. [6]*Id.* xiii. 227. [7]*Id.* xix. 28. [8]*Id* xx. 190. [9]*Id.* iii. 372.

*In an action against the acceptor on a bill directed to him, or, in his absence, to J. S., the conditional direction need not be stated (*y*). Variance.

Where the allegation was, that the bill was for value *received* in leather, and the evidence was that it was for value *delivered* in leather, it was held to be no variance (*z*): but if the bill be drawn in the usual form for value received (which means by the *drawer*), and the declaration allege it as value received by *the drawee*, the variance is material (*a*) (A). Consideration.

It seems that an allegation of the delivery of the bill to the payee may be rejected as surplusage (*b*). Delivery.

If the acceptance of the bill be unnecessarily alleged in an action against the drawer, it need not be proved (*c*).

Where the writing of the drawee upon the bill is not legible, it has been doubted whether it is to be considered as an accepted or as a defaced bill (*d*).

Indorsements unnecessarily alleged must be proved (*e*). If there be no date to the indorsement, a variance from the allegation that the bill was indorsed before it became due will not be material (*f*). Indorsements.

Upon a declaration against *B.* as an indorser of the bill, it appeared in evidence that the bill had been indorsed to *B.* in blank, and that *B.* without writing his own name, had converted the blank indorsement into a special indorsement to the plaintiff, and it was held that *B.* was not liable as indorser (*g*).

In the case of general acceptance, it is not necessary to allege or prove a presentment (*h*).

Although the declaration allege a presentment by a person specified, it is sufficient to prove a presentment by another (*i*). A variance as to the time of presentment and acceptance is not material, even although the bill be payable after sight (*k*). Presentment.

If presentment be alleged to have been made when the bill was due and payable, the day alleged under a *videlicet* will not be material, although it be on a Sunday (*l*).

The *indorsee* of a note or bill, in an action against the *maker or acceptor*, must prove, 1st, the *making* of the note, or the *drawing* and *acceptance* of Indorsee *v.* maker or acceptor.

(*y*) 12 Mod. 447. Bayley on Bills, 390.

(*z*) Bayley, O. B. 16, n. *Jones* v. *Mars*, 2 Camp. 305.

(*a*) *Highmore* v. *Primrose*, 5 M. & S. 65. *Priddy* v. *Henbrey*,[1] 1 B. & C. 675.

(*b*) *Smith* v. *Maclure*, 5 East, 476; 7 T. R. 596. (*c*) *Tanner* v. *Bean*,[2] 4 B. & C. 312.

(*d*) Bayley, O. B. 88; Chitty, 204, n. 9; 6 East, 199; 1 Taunt. 420.

(*e*) *Wayman* v. *Bend*, 1 Camp. 175; *R.* v. *Stevens*, 5 East, 244. *Williamson* v. *Allison*, 2 East, 446. *Peppin* v. *Solomon*, 5 T. R. 496.

(*f*) *Young* v. *Wright*, 1 Camp. 139.

(*g*) *Vincent* v. *Hurlock*, 1 Camp. 442. Where a note contains in the body of it, and not merely in a memorandum at the foot, a promise to pay at a particular place, a presentment at such place must be proved, but notice of dishonour to the maker is unnecessary. *Pearce* v. *Pemberthy*, 3 Camp. 261. A note payable at two places may be presented at either. *Beeching* v. *Gower*,[3] Holt's C. 313. A promissory note being in the following form, "I promise to pay *M. A. D.*, or bearer, on demand, the sum of 10*l. at sight*," a presentment for sight was held to be necessary. *Dixon* v. *Nuttall*, 1 C. M. & R. 307. Where a note is payable on demand, a demand need not be alleged or proved; the action itself is a demand. *Rumball* v. *Bull*, 10 Mod. 38.

(*h*) *Turner* v. *Hayden*,[4] 4 B. & C. 1. *Secus*, in case of a qualified acceptance. *Rowe* v. *Young*,[5] 2 B. & B. 185. Where an acceptance, under the st. 1 and 2 Geo. 4, c. 78, is general, and the holder neglects to present it, and the bankers fail with money of the acceptor's in their hands, the acceptor is not discharged. *Turner* v. *Hayden*,[4] 4 B. & C. 1.

(*i*) *Boehm* v. *Campbell*,[6] 1 Gow's C. 55. *Bolton* v. *Dugdale*,[7] 4 B. & Ad. 619.

(*k*) *Forman* v. *Jacob*,[8] 1 Starkie's C. 46. (*l*) *Bynner* v. *Russel*,[9] 1 Bingh. 23.

(A) (See ante Assumpsit—*variance.*)

[1]Eng. Com. Law Reps. viii. 179. [2]*Id.* x. 340. [3]*Id.* iii. 117. [4]*Id.* x. 259. [5]*Id.* vi. 53. [6]*Id.* v. 459. [7]*Id.* xxiv. 125. [8]*Id.* ii. 228. [9]*Id.* viii. 230.

*the bill by the defendant. 2dly, *presentment*, where necessary. These proofs, and the effect of variance, have been already stated. 3dly, he must prove his own *title* to it by *transfer*; and 4thly, in some instances, must show that he gave *value* for it.

Title by transfer.

3dly. His title to the bill.—In the first place, it must appear from the bill itself that it is a *negotiable* instrument, which is a pure question of law (*m*); and next he must prove that the bill or note has been transferred to him.

An indorsement is equivalent to a new drawing. If after a special indorsement, and before the special indorsee signs his name, the defendant indorses the bill, and then the special indorsee indorses it, he may sue the defendant, and no new stamp is requisite (*n*).

Transfer by indorsement.

Where the bill or note is not payable to the bearer, but to a particular person, or to his order, an indorsement *in writing* made by that person, or by his authority, is essential to the transfer: and therefore, evidence of that person's hand-writing or of another person (*o*) proved to be his authorized agent, is essential to prove the transfer (*p*) (B).

(*m*) 3 Burr. 1523, 1526, 1528; but see *Grant* v. *Vaughan*, Burr. 1516, where Lord Mansfield left this question to the jury. (*Vid. infra*, tit. CUSTOM.) A bill or note payable on a contingency cannot be declared on as a negotiable instrument. *Haussoullier* v. *Hartsincke*, 7 T. R. 733. *Collis* v. *Emmett*, 1 H. B. 313. *Hill* v. *Halford*, 2 B. & P. 413. *Blanckenhagen* v. *Blundell*, 2 B. & A. 417. See *Trier* v. *Bridgman*, 2 East, 359; *Carlos* v. *Fancourt*, 5 T. R. 482; *Colehan* v. *Cooke*, Willes, 393. An instrument acknowledging the receipt of an acceptance, and containing an undertaking to provide for it, is not a promissory note, and requires a receipt stamp. *Scholey* v. *Walsby*, Peake's C. 24. See *Williamson* v. *Bennett*, 2 Camp. C. 417; also *Leeds* v. *Lancashire*, 2 Camp. 205, in the note.) If a note, before it is signed, be indorsed with a memorandum that it shall be void on the happening of a contingent event, it is not within the stat. 3 and 4 Ann. c. 9. *Hartley* v. *Wilkinson*, 4 Camp. 127. But a defeasance indorsed by the payee on the instrument is no part of the contract, unless proved to have been made at the same time. *Stone* v. *Metcalf*,[1] 1 Starkie's C. 53. *I promise to pay*, signed by two persons, is a joint and several note. *March* v. *Ward*, Peake's C. 130. [*Hunt* v. *Adams*, 6 Mass. Rep. 519, acc.] A note payable to *A.* only, without the words, bearer or order, is a valid note. *Smith* v. *Kendall*, 1 Esp. C. 231; 6 T. R. 123. *Burchell* v. *Slocock*, 2 Ld. Raym. 1545. *Moor* v. *Paine*, C. T. Hard. 238. A request to pay 15*l.* out of half-pay which will become due in January, is not a promissory note. *Stevens* v. *Hill*, 5 Esp. 247.) And see *Evans* v. *Underwood*, 1 Wills. 262. *Jenny* v. *Herle*, 2 Ld. Raym. 1362; 1 Str. 591; 8 Mod. 25. *Josselyn* v. *L'Acier*, 10 Mod. 294, 316 (A).

(*n*) *Penny* v. *Innes*, 1 C. M. & R. 439.

(*o*) An authority to draw does not of itself import an authority to indorse bills, but is evidence to go to a jury. *Prescott* v. *Flinn*,[2] 9 Bing. 19. There the clerk of the payees had been accustomed to draw bills and cheques for them, and had been in one instance authorized to *indorse* a bill, and had in two other instances indorsed bills which had been discounted by the payees at their banker's, and the jury were held to be warranted in finding a general authority.

(*p*) Skinn. 411; 1 Atk. 282; 1 Burr. 674; 3 East, 482, *infra*, 163. *A.*, the indorsee of a bill of exchange, indorses it "pay to *B.*, or his order, for my use." *B.*'s banker discounts the bill for *B*, and applies the proceeds for *B.*'s use; the property in the bill remains in *A.*, and he may maintain an action against the bankers for the amount. *Sigourney* v. *Lloyd*,[3] 8 B. & C. 662. As to the transfer in a foreign country of a bill or note made in England, see *Chaumette* v. *The Bank of England*.[4] 9 B. & C. 208. A bank of England note is transferable in France under the stat. 3 and 4 Anne, c. 9. Where a set of foreign bills, drawn abroad, were sent to the drawee, the defendant who accepted two parts, and indorsed one to the plaintiff for value, prior to which the other had been indorsed by the defendant to his father conditionally, but who had never insisted on payment, but gave it up on the substitution of other securities; held, that the plaintiff was entitled to recover; and per Tenterden, L. C. J. and Parke, J., it would have been the same if the first

(A) (It is essential to a bill, that it be payable in money only, at all events, and not out of a particular fund. *Reeside* v. *Knox*, 2 Whart. 233. *Cook* v. *Satterlee*, 6 Cow. 108. *Tucker* v. *Maxwell*, 11 Mass. R. 143. *Wooley* v. *Sergeant*, 3 Halst. 262. *Nichols* v. *Davis*, 1 Bibb, 490. *Mills* v. *Kuykendall*, 2 Blackf. 47. *Looney* v. *Pinckston*, 1 Tennessee R. 384. *Lawrence* v. *Dougherty and Gwin*, 5 Yerger's R. 435. A note to be paid "in the office notes of a bank," is not negotiable by the usage or custom of merchants. *Irvine* v. *Lowry*, 14 Peters, 293. A note payable "in current bank notes," is not a negotiable note. *Gray* v. *Donohue*, 4 Watts, 400. But it has been held in Ohio, that a note promising to pay in current money, at a given time, a specific sum, unless the drawer takes "it out in store goods at the same rate," is a promissory note, importing in itself a consideration. *Dugan* v. *Campbell*, 1 Ohio R. 118. See also *Byington* v. *Geddings*, 2 Ohio R. 228.)

(B) (When a note is made payable to *C.*, as agent of *D.*, the legal title and interest in the note, is in C. *Cocke* v. *Dickens*, 4 Yerger's R. 29.)

[1]Eng. Com. Law Reps. ii. 292. [2]*Id.* xxiii. 246. [3]*Id.* xv. 319. [4]*Id.* xvii. 356.

*Where all the indorsements through which the plaintiff claims are special, they must all be alleged and proved by evidence of the hand-writing of the different indorsers, or of admissions on the part of the defendant (*q*).

Where the first, or any subsequent indorsement, is made in blank, the indorsee may claim immediately under that indorsement, although after the blank indorsement there be one or more special indorsements (*r*). Where, however, the intermediate indorsements are alleged in the declaration, they must all be proved (*s*), even although they were upon the bill at the time of acceptance (*t*). The hand-writing of the first indorser must be proved, although he was the drawer (*u*), and although his name was on the bill at the time of acceptance (*v*); and therefore the indorsee of a bill payable to a fictitious payee cannot recover against the acceptor, unless he can prove that the acceptor knew that the payee was fictitious, or that the money found its way into his hands (*x*).

Proof that the indorsement is in the hand-writing of another person of the same name with the payee is not sufficient, for it is a forgery, and a title to the bill cannot be derived through the medium of forgery (*y*). Neither can an indorsee recover where it appears that the first indorsement (through which he must derive his title) was made upon an usurious consideration (*z*). But where the defendant accepted bills drawn in fictitious names, and it was shown that the hand-writing of the supposed drawer and *indorser were the same, it was held that such evidence was admissible, and that a party accepting, without inquiry as to the reality of the person drawing, must be considered as undertaking to pay to the signature of the person actually drawing the bills (*a*). *217

An indorsement by a trader after his bankruptcy is good, if he has re-

part had been indorsed and delivered unconditionally. *Holdsworth* v. *Hunter*,[1] 10 B. & C. 449. So if a bill be drawn and issued in blank as to the name of the payee, it may be filled up by a *bona fide* indorser with his own name. *Cruchley* v. *Clarance*, 2 M. & S. 90. *Attwood* v. *Griffin*,[2] 1 Ry. & M. 425. *Edie* v. *East India Company*, Burr. 1216. A party to whom the bill is indorsed, for the purpose of procuring payment, may sue, although he is indebted to the indorsee, although no authority be given to bring the action. *Adams* v. *Oakes*,[3] 6 C. & P. 70. Or the indorser may sue. *Stovern* v. *Butt*, 2 C. & M. 416. So an indorsee by way of gift may sue an acceptor for value. *Heydon* v. *Thompson*,[4] 3 N. & M. 319. No indorsement is admitted by the acceptance. *Smith* v. *Chester*, 1 T. R. 654. Although the indorsement was on the bill at the time of the acceptance. *Bosanquet* v. *Anderson*, 6 Esp. C. 43. Where a bill is drawn and indorsed by procuration, the acceptance admits only the drawing, not the procuration. *Robinson* v. *Yarrow*,[5] 7 Taunt. 455. See *Hankey* v. *Wilson*, *infra*, 219 (*k*); and see *Bousanquet* v. *Anderson*, 6 Esp. C. 43, where Lord Ellenborough held, that though a drawee accept a bill with many names upon it, they must be proved.

(*q*) See *Sidford* v. *Chambers*,[6] 1 Starkie's C. 326.

(*r*) 1 B. & P. 658; 4 Esp. C. 210; 1 Esp. C. 180. *Smith* v. *Clarke*, Peake, 225; Bay. O. B. 48. But the intermediate indorsements must either be proved or struck out, per Abbot, C. J. *Cocks* v. *Borrodaile*, Chitty, 302, 7th edit., citing the opinion of Bayley, J. The indorsements may be struck out after the bill has been put in evidence. *Mayer* v. *Jadis*, 1 Mo. & R. 247.

(*s*) 1 T. R. 654; *Wayman* v. *Bend*, 1 Camp. 175. *Bosanquet* v. *Anderson*, 6 Esp. C. 43.

(*t*) 1 T. R. 654; 6 Esp. 43. In *Jones* v. *Radford*, 1 Camp. 83, Lord Ellenborough is stated to have held, that an indorsement in such a case by one person, in the name of himself and a supposed partner, was evidence against the acceptor after the indorsement, to prove the partnership, which was disputed at the trial; this, however, cannot be supported without going the full length of contending that the acceptance operates as an admission of the regularity of the indorsement altogether. See *Carvick* v. *Vickery*, Doug. 653.

(*u*) *Macferson* v. *Thoytes*, Peake's C. 20; Doug. 650, 653.

(*v*) 6 Esp. C. 43; 1 T. R. 654; Doug. 630; Peake's C. 225; 3 T. R. 175, 176; 4 T. R. 28.

(*x*) 1 Camp. 130; 3 Bro. 238; Co. B. L. 184, 5; 1 H. B. 313, 569, 625; Cullen, 98; *Gibson* v. *Minet and another*, 3 T. R. 481; 2 H. B. 187, 211. The plaintiff in such case may declare as on a bill payable to the bearer (3 T. R. 481; 1 H. B. 569, 625; 2 H. B. 187, 211, 288, 298); or, *semble*, as on a bill payable to the order of the drawer, or on a count stating the special circumstances. *Ibid.*

(*y*) *Mead* v. *Young*, 4 T. R. 28, by three Justices, Ld. Kenyon, C. J. *dissentiente*.

(*z*) *Lowes* v. *Mazzaredo*,[7] 1 Starkie's C. 385. (*a*) *Cooper* v. *Meyer*,[8] 10 B. & C. 468.

[1]Eng. Com. Law Reps. xxi. 110. [2]*Id.* xii. 176. [3]*Id.* xxv. 286. [4]*Id.* xxviii. 71. [5]*Id.* ii. 173. [6]*Id.* ii. 410. [7]*Id.* ii. 438. [8]*Id.* xxi. 116.

Indorsement by a bankrupt.

By an executor.

Trustee.

ceived value (*b*). An accommodation bill, payable to the order of the drawer, does not pass to the assignees, and therefore an indorsement for value after the bankruptcy will confer a right of action (*c*). Where the bill was payable to a person deceased, the plaintiff may derive a title to it by proof of an indorsement by his executor or administrator (*d*) (A). Where the bill is payable to *B.* or order, for the use of *C.*, and *B.* indorses to *D.* for value, *D.* may recover on the bill, since *B.* had the legal interest, and *C.* but an equitable interest in the bill (*e*).

Proof of transfer.

Indorsement by a wife.

If the property in the bill vest in a feme sole, who marries, the plaintiff must prove an indorsement by the husband (*f*), even although the husband permit her to trade as a feme sole (*g*); but where she indorses in the name of the husband, the jury may, in some instances, presume, from the particular circumstances of the case, that she was the authorized agent of the husband (*h*); and where a note was made payable to Mrs. Carter, and she indorsed it in that name, and in an action by an indorsee against the maker, the latter proved that she was the wife of *Cole*, and it was proved that when the note was presented to the defendant for payment, he had promised to pay it, it was left to the jury to presume, that the wife had authority from the husband to indorse the note in the name by which she was known to the world (*i*). Where the wife, by her husband's authority, signed and indorsed the bill in her own name, it was held sufficient to pass the interest in the bill to the indorsee, a *bonâ fide* holder (*k*). It is no defence to an action against the acceptor, that an indorsement essential to the plaintiff's title was made by an infant (*l*) (1).

By an infant.

An admission by an indorser of his indorsement, is not, it seems, evidence against the acceptor (*m*).

*218 *An averment that the payee by his indorsement directed the amount of the bill to be paid to *A. B.*, is satisfied by proof of an indorsement directing the payment to the order of *A. B.*, for the payment to his order is in effect a payment to him (*n*); and, conversely, an indorsement directing

(*b*) *Smith* v. *Pickering*, Peake's C. 50. Where the bill is drawn payable to the order of a third person for value received, it is no variance to allege that it was for value received of the drawer. *Grant* v. *Da Costa*, 3 M. & S. 351. Value *received* in leather for value *delivered* in leather is no variance. *Jones* v. *Mars*,[1] 2 Camp. 306. "Value received" in a note means value received from the payee. *Clayton* v. *Goslin*, 5 B. & C. 360. *Qu.* as to the indorsement of a bill by one partner after the bankruptcy of his co-partner. *Ramsbottom* v. *Cator*,[2] 1 Starkie's C. 228.

(*c*) 1 Camp. 46; 3 East, 321; 12 East, 656.

(*d*) 3 Wilson, 4. See tit. EXECUTOR.

(*e*) *Evans* v. *Cranlington*, Carth. 5. See 2 Vent. 307.

(*f*) *Connor* v. *Martin*, Str. 516; 3 Wils. 5; *Miles* v. *Williams*, 10 Mod. 243. And the husband may sue alone, without the wife's indorsement. *M'Neilage* v. *Holloway*, 1 B. & A. 218. But see *Richards* v. *Richards*,[3] 2 B. & Ad. 453. Where a promissory note is made payable to a married woman, the husband alone may indorse. *Mason* v. *Morgan*, 2 Ad. & Ell. 30.

(*g*) *Barlow* v. *Bishop*, 1 East, 432. (*h*) Ibid. Vide *supra*, tit. AGENT.

(*i*) *Cotes* v. *Davis*, 1 Camp. 485.

(*k*) *Prestwich* v. *Marshall*,[4] 7 Bing. 565; see *Cotes* v. *Davis*, 1 Camp. C. 485.

(*l*) *Taylor* v. *Croker*, 4 Esp. 187; Bayley, O. B. 58; 2 B. & C. 299. Although he was the payee of the bill (*Jones* v. *Darch and others*, 4 Price, 300). Note, in that case the defendant knew that the payee, who had indorsed the bill before acceptance, was an infant. See *Williams* v. *Harrison*, Carth. 140.

(*m*) *Hemmings* v. *Robinson*, Barnes, 436; Bay. O. B. 223. But see 2 Esp. C. 647, 8. The signature of a party may, it has been said, be proved by an admission which would be evidence against the party who made it. 2 T. R. 613: 1 Esp. C. 60; 4 Esp. C. 226, *tamen qu.*

(*n*) *Smith* v. *M'Clure*, 5 East, 476. *Fisher* v. *Pomfret*, 12 Mod. 125.

(A) (An executor or administrator may assign the negotiable notes or bonds of his testator or intestate without naming himself executor or administrator. *Neil* v. *Newbern*, 1 Mar. 133.)

(1) [An infant may indorse a negotiable note made payable to himself, so as to transfer the property therein to the indorsee, for a valuable consideration. *Nightingale* v. *Withington*, 15 Mass. Rep. 273.]

[1]Eng. Com. Law Reps. xi. 252. [2]*Id.* ii. 367. [3]*Id.* xxii. 119. [4]*Id.* xx. 242.

the payment to be made to *A. B.* may be alleged as a direction to pay to *A. B.* or order (*o*), since that is the legal import of the indorsement.

A special indorsement of a bill contains in itself an absolute transfer of a bill (*p*); but an indorsement in blank is mere *primâ facie* evidence of transfer (*q*); and therefore if *A.* the payee of a bill, indorse it in blank, and *B.* get the bill accepted, *A.* may still maintain an action on the bill, for *B.* might act either as agent or assignee, and not having filled up the indorsement, and thereby made the bill payable to himself, it is to be presumed that he acted as agent (*r*). Special indorsement.

Where the bill or note is payable to the bearer, or has been indorsed in blank, *possession* is *primâ facie* evidence of delivery (*s*), and ownership (*t*) (A). Consequently where several sue as the indorsees of a bill indorsed in blank, they are not bound to prove either that they are partners, or that the bill has been indorsed to them jointly (*u*); but where a bill specially indorsed to *K.*, was by his direction indorsed in blank, and delivered to *L. & Co.*, it was held that two of the firm of *L. & Co.* could not conjointly with a stranger support an action as indorsees of the bill, without some proof of transfer by *L. & Co.* to the plaintiffs, either by indorsement or delivery (*x*). By delivery. Transfer.

Where an indorsee of a bill recovered against a prior indorser (also an indorsee of the bill), who then brought an action against the acceptor, he was nonsuited for want of a receipt for the money paid by him to the indorsee (*y*); but it would have been sufficient to show that he had paid the money.

*And an indorser who takes up the bill from a subsequent indorsee, is remitted to his former rights on the bill (*z*) (B). It has even been held *219

(*o*) *Acheson* v. *Fountain*, Str. 557. *More* v. *Manning*, Com. 311. *Edie* v. *East India Company*, 2 Burr. 1216. Bl. R. 295.

(*p*) *Pothier Contrat du Change*, Part I. c. 2, s. 23, 24.

(*q*) *Smith* v. *Pickering*, Peake's C. 50. *Clarke* v. *Pigott*, Salk. 126, 130.

(*r*) *Clarke* v. *Pigott*, Salk. 126. 12 Mod. 192.

(*s*) The property in bills is not transferred by mere indorsement, without delivery, which must be averred. *R.* v. *Lambton and others*, 5 Price, 442.

(*t*) *Ord* v. *Portal*, 3 Camp. 239. *King* v. *Milsom*, 2 Camp. 5. So if a bill be indorsed in blank to several, one of whom dies, and the rest sue. *Attwood* v. *Rattenbury*,[1] 6 Moore, 579. And see *Rordasnz* v. *Leach*,[2] 1 Starkie's C. 446. *Machell* v. *Kinnear*,[3] 1 Starkie's C. 449. But where the bill is specially indorsed to a firm, 3 Camp. 240. Or where the plaintiffs sue as assignees of a bankrupt, or in any other special capacity, they must prove an indorsement in that capacity. *Bernasconi* v. *Duke of Argyle*,[4] 3 C. & P. 29.

(*u*) *Ord* v. *Portal*, 3 Camp. 239.

(*x*) *Machell* v. *Kinnear*, 1 Starkie's C. 499.

(*y*) *Mendez* v. *Carreroon*, Ld. Raym. 742. But this was on proof of a custom amongst merchants to produce a receipt for the money so paid; and Ld. Holt held that it would have been sufficient to prove that he had paid the money. In the above case (the record has been consulted) the plaintiff did not declare on the bill as indorsee, but specially alleged his payment of the money to the subsequent indorsee, on the default of the acceptor. Where, however, an indorser has been compelled by a subsequent indorsee to take up the bill, he may still sue as indorsee of the bill against the prior parties. See *Death* v. *Serwonters*, 1 Lut. 836; and the observations of Lawrence, J. in *Cowley* v. *Dunlap*, 7 T. R. 571, who considered the point as settled by the case of *Death* v. *Serwonters*, that the right to sue as indorser was not lost by indorsement, and that an indorser, on taking up the bill, was *remitted* to his former right to sue on the bill; and therefore that if *A.* indorsed to *B.*, and *B.* to C., and *C.* to *D.*, who returned the bill to *C.*, the latter might recover as indorsee of the bill. And see *Callow* v. *Lawrence*, 3 M. & S. 97, and the case of *Pownall* v. *Ferrand*, *infra*, note (*a*). Where three persons, not partners in trade, had separately indorsed the bill for the accommodation of the drawer, and, on its being dishonoured, had paid in equal portions the amount to a party who had discounted it subsequently to their indorsements; held, that they might strike out their indorsements, and proceed jointly as possessors of the bill against a previous indorser. *Low* v. *Copestake*,[5] 3 Carr. & P. C. 300.

(*z*) *Supra*, note (*y*).

(A) (And in Louisiana a promissory note payable to order may be transferred without indorsement, and the transfer may be proved by parol evidence. *Hughes* v. *Harrison and wife*, 2 Louis. R. 92. So the assignment of promissory notes in Indiana is not governed by the law of merchants. *Bullitt* v. *Scribner*, 1 Blackf. 14.)

(B) (Possession of a bill or note in the hands of a party to it, is *prima facie* evidence of his title to it,

[1] Eng. Com. Law Reps. xvii. 61. [2] *Id.* ii. 463. [3] *Id.* ii. 484. [4] *Id.* xiv. 195. [5] *Id.* xiv. 316.

that an intermediate indorser who, on actions brought by a subsequent indorsee against himself, and also against the acceptor, pays part of the amount to such indorsee, may recover that sum against the acceptor as money paid to his use (*a*).

So if a party take up a bill for the honour of an indorser, he is entitled to sue all the previous parties on the bill (*b*).

Where a note was given by *A.* to *B.* to secure a debt, and was assigned by *B.* to *C.* with directions not to negotiate it, as he should want it for the purpose of settling with *A.*; it was held that *C.* could not, after a settlement between *A.* and *B.*, and without a redelivery of the note, maintain an action against *A.* (*c*).

Where the bill or note is payable to *A.* and *B.*, who are not partners, the indorsement of both must be proved (*d*).

By partners. An indorsement by one of several partners in the partnership name will be sufficient, if the partnership be proved, for an authority may be implied (*e*). So if one partner transfer in the name which he as managing partner has occasionally used for the purposes of the firm, although no privity on the part of his partners be proved, and although the firm whose name is thus used no longer exists (*f*).

Where the plaintiff claimed through the indorsement of *E. S.* the payee of the bill, and proved, that a person calling himself *E. S.* came to Cadiz, having the bill in his possession, and also a letter of introduction, proved to be genuine, which purported to be given to a person introduced to the writer as *E. S.*, and also another bill of exchange drawn by the writer; and also, that that person resided at Cadiz ten days, during which time he visited the plaintiff, and indorsed the bill to him, and received a letter of credit from him, it was held that this was evidence of identity, sufficient to warrant a verdict for the plaintiff (*g*).

On the dissolution of a partnership, a power given to one of the partners to receive and pay debts, does not authorize him to indorse a bill in the name of the partnership (*h*). A partner becoming bankrupt cannot give a title by indorsement (*i*).

Evidence of an offer by the defendant to give another bill supersedes the proof of an indorsement (*k*).

*220 *4thly. *Value.* The holder of a bill indorsed in blank, or payable to

(*a*) *Pownall* v. *Ferrand*,[1] 6 B. & C. 439.

(*b*) *Mertens* v. *Winnington*, 1 Esp. C. 113. He holds as an indorsee for value from the party *for* whom (not *from* whom) he takes the bill. Bayley on Bills, 146–8.

(*c*) 1 Bos. & Pull. 398.

(*d*) *Carvick* v. *Vickery*, Doug. 653; Bay. O. B. 55.

(*e*) *Supra*, 204.

(*f*) *Williamson* v. *Johnson*,[2] 1 B. & C. 147; 2 D. & R. 281.

(*g*) *Bulkley* v. *Butler*,[3] 2 B. & C. 434. See *Mead* v. *Young*, 4 T. R. 28.

(*h*) *Kilgour* v. *Finlyson*, 1 H. B. 155. See *Lacy* v. *Woolcot*,[4] 2 D. & R. 458.

(*i*) *Thomason* v. *Frere*, 10 East, 418. See *Burt* v. *Moult*, 1 C. & M. 525. *Drayton* v. *Dale*,[5] 2 B. & C. 293.

(*k*) *Bosanquet* v. *Anderson*, 6 Esp. C. 43; 1 T. R. 654; see *Sidford* v. *Chambers*,[6] 1 Starkie's C. 326. Where no proof was given of the hand-writing of one of the indorsers, but it appeared that the indorsement was on the bill when the defendant accepted it, and that he promised to *pay* it, Ryder, C. J., left the case to the jury, and the Court, after a verdict for the plaintiff, refused a new trial. *Hankey* v. *Wilson*, Say. 223; Bayley on Bills, 367. But where a bill was shown to the drawer, with the name of the payee indorsed upon it, and the drawer merely objected for want of consideration, it was held that it did not supersede the necessity of proving the indorser's hand-writing. *Duncan* v. *Scott*, 1 Camp. 101.

even after a special indorsement made by him, and without a re-indorsement or other evidence of any subsequent re-assignment. *Dugan* v. *The United States*, 3 Wheat. 172. *Clark* v. *The United States*, 2 Wheat. 27. *Picquet* v. *Curtis*, 1 Sumner, 479. *Jacob Barker* v. *The United States*, 1 Paine, 156. *Lonsdale* v. *Brown*, 3 Wash. C. C. R. 404. See also *Zeigler* v. *Gray*, 12 Serg. & R. 42. *Weidner* v. *Schweigart*, 9 Serg. & R. 385. *Weakley* v. *Bell*, 9 Watts, 273. *Contra*, *Gorgerat* v. *M'Carty*, 1 Yeates, 94; S. C. 2 Dall. 144.)

[1] Eng. Com. Law Reps. xiii. 230. [2] *Id.* viii. 44. [3] *Id.* ix. 133. [4] *Id.* xvi. 101. [5] *Id.* ix. 91. [6] *Id.* ii. 410.

bearer, is not prejudiced by a defect in the title without his knowledge, but he must in general, in such case, prove that he has given *value* for the bill; and therefore it is no defence to an action on a bill or note to prove that it was *lost* by the owner, or *stolen* from him, provided the plaintiff can show that he gave a valuable consideration for it (*l*) (1). So if the bill has been extorted by duress, the plaintiff must prove that he gave some value for it (*m*). So where the bill has been obtained from the drawer by fraud (*n*); and though value were given, the defendant may defeat the holder's claim by proof that he had *notice* of the defect (*o*). Proof of value.

It is, however, a question whether the plaintiff acted *bonâ fide* in taking the bill, and whether he acted with due and reasonable care and caution in doing so, where there are any circumstances sufficient to excite the suspicion of a prudent man (*p*) (A). And though he gave value, the plain-

(*l*) *Miller* v. *Race*, 1 Burr. 452. *Lawson* v. *Weston*, 4 Esp. 56. *Grant* v. *Vaughan*, 3 Burr. 1516; 1 Bl. R. 485; 2 Show. 235; 3 Salk. 126; Ld. Raym. 738. *Peacock* v. *Rhodes*, Doug. 611. *Patterson* v. *Hardacre*, 4 Taunt. 114. So bank-notes cannot be followed by the legal owners into the hands of *bona fide* holders for a valuable consideration without notice; and therefore where a trader, after bankruptcy and a commission, procured bank-notes in exchange for bills, and by these bank-notes, through an agent unknown to the defendants (bankers), redeemed a bill of exchange in their hands, it was held that the assignees could not recover. *Lowndes* v. *Anderson*, 13 East, 130. See also *Solomons* v. *The Bank of England*, 13 East, 135; and *supra*, tit. BANKRUPTCY.

(*m*) *Duncan* v. *Scott*, 1 Camp. 100.

(*n*) *Rees* v. *Marquis of Headfort*, 2 Camp. 574.

(*o*) See the cases above cited, note (*l*).

(*p*) *Gill* v. *Cubitt*,[1] 3 B. & C. 466. There a discount broker discounted a bill (stolen the night before) from a person whose features he knew, but whose name was unknown. Where a trader received from a stranger, in part-payment of goods, a bill which had been lost, the party paying it representing to the trader that he had been recommended to him by a customer of his, and directing the goods to be sent to a place not a regular booking-office; there was no evidence that the newspaper advertising the loss ever came under his view; the Judge left it to the jury to say whether the bill was received out of the ordinary course of business, and under circumstances which should have excited suspicion and inquiry; and they having found for the defendant, the acceptor, the Court, deeming it a case peculiarly for the consideration of a jury, refused a new trial. *Slater* v. *West*,[2] 3 C. & P. 325. And see *Gill* v. *Cubitt*, 1 C. & P. 163, 487.

(1) [If a Banker in a small market town change a 500*l.* Bank of England note for a stranger, without any further inquiry than merely asking his name, he is liable in trover to a party from whose possession such note had been unlawfully obtained; the question in such a case being, not whether there was an *honest* holdering on the part of the defendant, but whether, under the circumstances, there was a want of *due caution*. The plaintiff, however, must show, that he has done everything which in reason he ought. *Snow et al.* v. *Peacock*; *Snow* v. *Leatham*, 2 Carr. & Payne, 215, 314.]

(A) (Though the holder of a negotiable promissory note, which has been fraudulently assigned, may recover upon it against the maker or a prior indorser, if it was taken by such holder in the usual course of trade, and for a fair and valuable consideration without notice of the fraud; yet if it was taken without due caution, and under circumstances which ought to have excited the suspicion of a prudent and careful man, the maker or prior indorser may be let into his defence. *Hall* v. *Hale*, 8 Conn. R. 336. *Bank of St. Albans* v. *Gilliland*, 23 Wend. 311. *Wheeler* v. *Guild*, 20 Pick. 545. So on the other hand if a note is paid in full, at maturity, by a party liable thereon to a person having the legal title to the note in himself by indorsement, and the party paying has no notice of any defect in the title of such holder, the payment will be good. *Wheeler* v. *Guild*, *supra*. The indorsee of a negotiable promissory note negotiated after it is due, is considered as receiving dishonoured paper, and takes it subject to every infirmity, equity and defence, to which it was liable in the hands of the payee. *Robinson* v. *Lyman*, 10 Conn. R. 30. And a note payable on demand is not regarded as dishonoured within one month after its date. *Ranger* v. *Cary*, 1 Metcalf R. 369. But such a note dated Sept. 3, 1817, was held to be dishonoured paper on the 25th of May, 1818. *Nevins* v. *Townsend*, 6 Conn. R. 5. A dishonoured note is not however subject to a set off of debts due from the payee to the maker, having no connection with the subject matter of the note. *Stedman and another* v. *Jillson and another*, 10 Conn. R. 55. If the word *renewal* were written upon the margin of a note, indorsed for the accommodation of the maker, and intended solely for the renewal of another note in the bank, and that word remained upon it, when it was negotiated to the holder; or if such word had been partially erased, leaving such appearances as would, in the ordinary course of business, excite the suspicion of a careful and prudent man; in either case, a misapplication and fraudulent transfer may be shown as a defence. *Hall* v. *Hale*, 8 Conn. R. 336. In a recent case in the District Court of Philadelphia, it was held in conformity with the recent English cases, that nothing but gross negligence or *mala fides* would let in any defence as against a holder of a note negotiated to him for value before it was due. *Parks* v. *M'Candless*, Sept. 1841. An indorsee as against the maker of a note is not bound to show what consideration he gave for it, even after notice to do so, unless the defendant has given evidence tending to show facts which

[1] Eng. Com. Law Reps. x. 154. [2] *Id.* xiv. 330.

tiff cannot recover on a note, cheque or bill, which has been lost or stolen, if he take it after it has become due (*q*).

Bankers who have given acceptances for a customer beyond the cash balance in their hands, hold all collateral securities for value (*r*), and may recover against an accommodation acceptor, although the customer who had previously deposited the bill with them had it in his hands when it became due, and had agreed to deliver it up for a valuable consideration, instead of which he redelivered it to the plaintiffs (*s*). So, although they had delivered it to the payee when it became due to procure payment, and it *221 *remained in his hands till his bankruptcy, and then passed into the hands of his assignees (*t*).

Effect of notice to prove value.

An acceptor could not, before the new rules, by mere notice to the plaintiff, and without throwing suspicion on his title, compel him to prove *value* (*u*) (1) (A). According to the practice of the Court of Common Pleas, the defendant was required to give notice of his intention to call upon the plaintiff to prove that he gave value for the bill (*x*). In the King's Bench it was not necessary to give such notice, although it was usual and proper to do so (*y*). Whether such notice had or had not been given (*z*), the plaintiff, it seems, was not bound to enter upon proof of consideration as part of his original case, or until suspicion had been cast upon his title,

(*q*) *Down* v. *Halling*,[1] 4 B. & C. 330. A cheque on a banker, lost by accident, was paid to a shopkeeper for goods, in London, five days after the date; in an action by the owner against the shopkeeper, it was held, that it was for the jury to say whether the defendant had taken the cheque under circumstances which ought to have excited the suspicion of a prudent man; it was also held that the shopkeeper having taken the cheque five days after it was due, it was sufficient for the plaintiff to prove his property in the cheque without showing how he lost it. And see *Egan* v. *Threlfall*,[2] 5 D. & R. 326; *Beckwith* v. *Corrall*,[3] 3 Bing. 444.

(*r*) *Bosanquet* v. *Dudman*,[4] 1 Starkie's C. 1.

(*s*) Ibid.

(*t*) *Bruce* v. *Hurley*,[5] 1 Starkie's C. 23.

(*u*) *Reynolds* v. *Chettle*, 2 Camp. 596.

(*x*) *Paterson* v. *Hardacre*, 4 Taunt. 11.

(*y*) In an action by an indorsee against the acceptor of an accommodation bill, no notice to dispute the consideration is necessary. *Mann* v. *Lent*,[6] 1 Mo. & M. 240. *Wyatt* v. *Campbell*,[7] 1 Mo. & M. 80. *Semble*, in all cases of no consideration given, the holder must prove value. Ib. *Sharpe* v. *Bailey*, 8 B. & C. 44. In an action on a note which has been stolen, it is incumbent on the plaintiff to prove that he gave full value for it. *De la Chaumette* v. *The Bank of England*,[8] 9 B. & C. 208. Nor can he recover if he had notice of the fact before he paid value. Ib. And notice to a party who presents the note for payment, and to whom the note has been remitted by a foreign merchant for payment, is notice to the party, a foreign merchant, who remits it. Ib. *S.* being indebted to a firm in which he was partner, gave a note in the name of another firm, in which he was also a partner, in discharge of his individual debt; the payees indorsed it over, and the indorsees sued the parties who appeared to be makers; held that this note was made in fraud of *S.*'s partner in the second firm, and could not be enforced against him by the payees, and that at all events, under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. Held also, Parke, J. *dissentiente*, that in all cases where, from defect of consideration, the original payee cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or prior indorsee, though he may have had no notice that such proof will be called for. *Heath* v. *Sansom*,[9] 2 B. & Ad. 291.

(*z*) A contrary course was adopted by Ld. Ellenborough (*Delauney* v. *Mitchell*,[10] 1 Starkie's C. 439); but the later practice appears to be more convenient, since it frequently happens that the defendant is unable to impeach the plaintiff's title, and then the proof of consideration becomes unnecessary.

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ought to exonerate him from payment, except as against a *bona fide* holder for value. *Jarden* v. *Davis*, 5 Wharton, 338. Receiving a note for a *precedent debt*, is receiving it *for value* within the law merchant, if it be taken *in satisfaction* of such *precedent debt*, and the indebtedness be cancelled. *Bank of St. Albans* v. *Gilliland*, 23 Wend. *Brush* v. *Scribner*, 11 Conn. R. 388. So even when a note is taken as collateral security for a pre-existing debt, if there is a new and distinct consideration—as if time was given in consideration of obtaining the note as security for the debt, &c. *Depeau* v. *Waddington*, 6 Wharton, 220.)

(1) [An indorsement is *prima facie* evidence of having been made for full value, and it is incumbent on the other party to show it to be otherwise. *Riddle* v. *Mandeville*, 5 Cranch, 332.]

(A) (*Bassett* v. *Dodgkin*, 10 Bingh. 40, (25 Eng. Com. Law Reps. 21. See also *Wylie* v. *Lewis*, 7 Conn. R. 301.)

[1]Eng. Com. Law Reps. x. 347. [2]*Id.* xvi. 237. [3]*Id.* xiii. 44. [4]*Id.* ii. 267. [5]*Id.* ii. 278. [6]*Id.* xxii. 301. [7]*Id.* xxii. 257. [8]*Id.* xvii. 356. [9]*Id.* xxii. 78. [10]*Id.* ii. 462.

either upon cross-examination of his witnesses (*a*), or by proof on the part of the defendant (*b*). (A).

An indorsee cannot recover against the acceptor, costs incurred by him in an action on the bill against him, there being no privity of contract between them (*c*).

Secondly, where the liability is of a secondary and conditional nature, and is consequent upon the default of the maker of a note or acceptor of a bill, that is, where the action is brought. Secondary liability.

1st. By the payee against the drawer of a bill. 2dly. By an indorsee against the drawer or indorser of a bill, or against the indorser of a promissory note. Payee against the drawer.

*1st. By the payee against the drawer of a bill: Here the plaintiff must prove (*d*), 1st, The drawing of the bill. 2dly, Due presentment. 3dly The drawee's or acceptor's default. 4thly, Notice, or facts which excuse the want of notice, to the drawer; and in some cases, 5thly, A protest. *222

1st. The drawing of the bill is usually established by proof of the drawer's hand-writing, or by proof of the drawing in his name by an authorized agent. Where there are several drawers, it must be proved that they all signed the bill, or gave authority for the drawing of it in their joint names (*e*). Drawing of the bill.

2dly. Presentment (*f*). As the liability of the drawer or indorser is of a secondary nature only, for he undertakes to pay the amount upon the default of the maker or acceptor, it is necessary to aver and prove that due diligence has been used for the purpose of procuring payment from the maker or acceptor (*g*) (B), and here it is to be observed, that an allegation of due presentment, and a refusal to pay, will not be satisfied by evidence that the maker or acceptor could not be found when the note or bill was due (*h*). Proof of presentment.

(*a*) Where notice had been given to prove the consideration given for a note, and a witness had been cross-examined in order to disprove the consideration, it was held that the plaintiff was bound to give evidence of consideration as part of his case in chief, and that he could not give such evidence in reply. *Whitlocke* v. *Underwood*,[1] 3 D. & R. 356. *Delauney* v. *Mitchell*, 1 Starkie's C. 439.

(*b*) *Reynolds* v. *Chettle*, 2 Camp. 596. *Paterson* v. *Hardacre*, 4 Taunt. 114. *Humbert* v. *Ruding*, Chitty on Bills, 512. In an action by a third indorser against the acceptor, it is not sufficient for the defendant to show no value given as between the drawer and first indorsee, or upon the subsequent indorsements, without showing no value as between himself and the drawer. *Whitaker* v. *Edwards*,[2] 1 Ad. & Ell. 538. Notice to dispute had been given.

(*c*) *Dawson* v. *Morgan*,[3] 9 B. & C. 618. (*d*) As to the production of the bill, vide *supra*, 202.

(*e*) Vide *supra*, Proof of Acceptance, 203. *Qu.* whether one who draws a bill in the name of a firm, and of which he is not a member, without authority, is liable as drawer. *Wilson* v. *Barthrop*, 2 M. & W. 863.

(*f*) Where it is ambiguous on the face of an instrument whether it be a bill of exchange or promissory note, the payee may treat it as either, and presentment is unnecessary. *Edis* v. *Bury*,[4] 6 B. & C. 433. *Gray* v. *Milner*,[5] 8 Taunt. 739. *Allen* v. *Mawson*, 4 Camp. 115. *Shuttleworth* v. *Stevens*, 1 Camp. 407. Presentment for acceptance is not necessary except in cases of bills payable within a limited time after sight. Bayley on Bills, 182. But in case of presentment and dishonour, notice must be given. *Goodall* v. *Dolly*, 1 T. R. 712.

(*g*) 2 Burr. 677; 2 H. B. 565. (*h*) *Leeson* v. *Pigott*, cited Bayley O. B. 187.

(A) (The publication in a gazette by the maker of a note, of a defence to it, will not affect a holder with notice, though it be proved that such holder is a subscriber to the gazette, that it was regularly sent to him, and no complaints were made of its not being received. *Beltzhoover* v. *Blackstock*, 3 Watts, 20.

In order to throw on the holder of a note, the necessity of showing the consideration which he gave for such note, express notice must be given that he will be called upon at the trial to do so; notice by maker (the defendant) that no consideration had passed between him and the payee is not sufficient. Id. But in *The People* v. *Niagara C. P.* 12 Wend. 246, it was held, that a *total* failure of the consideration of a note may be given in evidence under the general issue without notice. See also *Spalding* v. *Vandercoock*, 2 Id. 431. *Burton* v. *Stewart*, 3 Id. 238. *Reab* v. *M'Allister*, 8 Id. 109.

(B) (Where bills payable at a particular time were enclosed by letter to the drawee, before they were due, and he advised his correspondent that they were not accepted, it was held a sufficient presentment and refusal to accept. *Carmichael* v. *Bank of Pennsylvania*, 4 Howard's R. 567.)

[1]Eng. Com. Law Reps. ix. 51. [2]*Id.* xxviii. 171. [3]*Id.* xvii. 457. [4]*Id.* xiii. 227. [5]*Id.* iv. 265.

Duly presented means presented according to the custom of merchants, which necessarily implies an exception in favour of those unavoidable accidents which must prevent the party from doing it within the regular time (*i*) (A).

For payment. A presentment may be either for acceptance or payment. Where the bill is payable at a certain date a presentment for payment must be proved to have been made on the last day of grace, whether the bill be an inland or foreign one (*k*).

Where the bill is dishonoured for nonpayment a previous acceptance, though alleged, need not be proved (*l*)

A bill payable at a banker's must be presented within the usual banking-hours (*m*); but where the bill is payable at the house of a private tradesman, the presentment need not be made within the banking-hours. In *223 such *case it has been held that a presentment at eight in the evening is Time of. not unseasonable (*n*); and a presentment at any time in the day or evening is sufficient, if an answer be given by an authorized person (*o*).

Where the bill is payable at *sight*, or within a certain time after, it must be presented within a *reasonable* time (*p*) (B).

No precise rule has been laid down defining the limits allowed for pre-

(*i*) Per Lord Ellenborough, *Patience* v. *Townly*, 2 Smith, 224.

(*k*) 4 T. R. 152. *Tassel* v. *Lewis*, Ld. Raymond, 743. *Anderton* v. *Beck*, 16 East, 248. Days of grace are not allowed where the bill is payable on demand (Chitty, 146). A cheque received on one day should be presented for payment on the next day. 2 Camp. 537. Where a bill was drawn at *C.*, in Newfoundland, on the 12th August, in duplicate, from which place there was a daily post to St. John's, and a post-office packet from thence to England three times a week, and the voyage about 18 days, and the bill was not presented for acceptance until the 16th November, and was dishonoured when due, and the jury found a verdict for the defendant, the Court refused to disturb it. *Straker* v. *Graham*, 4 M. & W. 721.

(*l*) Either in an action against the drawee or an indorsee, for the fact is not essential to the defendant's legal liability. *Tanner* v. *Bean*,[1] 4 B. & C. 312. Contra, *Jones* v. *Morgan*, 2 Camp. 407.

(*m*) *Parker* v. *Gordon*, 7 East, 885. *Elford* v. *Teed*, 1 M. & S. 28. And it will not be inferred from the circumstance of the bill being presented by a notary, that it had before been duly presented within banking hours. Ibid.

(*n*) 2 Camp. 527. And see *Triggs* v. *Newnham*,[2] 1 C. & P. 631.

(*o*) *Garnett* v. *Woodcock*,[3] 1 Starkie's C. 475; 6 M. & S. 44. See also *Henry* v. *Lee*,[4] 2 Ch. 124; *Whitaker* v. *Bank of England*,[5] 1 C. M. & R. 744; 6 C. & P. 700.

(*p*) *Muilman* v. *D'Eguino*, 2 H. B. 565. And see *Darbishire* v. *Parker*, 6 East, 3; 2 H. B. 565. See *Fry* v. *Hill*,[6] 7 Taunt. 397. *Semble*, presentment on the fourth day in London, when drawn at the distance of twenty miles from London, is within a reasonable time. Ibid. And see *Goupy* v. *Harden*,[7] 7 Taunt. 159. It is not unreasonable to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay cannot of course be allowed), as part of the circulating medium of the country. *Shute* v. *Robins*, M. & M. 133. The question in such case is, whether looking at the situation and interests of both drawer and holder, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance, or putting it into circulation. *Mellish* v. *Rawdon*,[8] 9 Bing. 416. In the case of *Moule* v. *Brown*,[9] 4 Bing. N. C. 267, it appeared that a cheque drawn by *F.* on a banker at Bath, was cashed for the defendant by a branch of the N. W. bank at Malmesbury, on Tuesday, March 28; the same day it was forwarded to the principal N. W. bank, at Melksham, twelve miles from Bath; on Friday the 21st it was presented at Bath, and dishonoured. The Court held, that the presentment was not in time to give the N. W. bank a claim against the defendant. Tindal, J. in delivering judgment, said, "The result of the cases from *Richford* v. *Ridge*, 2 Camp. 539, to *Baddington* v. *Schleucher*,[10] 4 B. & Ad. 752, is that the plaintiff receiving a cheque has till the following day to present it, where there are the ordinary means of doing so. Here the plaintiffs resided in a post-town, and if they had remitted the cheque to Bath by the next day's post, it would have been presented on Thursday: if there was any sufficient cause for not pursuing that course, it is on them to show it, but I think on the whole of the facts, they have been guilty of laches."

(A) (Where the maker of a note removes from the state where he resided at the time of making it, into another state, the holder is not bound to make a demand of the maker to charge the indorser. *Gist* v. *Lybrand*, 3 Ohio R. 319.)

(B) (Where a bill of exchange is made payable at no particular time, it is payable immediately; and to charge a drawer or indorser, it must be presented for payment in a reasonable time after the receipt of it. *Taylor* v. *Young*, 3 Watts, R. 339.)

[1]Eng. Com. Law Reps. x. 340. [2]*Id.* xi. 502. [3]*Id.* ii. 473. [4]*Id.* xviii. 273. [5]*Id.* xxv. 605. [6]*Id.* ii. 152. [7]*Id.* ii. 58. [8]*Id.* xxiii. 319. [9]*Id.* xxiii. 347. [10]*Id.* xxiv. 153.

sentment in such cases, the courts have cautiously avoided the fixing any certain time even in respect of an inland bill; and it has been said that no precise rule can be laid down upon the subject (*q*). The question of reasonable time in this, as in all other cases, appears to be a mixed question of law and of fact (*r*); but in the late case of *Fry* v. *Hill*, the court seem to have considered it to be a question for the jury (1). It has been held, however, that the plaintiff is not guilty of laches in sending a foreign bill, payable after sight, into circulation before acceptance (*s*), and in keeping it in circulation without acceptance, so long as the respective holders found convenient.

A cheque payable on demand need not be presented till the day after that on which it was given; it is sufficient to send it for presentment by the next day's post (*t*).

Where a bill is accepted payable at a particular place (*u*), the allegation Place of.
*and proof that the bill was presented at that place is sufficient, without *224
showing a presentment to the acceptor himself. For although the statute 1 & 2 G. 4, c. 77, has provided that the acceptor *may* be called on else-

(*q*) Per Eyre, C. J. *Muilman* v. *D'Eguino*, 2 H. B. 565; and per Heath, J. and Gibbs, C. J. *Goupy* v. *Harden*, 7 Taunt. 159.

(*r*) *Darbishire* v. *Parker*, 6 East, 3. See the rule, *infra*, p. 226.

(*s*) *Goupy* v. *Harden*, 7 Taunt. 159, in an action by the indorsee against the indorser; and in *Muilman* v. *D'Eguino*, 2 H. B. 565. *Whitaker* v. *Bank of England*, 1 C. M. & R. 744; 6 C. & P. 700.

(*t*) *Fry* v. *Hill*, 7 Taunt. 397; and see the rule *Williams* v. *Smith*, 2 B. & A. 497, and *infra*, p. 226.

(*u*) A note in the margin mentioning a place where payable, need not be averred in the declaration, nor need the bill be proved to have been presented there for payment, it being treated as a memorandum only, and not as part of the contract. *Williams* v. *Waring*,[1] 10 B. & C. 2. It is sufficient that the bill is presented at the place where it is made payable, notwithstanding the drawee may die before it becomes due, and his representatives may be ignorant of the existence of the bill. *Philpot* v. *Bryant*,[2] 3 C. & P. 244. A foreign bill upon being presented to the drawees at their place of residence at *L.*, is refused acceptance; the defendants, the correspondents of the payees, who had indorsed it, accepted it in the terms, "accepted under protest for honour of *L. & Co.*, and will be paid for their account if regularly protested and refused when due," held, that as under such special acceptance there could not be a refusal to pay unless there was a presentment and demand of payment, it was the duty of the plaintiffs to present it to the drawees on the day it became due, and at the place where they resided, no other being designated in the bill, and that it was properly protested for non-payment at *L.*, the usage of merchants being excluded by the terms of the special acceptance. *Mitchell* v. *Baring*,[3] 10 B. & C. 4.

(1) [In *Atwood* v. *Clark*, 2 Greenleaf, 249, Mellen, C. J. says, "what is reasonable time, within which an act is to be performed, when a contract is silent on the subject, is a question of law." S. P. *Ellis* v. *Paige*, 1 Pick. 43. In cases of bills of exchange and notes, the reasonableness of demand and notice is now considered, in New Hampshire, as a mere question of law, though until recently it was otherwise. *Haddock* v. *Murray*, 1 N. Hamp. Rep. 140. When the facts are agreed on or proved, it is a question of law whether demand, notice, &c. are within a reasonable time. *Furman* v. *Haskin*, 2 Caines' Rep. 369. *Bryden* v. *Bryden*, 11 Johns. 188. *Whitwell & al.* v. *Johnson*, 17 Mass. Rep. 453. In Pennsylvania, it is said in several cases, that what constitutes reasonable notice is matter of fact for the jury to determine. *Robertson* v. *Vogle*, 1 Dallas, 255. *Mallory* v. *Kirwan*, 2 Dallas, 192. *Warder* v. *Carson's Ex'ors*, ibid. 129. 1 Yeates, 531. *Ball* v. *Dennison*, 4 Dallas, 165. *Bank of North America* v. *Pettit*, ibid. 233. In one case, however, *M'Kean*, C. J. says, what is reasonable notice, where the parties live in the same city, or near to each other, is now settled to be matter of law, though the strictness required in England has not obtained in Pennsylvania. *Bank of North America* v. *M'Knight*, 1 Yeates, 147.

In New Jersey, the question whether reasonableness of notice is to be decided by the court or by the jury seems not to be settled, *Ferris* v. *Saxton*, 1 Southard's Rep. 1. In Maryland, the court decide this question. *Phillips* v. *M'Curdy*, 1 Har. & J. 187.

The strict rule of the English law respecting non-payment of bills has not prevailed in North Carolina. What shall be reasonable notice depends on the local situation and respective occupations and pursuits of the parties—of which it seems the court are to judge. *London* v. *Howard*, 2 Hayw. 332. *Austin* v. *Rodman*, 1 Hawks, 195.

In Kentucky, reasonable diligence in giving notice, &c. is matter of law to be decided by the court. *Dodge* v. *Bank of Kentucky*, 2 Marsh. 616. *Noble* v. *Bank of Kentucky*, 3 Marsh. 264.

See *Taylor* v. *Bryden*, 8 Johns. 173 ,and *Field* v. *Nickerson*, 13 Mass. Rep. 131, where the question of reasonable notice seems to have been considered as a mixed question of law and fact.]

[1]Eng. Com. Law Reps. xxi. 11.‡ [2]*Id.* xiv. 288. [3]*Id.* xvi. 12.

where, notwithstanding the limitation in his acceptance, yet it is not compulsory on the holder to go elsewhere (*x*).

If the presentment be at the place mentioned in the acceptance, proof of the acceptor's hand-writing is essential, otherwise it would not appear that the place mentioned in the acceptance was appointed by him (*y*).

If a holder of a bill payable after sight keep it without either presenting it or putting it into circulation, he is guilty of laches, and cannot recover (*z*).

Present-ment, where.

Proof of presentment of a bill to a banker's clerk at the clearing-house, is sufficient (*a*). If the bill has been accepted by the agent of the drawee, who is abroad, it must be presented to that agent for payment (*b*).

Where the acceptor is dead, presentment must be made to his executor or administrator, and if there be none, at the house of the deceased (*c*) (A). If the bill be payable at a particular place it is not necessary to present it to the executor (*d*).

If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker (*e*). Where a note was made payable at the house of *C.*, who was the banker of *A.*, and in the course of business was indorsed to *C.*, it was held that it was unnecessary to make any demand upon the maker (*f*). If the maker or acceptor be dead, the note or bill should be presented to his representative, if he lives within a reasonable distance (*g*).

Presentment at a banker's must be within banking-hours, in other cases must be at a reasonable hour; presentment between seven and eight in the evening is reasonable (*h*).

*225 *An allegation of the presentment of a bill to *P. P.* (the bill having been accepted by *P. P.*, No. 6, Budge Row,) is proved by showing that the holder went to No. 6, Budge Row, and found it shut up, no one being there (*i*).

See the statute 6 & 7 W. 4, c. 58, as to a bill accepted *supra* protest for honour.

Proof of dishonour.

3dly. The *default* of the drawee or acceptor.—Where a bill is payable so many days after sight, the plaintiff must prove a presentment for ac-

(*x*) *De Bergareche* v. *Pillin*,[1] 3 Bing. 476. And see *Hawkey* v. *Borwick*,[2] 4 Bing. 135. *Turner* v. *Hayden*,[3] 4 B. & C. 2; Bayley on Bills, 178. Whether the house be mentioned in the bill or note, or in the margin, or in the acceptance only, that is the proper place of presentment. See *Macintosh* v. *Hayden*, My. & Mo. 362. Under an allegation that the bill was duly presented, without stating an acceptance, the plaintiff may prove a presentment at the place mentioned in the acceptance. *Parks* v. *Edge*, 1 C. & M. 429.

(*y*) *Sedgwick* v. *Jager*,[4] 5 C. & P. 199. (*z*) 2 H. B. 565.

(*a*) *Reynolds* v. *Chettle*, 2 Camp. 595. *Harris* v. *Parker*, 3 Tyr. 370.

(*b*) *Phillips* v. *Astling and others*, 2 Taunt. 206.

(*c*) Molloy, b. 2, c. 10, s. 34. Chitty on Bills, 317. (*d*) *Philpott* v. *Briant*,[5] 3 C. & P. 244.

(*e*) *Saunderson* v. *Judge*, 2 H. B. 509. *Bowes* v. *Howe*,[6] 5 Taunt. 30. Where the bill was taken to the house of which the drawer was described in the bill, and the party was informed by a woman in the passage that the drawer was gone, and it was shown by the defendant that the woman was a lodger, and that the drawer having quitted the premises, no one had heard of the message so communicated, it was held to be evidence from which the jury might infer that she was an inmate, and that the presentment was sufficient. *Buxton* v. *Jones*, 1 M. & G. 83.

(*f*) *Saunderson* v. *Judge*, 2 H. B. 509. In that case the note was made payable at the banker's merely by means of a memorandum indorsed at the foot; and the court were of opinion that the averment of a presentment according to that note was unnecessary.

(*g*) Bayley, O. B. 95.

(*h*) *Wilkins* v. *Jadis*,[7] 2 B. & Ad. 188; 2 M. & M. 141. *Barclay* v. *Bayley*, Camp. 527.

(*i*) *Hine* v. *Allely*,[8] 4 B. & Ad. 624.

(A) (Where the maker of the note having died on the day of maturity, the notary on calling at his domicil and being informed of his death, did not demand payment of his heirs or representatives, but protested the note for non-payment, and notified the indorser, held, that the circumstances did not excuse the want of demand and that the indorser was discharged. *Toby* v. *Maurian*, 7 Louis. R. 495.)

[1]Eng. Com. Law Reps. xiii. 59. [2]*Id.* xiii. 376. [3]*Id.* x. 259. [4]*Id.* xxiv. 277. [5]*Id.* xiv. 288. [6]*Id.* i. 8. [7]*Id.* xxii. 57. [8]*Id.* xxiv. 127.

ceptance (*k*). But in other cases it is sufficient to prove a presentment for payment when the bill becomes due and a refusal to pay (*l*) (A); and if a previous acceptance be unnecessarily alleged, it need not be proved (*m*). It is sufficient to prove a presentment for acceptance, and a refusal to accept at any time before the bill becomes due, for upon the dishonour the drawer becomes liable (*n*) immediately. (1) (B). It is also sufficient to show that the drawee refused to accept according to the form of the bill; and evidence is inadmissible for the purpose of proving that the mode of payment proposed would have been equivalent to a payment according to the terms of the bill (*o*). The plaintiff must prove that the refusal came from the defendant; it is not sufficient therefore to produce a witness who went to the drawee's residence, and was there told by *some one* that the bill would not be honoured (*p*).

4thly. Notice to the drawer (*q*).—The general rule is that the plaintiff must prove that he has used due diligence in giving notice of the default; and whether due diligence has been used is usually a question of *law*, but dependent on facts, such as the situation of the parties, their places of abode, and the facility of communication (*r*). Notice—General rule.

(*k*) Chitty, O. B. 122.

(*l*) B. N. P. 269. *Bright* v. *Purrier*, 3 East, 483. *Ballingalls* v. *Gloster*, 3 East, 481. See *Macarty* v. *Barrow*, Str. 949.

(*m*) *Tanner* v. *Bean*,[1] 4 B. & C. 312; *contra*, *Jones* v. *Morgan*, 2 Camp. 474.

(*n*) B. N. P. 269. *Bright* v. *Purrier*, 3 East, 483. *Ballingalls* v. *Gloster*, 3 East, 481. See *Macarty* v. *Barrow*, Str. 949.

(*o*) *Boehm* v. *Garcias*, 1 Camp. C. 425.

(*p*) *Cheek* v. *Roper*, 5 Esp. C. 175.

(*q*) *Dagglish* v. *Weatherby*, 2 Bl. R. 747. Notice to the acceptor in an action against the drawer of a bill, payable at a particular place, is unnecessary. *Edwards* v. *Dick*,[3] 3 B. & A. 212.

(*r*) See *Darbyshire* v. *Parker*, 6 East, 3; 2 Camp. 602. *Tindal* v. *Brown*, 1 T. R. 167. But see Lord Kenyon's opinion in *Hilton* v. *Shepherd*, 6 East, 14. n.; and see the ordinary rule, *infra*, n. (*a*). By the st. 7 & 8 G. 4, c. 15, s. 1, where bills of exchange becoming due on the day preceding Good Friday or Christmas-day are dishonoured, notice thereof may be given on the day after such Good Friday, &c. sec. 2. Bills of exchange becoming due on fast or thanksgiving days, to be payable the day next preceding such fast or

(A) (Absence of the drawer from home, when called on for acceptance, is not a refusal to accept. *Bank of Washington* v. *Triplett*, 4 Peters, 35. A notice sent through the post office to the maker of a note, is not such a demand as the law requires, where his residence is supposed to be ascertained. *Stuckert* v. *Anderson*, 3 Whart. 116. In an action on a promissory note payable at a time and place certain, it is not necessary for the plaintiff to aver and prove a presentment at such time and place; and it is incumbent on the defendant to show by way of defence that he was ready to pay at such time and place. *Payson* v. *Whitcomb*, 15 Pick. R. 212. See, also, *Granite Bank* v. *Ayres*, 16 Pick. 392. *Shaw* v. *Read*, 12 Pick. 132. [Going with a note to the maker's place of business *in business hours*, to demand payment, and finding it shut, is tantamount to a personal demand. *Shed* v. *Bret & Trustee*, 1 Pick. 413. So if a notary go to the maker's house, and find it shut up, and that he is out of town, it is a sufficient demand. *Ogden* v. *Cowley*, 2 Johns. 274. But in North Carolina, it is held that in such case, "some endeavour must be used to find the maker." *Sullivan* v. *Mitchell*, 1 Car. Law Repts. 482.] If a notary testifies that it is his usual custom to send written notice of protest by post, on the evening of the day on which a bill is dishonoured, to the indorser or drawer, and believes he gave such notice to the indorser in the case in question, this is *prima facie* evidence to support the averment of due notice to the indorser. *Miller* v. *Huckley*, 5 Johns. 375. The notarial book of a deceased notary is evidence of the fact it states respecting protest notice, &c. *Back* v. *Cooper*, 1 Harring. 10.)

(1) [*Sterry* v. *Robinson*, 1 Day, 11. *Watson & al.* v. *Loring & al.* 3 Mass. Rep. 557. *Lenox* v. *Cook*, 8 Mass. Rep. 460. *Mason* v. *Franklin*, 3 Johns. 202. *Weldon* v. *Buck*, 4 Johns. 144. *Taan* v. *Le Gaux*, 1 Yeates, 204. *Winthrop* v. *Pepoon*, 1 Bay. 468, acc.]

(B) (An action cannot be brought on the third day of grace against a maker of a promissory note. *Osborn* v. *Moncure*, 3 Wend. 170. See, also, *Church* v. *Clark*, 21 Pick. 310. *The Savings Bank of Newhaven* v. *Bates*, 8 Conn. R. 505. But it has been held, that the acceptor of a bill of exchange for the accommodation of the drawer, may pay it on the last day of grace, before the commencement of business hours, and forthwith bring his action against the drawer to recover an indemnity. *Whitwell* v. *Bingham*, 19 Pick. 117. Suit may be brought against the indorser of a promissory note on the very day a note becomes due after demand and notice, for there is then a breach of contract. *City Bank* v. *Cutter*, 3 Pick. 418. *Shed* v. *Brett*, 1 Pick. 401. The maker of a promissory note is bound to pay it, upon demand made at any seasonable hour of the last day of grace, and may be sued on that day, if he fail to pay on such demand. *Staples* v. *Franklin Bank*, 1 Metcalf, R. 43.)

[1]Eng. Com. Law Reps. xi. 340. [2]*Id.* vi. 403.

By whom. It is sufficient to prove that the defendant had due notice from any party to the bill (*s*) (1). If the drawer receive due notice from his own indorsee, he is liable to a subsequent indorsee, from whom he received no direct notice (*t*).

*226 *A bill indorsed in blank having been left at an attorney's office to be Proof of dishonour. presented by him, was on presentation dishonoured; a letter written by the attorney to the drawer was held to be a sufficient notice of dishonour, although he did not state on whose behalf he applied (*u*).

Upon the guarantee of the price of goods to be paid for by bill, it was held that notice of dishonour should be given both to the drawer and to the party who guaranteed the payment, unless both were bankrupts (*x*).

Notice should be given to all whom the holder means to sue (2); if he give notice only to an intermediate party, it will not be sufficient as to a prior party unless he has otherwise received due notice (*y*).

Time of. Notice of dishonour may be given immediately on the refusal to pay, without waiting to see whether the bill will be taken up in the course of the day (*z*). The general rule as to time, is, that if the parties live in the same town, notice shall be given the next day; if in different places, by the next day's post (*a*) (3). Where the holder received notice of the

thanksgiving day, sec. 3. Good Friday, Christmas-day, as regards bills of exchange, to be treated as the Lord's Day. A party who receives notice on a Sunday, Good Friday, or Christmas-day, is in the same situation as if it had not reached him till the next day. *Bray* v. *Hadwen*, 5 M. & S. 68. A Jew is not obliged to forward a bill on the day of a grand religious festival. *Lindo* v. *Unsworth*, 2 Camp. 602. If notice be, in fact, given before action brought, although not at the proper time, yet proof of having used diligence will satisfy the allegation of notice having been given. *Harris* v. *Richardson*,[1] 4 C. & P. 522.

(*s*) 2 Camp. 177. *Rosher* v. *Kieran*, 4 Camp. 87. *Shaw* v. *Croft*, 2 Camp. 373. *Wilson* v. *Swabey*,[2] 1 Starkie's C. 34. *Jamieson* v. *Swinton*, 2 Camp. 373. *Gunson* v. *Metz*,[3] 1 B. & C. 193. *Chapman* v. *Keane*,[4] 3 Ad. & Ell. 606. But see *ex parte Barclay*, 7 Ves. jun. 598; and *Tindal* v. *Brown*, 1 T. R. 167. In that case time had been given to the maker of the note. A notice given by one not a party to the bill is insufficient. *Stewart* v. *Kennett*, 2 Camp. 177. [See *Haslett* v. *Poultney*, 1 Nott & McCord, 456. *Bower* v. *Wooton*, 2 Taylor, 70. *Stafford* v. *Yates*, 18 Johns. 327.]

(*t*) *Shaw* v. *Croft*, 2 Camp. 373.

(*u*) *Woodthorpe* v. *Laws*, 2 M. & W. 109. (*x*) 2 Taunt. 206.

(*y*) Bayley on Bills, 209. Notice to the drawer's attorney is not sufficient. *Croft* v. *Smith*, 1 M. & S. 554. Where the drawee is dead, notice is to be given to his executors or administrators. Where a bankrupt has left his house, notice should be left there, and with the messenger when he is in possession. *Ex parte Johnson*, 1 Mont. & Ayr. 622. Where an indorsee was abroad, but had a house in England, and the notice was sent to his house, and the bill was shown to his wife, it was held to be sufficient. *Cromwell* v. *Hynrow*, 2 Esp. C. 511. *Honsego* v. *Cowne*, 2 M. & W. 348.

(*z*) 3 Camp. 193. And see *Wright* v. *Shawcross*, 2 B. & A. 501.

(*a*) *Williams* v. *Smith*, 2 B. & A. 496, where it was held that notice of the dishonour of bills must be given, or presentment made, by the post on the day following that on which the party receives the bills, or notice of the dishonour; and the Court said, that if it were to be the next practicable post, difficult questions of fact would often be raised, and uncertainty would arise from peculiar local situations. Where, there-

(1) [Notice by the drawee who has refused to accept the bill, is not sufficient—he not being a party or chargeable in virtue of the bill. *Stanton & al.* v. *Blossom & al.* 14 Mass. Rep. 116. Notice or demand, however, may be given or made by a notary. *Hartford Bank* v. *Stedman*, 3 Conn. Rep. 489. *Shed* v. *Brett*, Pick. 401.]

(2) [So if the indorser of a note be dead at the time it becomes payable, and there are executors or administrators known to the holder, notice of non-payment must be given to them. *Merchant's Bank* v. *Birch's Ex'ors*, 17 Johns. 25. But where a note fell due on the 22d December, and the indorser died at sea on the 12th December, but his death was not known to the holder until March following, and the bill was not proved, nor letters testamentary granted until April; it was held that a notice of non-payment left, at the time, at the dwelling house of the indorser, his last place of residence in New York, and also sent to his family, who had, a short time before, removed into the country, was sufficient to support an action against the executors of the indorser, without showing notice to them of the non-payment, *ibid.* S. P. *Stewart's* v. *Eden's Ex'ors*, 2 Caines' Rep. 124. See *Price* v. *Young*, 1 Nott & McCord, 438. *Hale* v. *Barr*, 12 Mass. Rep. 86.]

(3) [*Whitwell & al.* v. *Johnson*, 17 Mass. Rep. 453. *Shed* v. *Brett*, 1 Pick. 401. *Ireland* v. *Kip*, 11 Johns. 231. *Dodge* v. *Bank of Kentucky*, 2 Marsh. 616. *Robinson* v. *Ames*, 20 Johns. 146, *acc.* See post. p. 269. *note* (1).]

[1] Eng. Com. Law Reps. xix. 506. [2] *Id.* ii. 283. [3] *Id.* viii. 58. [4] *Id.* xxx. 69.

dishonour on Sunday, notice by him by Tuesday's post was held to be sufficient (*b*). Where the dishonour was on Saturday at nine, the notice to the plaintiff on Monday, at Knightsbridge, by his banker, and notice by the plaintiff to *the indorsee in Tottenham-court-road on Tuesday, it was held to be sufficient (*c*). Notice by a letter put into the two-penny post-office after five o'clock in the afternoon of the day after that on which the party knew of the dishonour, was held to be insufficient (*d*); but where the letter in the usual course, would reach the defendant on the evening of the day following that on which the bill was dishonoured, it was held to be sufficient although the parties resided within a short distance of each other (*e*). Where notice was given to a Jewish indorser on the 8th, which was a great Jewish festival, it was held that it was not necessary for him to give notice by the general post till the 9th (*f*). Where the indorsee, living in Holborn, gave notice to the indorser, living at Islington, by nine the next night, it was held to be reasonable notice (*g*).

*227 Time of notice.

A bill was received by a traveller for the plaintiff, who transmitted it to his principal; the bill being dishonoured, the latter wrote to his traveller to inquire from whom he received it, and on receiving the requisite information gave notice to the defendants, and it was held to be sufficient (*h*).

An attorney who is employed to discover the residence of a party to a bill, has on discovery made, as in the case of a banker, a day to consult his employer, and it is sufficient if he forward the information to him on the succeeding day (*i*).

Where a bill is dishonoured abroad, notice by the first *direct* and *regular* mode of conveyance, whether it be an English or a foreign ship, is sufficient; the holder is not bound to send such notice by the accidental, though earlier, conveyance, of a foreign ship (*k*).

fore, country bank notes were received on Friday, and transmitted partly by the Saturday and partly by the Sunday's post, so that both were received in London on Monday, and were presented on Tuesday and dishonoured, the Court held that the holder had not been guilty of laches, although he had received the note several hours before the post went off on Friday. *Ibid.* And see *Tindal* v. *Brown*, 1 T. R. 167; *Puckford* v. *Maxwell*, 6 T. R. 52; and *Wright* v. *Shawcross*, 2 B. & A. 501. It has been doubted whether it is sufficient that the drawer should have had notice in as many days as there are intermediate indorsers between himself and the plaintiff. Lord Ellenborough ruled in the negative in *Marsh* v. *Maxwell*, 2 Camp. 210; and the same point was decided in *Turner* v. *Leach*,[1] 4 B. & A. 451. See *M'Queen* v. *Farquhar*, 11 Ves. 478; and *infra*, 234. Where there is a post on the day when the party receives notice, and none on the following day, it is sufficient to send notice on the third day. *Geill* v. *Jeremy*, M. & M. 61. Notice on the day on which the bill becomes due is not too soon. *Burridge* v. *Manners*, 3 Camp. 193. Unless the acceptor afterwards, and on the same day, pays the bill. *Hartley* v. *Case*, 1 C. & P. 556. A party receiving notice of dishonour need not give notice to the party above him till the next post after the day on which he himself receives the notice, although he might easily give it on that day, and there is no post on the day following. *Geill* v. *Jeremy*,[2] 1 M. & M. 61. A bill drawn by bankers in the country on their correspondents in town, payable after sight, is indorsed to the traveller of the plaintiffs on their account; he transmits it to them after an interval of a week, and they, two days afterwards, send it for acceptance, which is refused, the drawer having become a bankrupt; if the bill had been sent by the traveller to his employers on the receipt, they would have been able to have got it accepted before the bankruptcy. Held, that there was no laches in the traveller or his employers. *Shute* v. *Robins*,[3] 1 M. & M. 133.

An averment of notice is satisfied by proof of notice within a reasonable time, without stating the special circumstances which render earlier notice unnecessary. *Firth* v. *Thrush*,[4] 8 B. & C. 387. *Sharp* v. *Bayley*,[5] 9 B. & C. 44.

(*b*) *Wright* v. *Shawcross*, 2 B. & A. 501.

(*c*) *Haynes* v. *Birks*, 3 B. & P. 599.

(*d*) 3 Camp. 108; Bay. 125. *Scott* v. *Lifford*, 9 East, 347; and see *Langdale* v. *Trimmer*, 15 East, 291.

(*e*) *Hilton* v. *Fairclough*, 2 Camp. 633. (*f*) Ibid. 602.

(*g*) 2 Taunt. 224; and see *Hilton* v. *Shepherd*, 6 East, 14, n. Where there were five indorsers, *A. B. C. D. E.* all living near London, notice of dishonour on the same day to *E.*, and on the next to *D.*, was held to be sufficient.

(*h*) *Baldwin* v. *Richardson*,[6] 1 B. & C. 45. (*i*) *Firth* v. *Thrush*,[4] 8 B. & C. 387.

(*k*) *Muilman* v. *D'Eguino*, 2 H. B. 565.

[1]Eng. Com. Law Reps. vi. 484. [2]*Id.* xxii. 249. [3]*Id.* xiv. 215. [4]*Id.* xv. 242. [5]*Id.* xvii. 329. [6]*Id.* viii. 66.

Manner of the notice. It is not necessary to prove a notice in writing (*l*) (A). It is sufficient to prove a reasonable endeavour to give notice, as by sending an agent to the drawer's country house, who used his endeavours to give the notice (*m*) (B).

By the post. To prove a notice, it is sufficient to show that a letter, announcing the dishonour, and directed to the defendant (*n*), was put into the proper post-office (*o*), or that such a letter was left at the defendant's house (*p*).

*228 *Notice by a letter put into the twopenny post, has been deemed to be sufficient, although the parties lived within a short distance of each other (*q*); but it should appear that the letter was put into the receiving-house in sufficient time to be delivered to the party, according to the course of the post, within the time of legal notice (*r*). And in the case of a foreign bill also, the delivery of a letter at the post-office has been held to be sufficient evidence of notice (*s*). Where there is no post, it is sufficient to prove that notice was sent by the ordinary mode of conveyance (*t*) (1).

Where a bill was indorsed in Jamaica by *A.*, who remained there after the dishonour of the bill, but whose usual residence was in England, it was held that proof of notice of the dishonour left at his residence in England

(*l*) *Cross* v. *Smith*, 1 M. & S. 545. *Housego* v. *Cowne*, 2 M. & W. 348. *Phillips* v. *Gould*,[1] 8 C. & P. 355. Notice to the drawers by sending to their counting-house during the hours of business on two successive days, knocking there and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door being locked, is sufficient, without leaving notice in writing or sending by the post, although some of the drawers live at a small distance from the place. *Woodthorpe* v. *Lomas*, 2 M. & W. 109.

(*m*) As where such agent went to the drawer's counting-house on two successive days, during hours of business, knocked there, and made sufficient noise to be heard by persons within, and waited there several minutes, the inner door being locked. *Cross* v. *Smith*, 1 M. & S. 545.

(*n*) Notice to an indorser, addressed, '*Mr. Haynes, Bristol*,' was held to be too general. *Walter* v. *Haynes*,[2] 1 R. & M. 149. It is otherwise in an action against the drawer of a bill dated generally. Where the bill was dated *Manchester*, Abbott, C. J. held that it was sufficient to direct a letter to the drawer, 'at Manchester,' generally. *Mann* v. *Moors*,[3] R. & M. 249. So where a party drew a bill, dating it generally London. *Clarke* v. *Sharpe*, 3 M. & W. 166.

(*o*) Pothier, 148; Bay. 119; 2 H. Bl. *Scott* v. *Lifford*, 9 East, 347; 1 Camp. 246. *Saunderson* v. *Judge*, 2 H. B. 509.

(*p*) 1 Esp. C. 5. [*Smith* v. *Bank of Washington*, 5 Serg. & Rawle, 322. *Smedes* v. *Utica Bank*, 20 Johns. 372.]

(*q*) *Hilton* v. *Fairclough*, 2 Camp. 633. *Scott* v. *Lifford*, 9 East, 347; 1 Camp. 246.

(*r*) *Smith* v. *Mullett*, 2 Camp. 208. *Hilton* v. *Fairclough*, 2 Camp. 633.

(*s*) 2 H. Bla. 509; 6 East, 3, 9; 7 East, 385; 3 Esp. C. 54.

(*t*) Bayley, O. B. 128.

(A) (*Caylev* v. *Stevens*, 4 Wend. 556.)

(B) (Where there is no dispute as to the facts, the Court must determine the question of diligence used to charge an indorser, and the sufficiency of the notice, and not submit these questions to the jury. *Remer* v. *Downer*, 23 Wend. 620. It is settled, that whether or not due diligence was used in making inquiry for the indorser is a mixed question of law and fact. The court are to give their opinion on the law to the jury according to the circumstances as they appear; but the jury must decide the fact whether there was due diligence or not. *Stuckert* v. *Anderson*, 3 Whart. 116. Verbal notice of the non-payment of a note is sufficient. *Rahm* v. *Philadelphia Bank*, 1 Rawle, 335. It is not necessary that the notice, when sent by mail, should be addressed to the post-office *nearest* the residence of the party when there were *several post-offices* in the same town. *Remer* v. *Downer*, 23 Wend. R. 620. S. P. *Gist* v. *Lybrand*, 3 Ohio, 318. *Notice* of non-payment of a note, erroneous in *amount*, and directed *on its face* to a person other than the one sought to be charged as indorser, is not sufficient, although it be directed on its *outside* to the indorser of the note described in the declaration. Ibid. See further *Davis* v. *Williams*, Peck. 191. *Barker* v. *Hall*, Mart. & Yerg. 183. Where a party to a bill of exchange is a transient person, having no known residence, notice of protest sent by the first mail to a place to which he very frequently resorts, is sufficient. And if he shows that another place is his usual resort, as his home, still if it appears, that if the notice had been sent there, he could not have received it sooner than he did, it must be deemed sufficient. *M'Lain* v. *Waters*, 9 Dana, 55.)

(1) [In the *Bank of Logan* v. *Butler*, 3 Littell's Rep. 498, the court in Kentucky held that where an indorser lived in the country and not on a post-road, a special messenger ought to be employed, or other means used to convey the notice with the same despatch and certainty as it would go between places where there are post-offices. See post, 259.]

[1]Eng. Com. Law Reps. xxxiv. 425. [2]*Id.* xxi. 402. [3]*Id.* xxi. 429.

was sufficient (*u*). Proof that the letter containing notice was delivered to the person in whose house the defendant lodged, for the defendant, and was next morning thrown into the plaintiff's house, was held to be presumptive evidence of notice (*x*). It is insufficient to prove that notice was given on one of two days, where the notice on the latter day would not be in time; for the plaintiff is bound to show that he has given proper notice (*y*). It seems to have been doubted whether parol evidence of the contents of the letter announcing the dishonour be admissible, unless notice to produce the letter be first proved (*z*) (1). It has since been held, upon a conference of all the Judges, that it is unnecessary to give such notice (*a*).

Where a notice sent to the drawer of a bill arrives too late in consequence of misdirection, it is a question for the jury whether the holder has used due diligence (*b*).

Contents of notice.

A notice is good although it be accompanied by an intimation that the holders had reason to believe that a friend of the acceptor's would take up the bill in a few days, and that they would hold the bill (to save expense), till the end of the week, unless they heard from the drawers to the contrary (*c*). No particular form of notice is requisite; the object in giving *notice is to apprise the party that the holder intends to require payment from him, and to enable him to pursue his remedy against any other party who may in turn be liable to him (*d*). *229

(*u*) 2 Esp. C. 561. [S. P. *Fisher* v. *Evans*, 5 Binney, 542.] (*x*) *Stedman* v. *Gooch*, 1 Esp. C. 3.

(*y*) Per Ld. Ellenborough, C. J. in *Lawson* v, *Sherwood*,[1] 1 Starkie's C. 314. Where it was proved that duplicate notices had been written, and that a letter had been sent to the drawer the same day, and that notice had been given to the defendant to produce this letter, it was held to be evidence of notice of dishonour. (Ibid. And afterwards by the court of K. B.) But in *Hetherington* v. *Kemp*, (4 Camp. 193), it is said to have been held, that it is not sufficient to show that notice was written by a merchant in his counting-house, and laid upon his table, from which, in the course of business, all letters would be carried to the post-office.

(*z*) In *Langdon* v. *Hulls*, 3 Esp. C. 157. *Shaw* v. *Markham*, Peake's C. 165, such proof was held to be necessary. In *Ackland* v. *Pearce*, 2 Camp. 601, Le Blanc, J. admitted secondary evidence without proof of notice. It is sufficient to prove a duplicate of the notice (*Philipson* v. *Chase*, 2 Camp. 110; *Roberts* v. *Bradshaw*,[2] 1 Starkie's C. 28; S. P. *King* v. *Beaumont*,[3] 3 B. & B. 228). Where the plaintiff's clerk stated that a letter containing the notice was sent by the post on a Thursday morning, but had no recollection whether it was put in by himself or another clerk, it was held to be insufficient. *Hawkes* v. *Salter*,[4] 4 Bing. 715.

(*a*) *Swain* v. *Lewis*, 2 C. M. & R. 263. And notice to produce such notice is unnecessary. *Ib.* But notice is necessary to warrant the reading of letters, to prove the dishonour of bills, other than those on which the action is brought. *Lanauze* v. *Palmer*,[5] M. & M. 31.

(*b*) *Siggers* v. *Brown*, 1 Mo. & R. 520. Where the delay arose from the bill having been sent to a wrong person, and the mistake arose from the indistinctness of the drawer's writing on the bill, it was held that he was not discharged. *Howitt* v. *Thompson*, 1 Mo. & R. 548.

(*c*) *Forster* v. *Jourdison*, 16 East, 105.

(*d*) *Tindal* v. *Brown*, 1 T. R. 170. The notice, however, must be such as to show what the bill is, and that payment has been refused. A letter containing merely a demand of payment, without even stating that the bill was ever accepted, is insufficient. And see *Margeson* v. *Coble*,[6] 2 Chitty's R. 365. *Hartley* v. *Case*,[7] 4 B. & C. 339; 6 D. & R. 505; where notice was given on the day when the bill became payable, but did not explicitly state the fact of dishonour, the answer being "no effects, but that they probably should have them in the course of the day," the notice was held to be insufficient. *Hartley* v. *Case*,[7] 1 C. & P. 555. Although a notice of dishonour does not require all the formality of a protest, yet it must in express terms, or by necessary implication, inform the party that the bill has in fact been dishonoured: where the notice to an indorsee was contained in a letter from the attornies of the holder, stating only that the bill bearing the indorsement of the defendant had been put into their hands, with directions to take legal measures unless immediately paid; it was held not to amount to a notice of dishonour. *Solarte* v. *Palmer*,[8] 7 Bing. 530. A

(1) [In *Lindenberger & al.* v. *Beall*, 6 Wheat. 104, it was held, that evidence of a letter having been put into the post-office, giving notice of the dishonour of a bill, might be given to the jury, without giving notice to the defendant to produce the letter.] {The contents of a written notice to an indorser of a promissory note may be proved by parol, without giving notice to produce such writing. *Eagle Bank, &c.* v. *Chapin*, 3 Pick. Rep. 180.}

[1] Eng. Com. Law Reps. ii. 405. [2] *Id.* ii. 281. [3] *Id.* vii. 423. [4] *Id.* xv. 125. [5] *Id.* xxii. 239. [6] *Id.* xviii. 368. [7] *Id.* x. 350. [8] *Id.* xx. 226.

Where the bill has been drawn by several, who are partners, a notice to one is a notice to all (*e*).

Facts in excuse (A.) The plaintiff, in excuse of his laches in not giving notice, may prove (*f*) that the drawer had no effects in the hands of the acceptor to answer the bill, either at the time of drawing, or when the bill became due (*g*); for the

note from the holder's attorney, "A bill for 50*l*., drawn on and bearing your indorsement, has been put into our hands by *A. B.*, with directions to take legal measures for the recovery thereof unless immediately paid," is insufficient. *Salarte* v. *Palmer*,[1] 7 Bing. 530; 1 Bing. N. C. 194; 2 Clark & F. 93. So where the notice was that the bill in question had been returned unpaid, coupled with a demand of payment. *Boulton* v. *Welsh*,[2] 3 Bing. N. C. 688. But in the case of *Grugeon* v. *Smith*, where the notice was, "Your bill, due this day, has been returned with charges, to which we request your immediate attention," Patterson, J. and afterwards the court above, held the notice to be sufficient. And this case was afterwards approved of in that of *Hedger* v. *Stevenson*, 2 M. & W. 799. In the latter case the notice in substance was, that the promissory note indorsed by the defendant had been returned unpaid, and requesting a remittance. In *Phillips* v. *Gould*,[3] 8 C. & P. 355, a notice that the bill "in question, indorsed by you (the defendant), lies at my office due and unpaid," was held to be insufficient. Notice of dishonour in a letter in the terms, "*S. & Co.* inform *P.* (the defendant) that *B.*'s acceptance, 100*l*. is not paid; as indorsee, *P.* is called upon to pay the money, which will be expected immediately," is insufficient. *Strange* v. *Price*, 2 Perr. & D. 278, and 10 Ad. & Ell. 125; supporting *Solarte* v. *Palmer*,[4] 1 Bing. N. C. 194. Although it need not be expressly stated, it ought to appear by necessary inference that the bill is due. Where the notice was in the terms, "*D.*'s acceptance for 100*l*., drawn and indorsed by you, has been presented and returned, and now remains unpaid," was held to be sufficient. *Cook* v. *French*, 10 Ad. & Ell. 131. A letter to the defendant, the indorser of a bill, dated ——, in the terms, "Sir, the bill for 100*l*., drawn by *R.* and accepted by *S.*, and bearing your indorsement, has been presented to the acceptor for payment and returned dishonoured, and now lies overdue and unpaid by me, as above, of which I hereby give you notice," was held sufficient notice of dishonour, as conveying all the requisite information. *Lewis* v. *Gompertz*, 6 M. & W. 399. And see *Hedger* v. *Steavenson*, 2 M. & W. 799. A letter in the terms, "This is to inform you that the bill I took of you, 100*l*., is not took up, and 4*s*. 6*d*. expense, and the money I must pay immediately," was held to be an insufficient notice of dishonour. *Messenger* v. *Southey*, 1 Man. & Gr. 76; 1 Sc. N. S. 180. [*Reedy* v. *Seixas*, 2 Johns. Cas. 337.]

(*e*) *Porthouse* v. *Parker*, 1 Camp. 82, (1.)

(*f*) But the excuse for not giving due notice must appear on the face of the declaration; still, if the parties be in privity, as where an action is brought by the payee of a bill against the drawer, the plaintiff may recover on the account stated. Per Abbott, L. C. J. Guildh. Sitt. after M. T. 1826. Where there is express averment of notice of dishonour, proof of mere knowledge is insufficient, and if there be facts amounting to a waiver they should be set forth; held also, that a statement that in case of certain events, the party would pay part of the money on the bills the day they fell due, was not an admission of a present debt sufficient to support the count on an account stated. *Burgh* v. *Legge*, 5 Mees. & W. 418; and 7 Dowl. 814.

(*g*) If the drawer of a bill have no effects in the hands of the drawee at the time of drawing the bill and of its maturity, and have no reason to expect that it will be paid, it is not necessary to present the bill at maturity; and the drawer will be liable, although the bill be not presented till two days after, and is then refused. For P. C. the same reason applies to want of presentment as to want of dishonour, and therefore the same rule ought to prevail with regard to want of effects operating as an excuse. *Terry* v. *Parke*,[5] 6 Ad. & Ell. 502; and see *Bickerdike* v. *Bollman*, 1 T. R. 405. *Rogers* v. *Stephens*, 2 T. R. 713. *Clegg* v. *Cotton*, 1 Bos. & Pull. 652; 3 Bos. & Pull. 239, 242. Per Chambre, J. in *Clegg* v. *Cotton*, the ground of this rule is the fraud of the drawer. *Calridge* v. *Dalton*, 4 M. & S. 226. But where it was clear that the drawee lent his name in the expectation that a third party, who was indebted to him, would provide funds for the payment of the bill when due; held that he was entitled to notice. *Lafitte* v. *Slater*,[6] 6 Bing.

(A) (The use of due diligence, in order to give notice to a long absent drawer, who has no known agent to receive it, will charge him. *Blakely* v. *Grant*, 6 Mass. 386. The stoppage of all business in a city during a pestilence. *Junno* v. *Lague*, 2 John. C. 1. So a state of war. *Hopkirk* v. *Page*, 2 Brock. 20; but in that case notice must be given within a reasonable time after peace. *Ibid.* If the drawer had no effects in the hands of the drawee, at the date of the bill, and no reasonable ground to expect it would be honoured, he is chargeable without notice. *Hopkirk* v. *Page*, 2 Brock. 20. *Warder* v. *Tucker*, 7 Mass. R. 452. *Savage* v. *Merle*, 5 Pick. 88. *Read* v. *Wilkinson*, 2 Wash. C. C. R. 514. *Hoffman* v. *Smith*, 1 Caines, 157. But an indorser must always receive notice, unless he has been placed in funds by the drawer to take up the bill. *Barton* v. *Baker*, 1 Serg. & R. 334. *Scarborough* v. *Price*, 1 Bay. 178. *Denniston* v. *Imbrie*, 3 Wash. C. C. R. 401. *Ramdulolday* v. *Darieux*, 4 Wash. C. C. R. 61. And even the drawer is entitled to notice of the dishonour of a bill, if he had reasonable ground to believe it would be honoured, though he had no funds in the drawee's hands. *Austin* v. *Rodman*, 1 Hawks, 195. *Stanton* v. *Blossum*, 14 Mass. R. 116. *French's Ex'ors* v. *Bank of Columbia*, 4 Cranch, 141. *Robinson* v. *Ames*, 20 John. R. 146. *Grosvenor* v. *Stone*, 8 Pick. 83. The burden of proof is, however, on the holder of a bill, to show that the drawer had no funds in the drawee's hands. *Thompson* v. *Stewart*, 3 Conn. 172. *Ralston* v. *Bullits*, 3 Bibb, 261.)

(1) [*Dodge* v. *Bank of Kentucky*, 2 Marsh. 616. Sed vide *Shepherd* v. *Hawley*, 1 Conn. Rep. 367.]

[1] Eng. Com. Law Reps. xx. 226. [2] *Id.* xxxii. 283. [3] *Id.* xxxiv. 425. [4] *Id.* xxvii. 351. [5] *Id.* xxxiii. 129. [6] *Id.* xix. 181.

*drawer was guilty of fraud in drawing on one who had no effects to answer the call (*h*); and an acceptor is competent to prove the fact (*i*); and a protest is unnecessary to charge the drawer of a foreign bill where the drawee had no effects of the drawer in his hands, although the drawer entertained reasonable expectations that the bill would be accepted (*k*)(1).

Deeds deposited by the drawer in the hands of the drawee, for the purpose of raising money, are not effects, it seems, for this purpose (*l*).

Absence from home on account of the dangerous illness of the party's wife has been held to be no excuse for not giving notice (*m*).

An acknowledgement by the drawer that the bill would come back to him, has been held to supersede the necessity of notice (*n*) (2).

Where the plaintiff received a bill in payment of goods which turned out worth nothing for want of a sufficient stamp, and was never paid, it was held that the defendant from whom he received it was not entitled to any notice of dishonour (*o*).

A declaration by the drawee when the bill is presented, as to the want of effects of the drawer in his hands, is evidence of the fact, because he is for that purpose the agent of the drawer; but a subsequent declaration is not admissible (*p*). The plaintiff may also show, in excuse for want of

623. The Court considering the case of *Bickerdike* v. *Bollman*, 1 T. R. 405, as an excepted case, and not to be extended. See also *Rucker* v. *Hillier*, 16 East, 45. Where the drawer made a bill payable at his own house, held that it was properly left to the jury as evidence of its being an accommodation-bill, and rendering notice of dishonour unnecessary. *Sharp* v. *Bailey*,[1] 9 B. & C. 44.

(*h*) See *Spooner* v. *Gardiner*,[2] 1 R. & M. 84.

(*i*) 1 Esp. R. 332. *Walwyn* v. *St. Quintin*, 2 Esp. R. 515; Peake's L. Ev.

(*k*) 2 Camp. 310. *Legge* v. *Thorpe*, 12 East, 171, 177.

(*l*) *Walwyn* v. *St. Quintin*, 1 B. & P. 651; and see *Legge* v. *Thorpe*, 12 East, 171.

(*m*) *Turner* v. *Leach*, Chitty, O. B. 212, 7th Ed. *cor.* Ld. Ellenborough, C. J.; but see *Hilton* v. *Shepherd*, 6 East, 15.

(*n*) *Brett* v. *Levett*, 13 East, 213; but *qu.* (*o*) *Cundy* v. *Marriott*,[3] 1 B. & Ad. 696.

(*p*) *Prideaux* v. *Collier*,[4] 2 Starkie's C. 57. *Pickin* v. *Graham*, 1 C. & M. 725.

(1) [Notice is not necessary when the drawee has no effects of the drawer. *Bond & al.* v. *Fornham*, 5 Mass. Rep. 170. *Hoffman* v. *Smith*, 1 Caine's Rep. 157. *Baker* v. *Gallagher*, Circuit Court, Oct. 1806. Wharton's Digest, 87. *Anon.* v. *Stanton*, 1 Hayw. 271. But it lies in the holder of a bill to prove that the drawer had no funds in the hands of the drawee, in order to excuse the want of notice. *Baxter* v. *Graves*, 2 Marsh. 152.

The drawer of a bill is entitled to notice of its dishonour, though the drawee is not indebted to him, either when the bill was drawn or fell due, if he had *reasonable ground to believe that it would be honoured*—and a written authority from the drawee to the drawer for the latter to draw is sufficient ground. *Austin* v. *Rodman*, 1 Hawks, 194. S. P. *Robinson* v. *Ames*, 20 Johns. 146.

If the drawer withdraw his funds from the drawee's hands, after the bill is drawn, he is still entitled to notice of the dishonour of the bill. *Edwards* v. *Moses*, 2 Nott & M'Cord, 433. So if his effects are attached by a trustee process before the bill is presented. *Stanton & al.* v. *Blossom & al.* 14 Mass. Rep. 116. See *Sutcliffe* v. *M'Dowell*, 2 Nott & M'Cord, 251. *Lilly* v. *Miller*, *ibid.* 257, *n.*

Insolvency of a party to a bill does not excuse the holder from giving notice of its dishonour. *May* v. *Coffin*, 4 Mass. Rep. 341. *Bond & al.* v. *Farnham*, 5 ib. 170. *Lenox* v. *Leverett*, 10 ib. 1. *Sullivan* v. *Mitchell*, 1 Car. Law Repos. 482. *Edwards* v. *Thayer*, 2 Bay, 217. *Buck* v. *Cotton*, 2 Conn. Rep. 126.

Where before a note became due, the indorser informed the holder that the maker had absconded, and requested a further time of payment, it was held that a demand on the maker or notice to the indorser was unnecessary. *Leffingwell* v. *White*, 1 John. Cas. 99. If the maker has absconded, and is not to be found when the note falls due, a demand of payment is not necessary to charge the indorser. *Duncan* v. *M'Cullough*, 4 Serg. & Rawle, 480.

Where the drawer of a bill is partner of the house or firm, on whom it is drawn, it is not necessary for the holder to prove that notice of its dishonour was given to the drawer. *Gowan* v. *Jackson*, 20 Johns. 176. But in Connecticut, where a note was drawn by one partnership and indorsed by another, the acting partner in both being the same person, it was held that this did not excuse the want of due demand and notice. *Dwight* v. *Scovill*, 2 Conn. Rep. 664.]

(2) [The prevalence of a malignant fever in the place of the parties' residence was admitted to be a sufficient excuse for not giving notice until November of a protest for non-payment, made in September. *Tunno* v. *Lague*, 2 Johns. Cas. 1.]

[1]Eng. Com. Law Reps. xvii. 329. [2]*Id.* xxi. 386. [3]*Id.* xx. 474. [4]*Id.* iii. 242.

notice, that he was ignorant of the drawer's place of abode, and that he has used due diligence to discover it (*q*).

Proof to excuse want of notice.

In the case of *Phipson* v. *Kneller* (*r*), the drawer, a few days before the bill became due, stated to the holder that he had no regular place of residence, but that he would call and inquire whether the bill had been paid by the acceptor, and Ld. Ellenborough held that he was not entitled to notice of dishonour. Notice by the drawer to the drawee before the bill becomes due, not to pay it, dispenses with notice of dishonour, but not with the duty of presentment for payment (*s*). The plaintiff cannot go into general evidence to show that the defendant in the particular instance has suffered no prejudice from the want of notice, for this would lead to inquiries of too complicated and indefinite a nature (*t*). Where one of the
*231 drawers is also *the acceptor of the bill, notice is unnecessary (*u*). But it is necessary where the party draws the bill with a *bonâ fide* reasonable expectation that he shall have assets in the hands of the drawee, having shipped goods on his own account, and which were on their way to the drawee, although the goods had not come to the hands of the drawee when the bill was presented for acceptance (*x*). So, where acceptances were made on the faith of consignments of goods which had not been received, on the ground of fair mercantile agreements (*y*), or where there are fluctuating accounts between the drawer and drawee (*z*); or where at the time of drawing a foreign bill, the drawee has effects of the drawer in his hands, although they are taken out before the bill becomes due (*a*); or where the drawee has effects of the drawer in his hands at any time whilst the bill is running (*b*).

Or where the bill is drawn in the fair and reasonable expectation, that in the ordinary course of mercantile transactions it will be accepted or paid (*c*). And in general, notice must be given in all cases where the drawer would have any remedy over against a third person (*d*).

It has been held, that notice is not dispensed with although the drawer and drawee have agreed that the former should take up the bill (*e*), or, although the drawer of a bill, destroyed by accident, refuse to give a new bill according to the statute (*f*); or although the drawee be a bankrupt or insolvent (*g*); or although the drawee has previously informed the drawer of his inability to pay, and has paid him money towards the taking up the

(*q*) *Phipson* v. *Kneller*,[1] 1 Starkie's C. 116. (*r*) 1 Starkie's C. 116; 1 Camp. 285.
(*s*) *Hill* v. *Heap*,[2] 1 D. & R. 57. (N. P. C.) 57.
(*t*) *Rogers* v. *Stephens*, 2 T. R. 718. *Dennis* v. *Morrice*, 2 Esp. C. 158.
(*u*) 12 East, 317.
(*x*) *Rucker* v. *Hillier*, 16 East, 43. *Claridge* v. *Dalton*, 4 M. & S. 226.
(*y*) Per Eyre, C. J. 1 B. & P. 652.
(*z*) Semble, *Blackhan* v. *Doren*, 2 Camp. 503. *Brown* v. *Maffey*, 15 East, 221. And see *Legge* v. *Thorpe*, 12 East, 171.
(*a*) *Orr and others* v. *Maginnis*, 7 East, 359.
(*b*) *Hammond* v. *Dufresne*, 3 Camp. 145. *Thackray* v. *Blackett*, 3 Camp. 164. So if the drawer has effects in the hands of the drawee, although to less amount than the bill. *Thackray* v. *Blackett*, 3 Camp. 164. Or although the drawer is indebted to the drawee in a greater amount than those effects. *Blackhan* v. *Doren*, 2 Camp. 503.
(*c*) *Claridge* v. *Dalton*, 4 M. & S. 231. See *France* v. *Lucy*,[3] R. & M. 342.
(*d*) As where a bill is drawn for the accommodation of an indorsee. *Cory* v. *Scott*,[4] 3 B. & A. 623. *Norton* v. *Pickering*,[5] 8 B. & C. 610.
(*e*) 1 Esp. 333; 2 H. B. 607; 11 East, 114; 15 East, 216.
(*f*) 9 & 10 Will. 3, c. 17.
(*g*) *Esdaile* v. *Sowerby*, 11 East, 114. *Bowes* v. *Howe*,[6] 5 Taunt. 30; *Thackray* v. *Blackett*, 3 Camp. 164. *Russell* v. *Langstaffe*, Doug. 514. But see *Brett* v. *Levett*, 13 East, 213. Note, it was there held that an acknowledgement after his bankruptcy by the drawer, that the bill would be paid, superseded the proof of notice.

[1]Eng. Com. Law Reps. ii. 321. [2]*Id.* xvi. 435. [3]*Id.* xxi. 452. [4]*Id.* v. 401. [5]*Id.* xv. 314. [6]*Id.* i. 8.

bill (*h*); or although the drawer had no effects in the hands of the acceptor, but has given acceptances still outstanding for the accommodation of the acceptor (*i*); or although the drawer become bankrupt and abscond before the bill becomes due, the house being still kept open by the assignee under the commission (*k*); or although the plaintiff be able to show that the drawer was not damnified by the want of notice (*l*); or although the party knew of the dishonour. But although mere knowledge is insufficient without *notice*, yet proof that the drawer of a bill knew two days after its maturity that it was unpaid in the hands of a particular indorsee, and that he objected to paying *it on the ground of its having been obtained by fraud, has been held to be evidence for the consideration of the jury of the defendant having received notice (*m*). *232

The necessity of proving due notice is superseded by evidence of part-payment, or other admission on the part of the defendant (with a knowledge of the facts), of his liability on the bill (*n*).

Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, it is sufficient to prove the dishonour of that bill, without proving notice of the dishonour of the substituted bill (*o*).

5thly. In the case of a foreign bill a *protest* is necessary (*p*) (A), for it is part of the custom of merchants (*q*) (1); the mere proof of noting the bill for non-acceptance, without a protest, is insufficient to charge the drawer (*r*). Where the drawer resides abroad, the notice of the non-acceptance should be accompanied by a copy, or some other memorial of the protest, for otherwise he cannot know of the protesting (*s*). But a copy of the protest Proof of protest.

(*h*) *Baker* v. *Birch*, 3 Camp. 107. But such sum may be recovered by the holder, as money had and received by the drawer to his use.

(*i*) *Spooner* v. *Gardiner*,[1] 1 R. & M. 84.

(*k*) *Rohde* v. *Procter*,[2] 4 B. & C. 517. It is insufficient to show that the chance of obtaining anything by way of remedy once was hopeless, that the persons against whom the remedy would apply were insolvent or bankrupt, or had absconded, for parties are entitled to have that chance offered them; the law, which is founded on the usage and custom of merchants, says they are discharged, *Ibid;* and see *Cory* v. *Scott*, 3 Bert. 619.

(*l*) *Dennis* v. *Morris*, 3 Esp. 158. But see Poth. p. 1, c. 5, n. 157.

(*m*) *Wilkins* v. *Jadis*, 1 Mo. & R. 41.

(*n*) Vide *infra*, 237. A letter written six days after the drawer should in due course have received notice of dishonour, containing ambiguous expressions respecting the non-payment of the bill, is evidence to go to a jury of regular notice. *Booth* v. *Jacobs*,[3] 3 Nev. & M. 351. A declaration by a defendant in reference to his defence, that the plaintiff had not sent the letter to him in time, is not evidence to go to a jury of notice of dishonour. Per Ld. Denman, *Braithwaite* v. *Colman*,[4] 4 Nev. & M. 654.

(*o*) *Bishop* v. *Rowe*, 3 M. & S. 362.

(*p*) *Gale* v. *Walsh*, 5 T. R. 239. But see *Legge* v. *Thorpe*, 12 East, 171; and see 7 East, 359, where notice was held to be unnecessary where it appeared that the drawer had no effects in the hands of the drawee at the time, nor any fluctuating balance of assets between them unascertained, which might have afforded probable ground of belief to the drawer that the bill would be honoured.

(*q*) 4 T. R. 174; 5 T. R. 239; B. N. P. 272; 6 Mod. 80; Salk. 134; 12 Mod. 345; Ld. Ray. 993. A bill protested for non-acceptance need not be protested for non-payment. See *Price* v. *Dandell*, Chitty, O. B. 309. *De la Torre* v. *Barclay*,[5] 1 Starkie's C. 7. But see *Orr* v. *Maginnis*, 7 East, 359. The noting of a bill is a proceeding unknown to the law as distinguished from the protest. 4 T. R. 170. The protest must be made on the last day of grace. 4 T. R. 174.

(*r*) 2 T. R. 713. The use of noting is, that it should be done on the day of the refusal, in order that a formal protest may afterwards be drawn. See *Chaters* v. *Bell*, 4 Esp. 48; Sel. 312.

(*s*) *Goostrey* v. *Mead*, B. N. P. 271. Bayley on Bills, 118. *Cromwell* v. *Hynson*, 2 Esp. C. 211.

(A) (The notarial certificate of protest is sufficient proof of the dishonour of a foreign bill. *Nicholls* v. *Webb*, 8 Wheat. 333. *Bryden* v. *Taylor*, 2 Har. & J. 399. But a protest by a *huissier* (an officer authorized by the French commercial code) to make protests is not evidence without proof of the code. *Chanoine* v. *Fowler*, 3 Wend. 173.)

(1) [As to bills drawn in the U. States and payable in a foreign country, the custom of merchants in the United States does not ordinarily require, in order to recover on a protest for non-payment, that a protest for *non-acceptance* should be produced, although the bills were not accepted. *In Supreme Court of U. States*, *Brown* v. *Barry*, 3 Dallas, 365. *Clarke* v. *Russell*, *ibid.* 415.]

[1]Eng. Com. Law Reps. xxi. 386. [2]*Id.* x. 397. [3]*Id.* xxviii. 401. [4]*Id.* xxx. 403. [5]*Id.* ii. 270.

is not necessary (*t*). But if he resides here, although at the time of the dishonour he be abroad, or if he has returned to this country previous to the dishonour of the bill, notice of dishonour is sufficient, for he can make inquiry as to the protest (*u*). Such protest should be made out by a notary public, if there be one in the neighbourhood, if not, by an inhabitant of the place where it is made, in the presence of two witnesses (*x*). The bill should be noted on the day of refusal, but the protest may be drawn up afterwards (1).

In the case of an inland bill, it is unnecessary to prove a protest (*y*) (A), except, perhaps, for the purpose of recovering special damages or costs, occasioned by the non-acceptance or non-payment (*z*). Such a protest cannot be made until after the bill has become due (*a*). The protest is proved
*233 *by the mere production (*b*), and will be presumed from a subsequent part-payment of the bill, or promise to pay it, in the case of a foreign bill (*c*). The presentment of a foreign bill in this country must be proved, as in the case of an inland bill (*d*). The necessity of proving a protest is superseded by proof of an admission by the defendant of his liability (*e*).

(*t*) *Goodman* v. *Harvey*,[1] 4 Ad. & Ell. 870.

(*u*) *Cromwell* v. *Hynson*, 2 Esp. C. 511. *Robins* v. *Gibson*, 1 M. & S. 237; 3 Camp. 335.

(*x*) Bayley, O. B. 118; B. N. P. 272. *Chaters* v. *Bell*, 4 Esp. 48; Sel. 379.

(*y*) *Windle* v. *Andrews*, 2 B. & A. 696.

(*z*) Bay. O. B. 121. *Brough* v. *Parkins*, Ld. Raym. 992; 6 Mod. 80; Salk. 131. *Harris* v. *Benson*, Str. 910; Skinn. 272; 4 T. R. 75, 170; Ca. Temp. Hardw. 74. *Lumley* v. *Palmer*, Ann. 78. Interest is recoverable, although there be no protest,[2] 2 Starkle's C. 425. [See *Payne* v. *Minne*, 2 Bay. 374. *Lang* v. *Brailsford*, 1 Bay. 222. *Murray* v. *Clayborn*, 2 Bibb. 300.] *Qu.* whether if in the case of an inland bill, a protest be alleged, it must not be proved? *Boulager* v. *Talleyrand*, 2 Esp. C. 550.

(*a*) See 9 & 10 Will. 3, c. 17, s. 1, which directs a protest in case of the non-payment of inland bills to the amount of 5*l.* and upwards for value received, payable at a certain number of days, weeks, and months from the date, and accepted by the underwriters of the acceptor, to be made after the expiration of three days after the bill shall become due. The stat. 3 & 4 Ann. c. 9, s. 4, extends these provisions to cases where the drawee refuses to accept. By 3 & 4 Ann. c. 9, s. 6, no such protest is necessary either in the case of non-acceptance or non-payment, unless the bill be expressed to be for value received, and be drawn for the payment of 20*l.* sterling or more. The first of these statutes does not apply to bills payable after sight.

(*b*) 12 Mod. 345; per Holt, C. J. Bay. O. B. 226. A protest made in England ought, it is said, to be proved by the notary who made it and subscribing witness, if any. Chitty on Bills, 405, 7th ed.

(*c*) Bay. O. B. 221. *Gibbon* v. *Coggon*, 2 Camp. 188. *Taylor* v. *Jones*, 2 Camp. 105.

(*d*) *Chesmer* v. *Noyes*, 4 Camp. 129. (*e*) Vide *infra*, 237.

(1) [A bill was drawn and dated at New York on persons residing there, who accepted it. The drawers resided in Petersburg in Virginia: The bill being protested for non-payment, two letters were seasonably put into the post-office, giving notice to the drawers, one directed to New York, and the other to Norfolk, the supposed place of their residence.—It was held that the notice was sufficient, as it did not appear that the holders knew where the drawers resided. *Chapman* v. *Lipscombe*, 1 Johns. 294. See also *Reid* v. *Payne*, 16 Johns. 218. Where a notary testified that it was his practice, in all cases of protest of bills, where the indorser or drawer lived at a distance, to send written notice by post on the same day, and that he believed he had so done in the case then before the court, it was held to be sufficient, in the first instance, to support an averment of due notice to the indorser, of the dishonour of the bill. *Miller* v. *Hackley*, 5 Johns. 375. In an action by an indorsee of a foreign bill of exchange against the drawer or indorser for non-payment of the bill, the plaintiff is bound to prove a protest for non-acceptance as well as for non-payment, and the protests themselves are the only regular evidence of the fact. *Lenox* v. *Leverett*, 10 Mass. Rep. 1. And where a bill, noted for non-acceptance, is accepted and paid for the honour of a party, the holder is still bound to the same duties as to protests and notice, as if the bill had not been taken up. *Ibid.* In South Carolina, a bill drawn there on a person in New York, is regarded as a foreign bill, and if not protested for non-acceptance, though notice be given of its dishonour, the holder cannot recover against the indorser. *Duncan* v. *Course*, 1 Rep. Con. Ct. 100. But in New York, a bill drawn in the U. States, on any part of the U. States, is regarded as an inland bill, and no protest is necessary. *Miller* v. *Hackley*, *ubi sup.* When a drawer has no effects in the drawee's hands, no protest is necessary, as between them—*Aliter*, if an indorser is to be charged. *Fotheringham* v. *Price's Executors*, 2 Bay. 291.] {But a protest is not necessary upon the dishonour of a promissory note, and notarial fees cannot be recovered of the indorser. *City Bank* v. *Cutter*, 3 Pick. Rep. 415.}

(A) (A protest of an inland bill is not necessary nor evidence of the facts stated in it. *Union Bank* v. *Hyde*, 6 Wheat. 572. *Miller* v. *Hackley*, 5 John. R. 375. *Lonsdale* v. *Brown*, 4 Wash. C. C. R. 148. *Fitler* v. *Morris*, 6 Whart. 406.)

[1]Eng. Com. Law Reps. xxxi. 212. [2]*Id.* ii. 415.

Indorsee v. Drawer.

An indorsee in an action against the drawer must prove (*f*), 1st. The drawing of the bill. 2dly. Due presentment. 3dly. The drawee's or acceptor's default. 4thly. Notice of the dishonour. 5thly. Title in himself by indorsement. 6thly. In the case of a foreign bill, a protest. The proofs, therefore, seem to be similar to those in the preceding class, except as to proving the title by indorsement, the proofs of which have been already partially considered (*g*); but some additional observations as to proof of notice, which are applicable to this case, will be subsequently made in considering the evidence in an action by an indorsee against an indorser (A).

Proof of indorsement. By agent.

Where the indorsement is by an agent, proof of the agent's authority must be given (*h*); and if the principal expressly enjoin the agent not to indorse a bill, which he delivers to him in order to procure it to be discounted, he will not be bound by an indorsement by the agent (*i*); but in the absence of any direction as to indorsing the bill, if the agent in fact indorse it, and the principal afterwards promise to pay the bill, it is strong evidence of authority to the agent (*k*) (B).

Indorsee v. Indorser.

Every indorser of a bill of exchange is to be regarded as a new drawer (*l*). Hence, the same proofs are for the most part applicable, as in the last class of cases (*m*) (C). The plaintiff must prove, 1st. The indorsement by the defendant, which amounts to an admission of the drawing, and of the previous indorsements (*n*). 2dly. Due presentment. 3dly. The refusal to accept or pay. 4thly. Due notice to the defendant, or of facts in excuse. 5thly. Title in himself by indorsement; and, 6thly. In the case of a foreign bill, a protest.

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Indorsement.

*1st. Proof of the defendant's indorsement (*o*) is conclusive evidence of the hand-writing of the drawer, and of that of all the prior indorsees (*p*),

(*f*) The indorsement, unless traversed, will be taken as admitted. In an action by the indorsee against the drawer, it was pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due, replication that the bill was not indorsed to the plaintiff after it became due, but was indorsed to, and taken and received by the plaintiff before it became due; and it was held to be sufficient for the plaintiff to put in the bill, and that it was not incumbent on him to show that the bill was indorsed to him before it became due. *Parkin* v. *Moore*,[1] 7 C. & P. 408.

(*g*) In the case of an indorsee against the acceptor. *Supra*, 214.

(*h*) See tit. AGENT.

(*i*) *Fenn* v. *Harrison*, 3 T. R. 757. And a promise to pay the bill would be a mere *nudum pactum*. *Ibid.*

(*k*) *Fenn* v. *Harrison*, 4 T. R. 177.

(*l*) But the indorsee of a note cannot declare against his indorser as maker, even when the latter has indorsed the note, not payable or indorsed to him, so that the indorsee cannot sue the maker. *Gwinnell* v. *Herbert*,[2] 5 Ad. & Ell. 436.

(*m*) 1 Show. 495; 1 Str. 479; 2 Burr. 674; 3 East, 482.

(*n*) The admission is conclusive. *Lambert* v. *Oakes*, 1 Ld. Ray. 443. It admits the ability and signature of all intermediate indorsers. *Critchlow* v. *Parry*, 2 Camp. 182. An acceptance, although stated, need not be proved. *Tanner* v. *Bean*,[3] 4 B. & C. 312. *Park* v. *Edge*, 1 C. & M. 429. No demand from the drawer or any previous indorsee is necessary. *Bromley* v. *Frazier*, 1 Str. 441.

(*o*) An indorsement in pencil is sufficient. *Geary* v. *Physic*,[4] 5 B. & C. 234.

(*p*) Salk. 127. *Lambert* v. *Oakes*, Ld. Raym. 443. Peake's L. E. 221. Although stated without necessity, *Ibid.* and *Critchlow* v. *Parry*, 2 Camp. 282. *Chaters* v. *Bell*, 4 Esp. C. 210.

(A) (The contract of the indorser of a bill is a new and independent contract, which is governed by the law of the place where the indorsement is made, and the extent of his obligation is determined by it. *Aymar et al.* v. *Sheldon et al.* 12 Wend. 439.)

(B) (In an action against a party charged as indorser of a promissory note, where it was proved that the indorsement was not in the hand-writing of the indorser, but in that of the maker, it is competent for the plaintiff, for the purpose of showing authority in the maker and acquiescence in the indorser, to prove that the defendant remained silent, although he received notice of the protest, was sued, suffered a default in pleading, and took no measures to defend his suit until after the maker absconded, and that the indorser had assumed the payment of other notes similarly situated. *Weed* v. *Carpenter*, 10 Wend. 403. Where a note was made payable to *J. H. or order*, who enclosed it *J. H. agent*, he is not liable as indorser. *Mott* v. *Hicks*, 1 Cow. 513.

(C) In an action by indorsee against the indorser, the declaration alleged acceptance by the drawee. Held, it need not be proved. *Tanner* v. *Bean*, Eng. Com. Law Reps. x. 340.

[1] Eng. Com. Law Reps. xxxii. 559. [2] *Id.* xxxi. 373. [3] *Id.* x. 340. [4] *Id.* xi. 213.

although the bill be forged. The subsequent indorsements must be proved as alleged in the declaration. An admission by the defendant of his liability supersedes the necessity of proving subsequent indorsements (*q*). If the bill be payable to *A.* or bearer, and *A.* deliver it for money without indorsing it, it is a sale by *A.* and he is not liable on the bill (*r*). An indorsee cannot recover against an indorser, on proof that he took the bill when due to the acceptor, who had absconded with it (*s*), although the defendant had promised to pay the bill if produced (*t*).

Present-ment. Refusal. Notice.

2dly. The presentment (A), and 3dly, the dishonour, must be proved, as in an action against the drawer (*u*); and 4thly, The proofs of due notice of the dishonour to the drawer of a bill, apply for the most part to the proofs of notice to an indorser (*x*). It is not necessary to prove any demand on the drawer or prior indorsers, or to give any notice to them, since the undertaking is to pay on the default of the acceptor; and the very existence of the drawer or prior indorsers is immaterial (*y*). The rule as to notice, by an indorsee to an indorser or drawer, is, that reasonable notice shall be given, and what is reasonable notice seems to be a question of law, the rule in regard to which has already been stated (*z*). What has been said as to the notice from the payee to the drawer, applies for the most part to notice by an indorsee to an indorsee (*a*) (1). There are, however, some consider-

(*q*) *Sidford* v. *Chambers*,[1] 1 Starkie's C. 320.

(*r*) Per Holt, C. J. *Gov. & Co. of the Bank of England*, v. *Newman*, Ld. Raym. 442.

(*s*) *Powell* v. *Roach*, 6 Esp. 76; 12 Mod. 310; 1 Show. 164; Holt, 118.

(*t*) *Ibid.* And see 1 Taunt. 153.

(*u*) *Supra*, 221. An action lies by the indorsee against the indorser immediately upon non-acceptance. *Ballingalls* v. *Gloster*, 3 East, 481.

(*x*) *Supra*, 225. Notice to the indorsee of a bill of the dishonour of a bill *drawn* by him is insufficient. *Beauchamp* v. *Cash*,[2] 1 D. & R. (N. P. C.) 3. *A.* draws a bill on *B.* for the accommodation of *C.*, who indorses it for value to *D.*; neither *A.* nor *C.* have effects in the hands of *B.*, yet *B.* is entitled to notice. *Norton* v. *Pickering*,[3] 8 B. & C. 610; see *Cory* v. *Scott*,[4] 3 B. & A. 619. Where bankers paid a bill purporting to be the acceptance of a customer, but on the following day, having discovered the acceptance to be a forgery, gave notice to the party whom they had paid, and required him to repay the money; it was held, that the holder of a bill being entitled to know, on the day it becomes due, whether it is an honoured or dishonoured bill, that he may, if he thinks fit, take steps on that day against the parties to the bill; the parties who pay the bill ought not, by any negligence in satisfying themselves whether the acceptance is genuine or not, to deprive the holder of that right; the bankers having therefore suffered him to retain the money during the whole of that day, they could not recover it back. *Cocks* v. *Masterman*,[5] 6 B. & C. 902.

(*y*) See Ld. Mansfield's observations, 2 Burr. 675. So in the case of a cheque, 2 Camp. 537.

(*z*) *Supra*, 226. *Darbishire* v. *Parker*, 5 East, 10, 11, 12. But see *Hilton* v. *Shepherd*, 6 East, 14, n.

(*a*) *Vide supra*, 226.

(A) (Where no particular place of payment is designated, the holder is bound to demand payment of the maker personally, or at his place of residence, and the indorser contracts only to be answerable in case of default by the maker after demand and notice. *Anderson* v. *Drake*, 14 John. R. 114. *Woodworth* v. *Bank of America, in error*, 19 John. R. 391; see also *Wilbar* v. *Selden*, 6 Cow. 162. It is sufficient evidence of demand and refusal on a note payable at a particular place, if the note be left there and no funds provided to take it up. *Nichols* v. *Goldsmith*, 7 Wend. 160; *Folger* v. *Chase*, 18 Pick. 63. In the case of a note indorsed after it has become due, the indorser is not liable unless payment be demanded of the maker, and notice of the non-payment given to the indorser; and as such a note has become payable on demand, the demand on the maker must be made within a reasonable time, and immediate notice of non-payment given to the indorser. *Colt* v. *Barnard*, 18 Pick. 260. As to demand in case of cheques on a bank, see *Mohawk Bank* v. *Broderick*, 10 Wend. 304.)

(1) [When the indorser lives in another town, notice to him is seasonable if put into the post-office at any time during the day succeeding that on which the note becomes due. *Whitwell et al.* v. *Johnson*, 17 Mass. Rep. 453; *Shed* v. *Brett*, 1 Pick. 410. But notice may be given on the day the note becomes due, after refusal by the maker to pay on demand made on that day. 1 Pick. *ubi sup. Corp* v. *M'Comb*, 1 Johns. Cas. 328; *Lindenburgher et al.* v. *Beall*, 6 Wheat. 204. And notice by mail is sufficient, though it is never received by the indorser; putting a letter into the post-office is notice *per se*. 1 Pick. *ubi sup.*; *Smith* v. *Bank of Washington*, 5 Serg. & R. 322. When the indorser resides in a post town different from that in which the note is dishonoured, it is proper to send him notice by the mail; and *perhaps*, where he does not, sending it to the nearest post town is sufficient. Per Parker, C. J. 1 Pick. *ubi sup.* A notice to an indorser is sufficient, though it does not state at whose request it is given, nor who is the owner of the note. *Ibid.* *Shrieve* v. *Duckham*, 1 Littell's Rep. 194.]

[1]Eng. Com. Law Reps. ii. 410. [2]*Id.* xvi. 410. [3]*Id.* xv. 314. [4]*Id.* v. 401. [5]*Id.* xvii. 517.

ations which are peculiar to the present case; for where there are several previous indorsers, the indorsee may, by giving notice, proceed against any or all of them, as well as against the drawer. The general rule is, that each indorser is bound to give notice within a day after he has received notice (*b*).

*Where a bill passed through the hands of five persons, *A. B. C. D.* and *E.*, all of whom lived in or near London, and the bill being dishonoured, the holder on the same day gave notice to *E.*, who on the next day gave notice to *D.*, and he on the same day to *A.*, the Court were of opinion that due diligence had been used (*c*). *235 Proof of notice.

But the holder of a bill has not as many days as there are indorsers, but each indorser has his own day, and whether the holder proceed against the indorser or the drawer, notice must be given within the same time (*d*).

Where the bill when it becomes due is in the hands of the bankers of the indorsee, and is presented by them, notice to him by the next day's post, and by him to a previous indorser by the next day's post after that, is sufficient.

Where the holder had deposited a bill indorsed in blank with his bankers in London, which was presented by them at two o'clock on the afternoon of Saturday (when due), and being dishonoured, was noted, and presented again between nine and ten in the evening by a notary, and on the Monday the bankers informed the holder at Knightsbridge of the dishonour, and he the same day gave notice to the indorser in the Tottenham-court-road, the notice was held to be sufficient (*e*).

Where a bill due on the 25th, was presented on that day by the banker of the holder at another banking-house in London, and dishonoured, but a doubt being entertained whether it had not been presented too early on that day, it was presented again on the 26th, and again dishonoured, and was returned to the holder on the same day, who sent notice of the dishonour to the indorser in the country on the 27th, it was held to be sufficient (*f*).

The plaintiff may prove in excuse (*g*) (A), for not giving notice, that the

(*b*) *Turner* v. *Leach*,[1] 4 B. & A. 451. An indorser who pays the bill after laches by a subsequent indorsee, cannot recover against a former indorser, although had successive notices been given, the defendant would not have received earlier notice. *Ibid.* and per Ld. Ellenborough, in *Marsh* v. *Maxwell*, 2 Camp. 210. Where, after due diligence to ascertain the abode of an indorser, it was not discovered until a month after the bill became due, when it was communicated to the attorney of the holder; held, that as he had a right to take a day to communicate it to his client, notice on the following day was sufficient; and the notice being legal and valid, held that evidence of the circumstances under which it was given was sufficient to support the allegation in the declaration that notice was given according to the legal effect. *Firth* v. *Thrush*,[2] 8 B. & C. 387. And see *Bateman* v. *Joseph*, 12 East, 443; and *Baldwin* v. *Richardson*,[3] 1 B. & C. 245.

(*c*) *Hilton* v. *Shepherd*, 6 East, 14, n.

(*d*) *Dobree* v. *Eastwood*,[4] 3 C. & P. 250.

(*e*) *Haynes* v. *Birkes*, 3 B. & P. 599.

(*f*) *Langdale* v. *Trimmer*, 15 East, 291.

(*g*) It seems that the excuse for want of notice should be alleged on the face of the declaration, *vide supra*, and *Cory* v. *Scott*,[5] 3 B. & A. 619. But the general principle on which notice is excused is, that the party must have known that the bill when presented would not be paid. This is in effect to substitute *knowledge* for actual *notice*. *Qu.* therefore, whether when the want of effects in the hands of the acceptor is the excuse for not giving notice to the drawer, such excuse need be alleged specially, for the drawer has notice in effect.

(A) (It is not sufficient to excuse want of notice that the indorser was not injured by the neglect. *Hill* v. *Martin*, 12 Martin, 199. The duty of presentation of a bill for payment will not be dispensed with under circumstances of involuntary mistake and accident in forwarding it, but it seems that where there is an impossibility to present the bill on the day it falls due through unavoidable accidents, without the fault of the holder, a subsequent presentment will be good. *Scofield* v. *Bayard*, 3 Wend. 488. For circumstances under which a delay in presentation will be excused, see *Gowan* v. *Jackson*, 20 John. R. 176. The relative right and duties of parties who indorse a promissory note for the accommodation of the maker, are the same as in the case of a business note; so that due notice of the dishonour of such accommodation note having been given, a subsequent indorser who pays it, may recover of a prior indorser the whole amount paid, and not merely a contribution as in the case of sureties. *Church* v. *Barlow*, 9 Pick. R. 547.)

[1]Eng. Com. Law Reps. vi. 484. [2]*Id.* xv. 242. [3]*Id.* viii. 66. [4]*Id.* xiv. 289. [5]*Id.* v. 401.

Excuse for want of notice.

indorser gave no consideration for the note, and knew the maker to be insolvent (*h*): That the defendant, the payee of the note, had no effects in the hands of the maker (*i*): That the indorsee was ignorant of the indorser's place of abode (*k*); and then it is question of fact, whether he used due diligence to discover it (*l*). He ought to show that he has made diligent but ineffectual inquiry in places where the indorser was likely to be found (*m*) (1):

*236 *That the defendant afterwards promised to pay the bill (*n*); and a promise made to a subsequent indorsee is evidence for this purpose (*o*).

It is no defence to an action by a *bonâ fide* indorsee without knowledge that the bill had already been dishonoured, and no notice given (*p*).

One who indorses a bill without consideration, but without fraud, is entitled to notice, although the acceptor is a fictitious person (*q*). So where the transaction arises out of various dealings for the accommodation of the acceptor (*r*).

It is no excuse in an action against an indorser to show that the drawee has no effects of the drawer in his hands (*s*), or that the payee (the indorser) gave no consideration to the maker of a note (*t*); or that there was an understanding that the note was not to be put in suit; or that the payee and indorser of a promissory note knew that *D.*, at whose house the note was made payable, had no effects of the maker in his hands, and requested *D.* to send it to him that he might pay it (*u*) (2); that the payee and in-

(*h*) *De Berdt* v. *Atkinson*, 2 H. B. 336; and see *Sisson* v. *Tomlinson*, 1 Sel. N. P. 328, 7th edit. But a mere accommodation indorsee is entitled to notice. *Smith* v. *Becket*, 13 East, 187. *Secus*, in an action against the drawer of a bill accepted for his accommodation, for the drawer is the real debtor, and cannot be hurt by want of notice.

(*i*) 1 Esp. 302. See 13 East, 127; Bay. 136. (*k*) 12 East, 433; 3 Esp. R. 240.

(*l*) *Bateman* v. *Joseph*, 12 East, 433; 3 Esp. R. 240. And see *Goodall* v. *Dolley*, 1 T. R. 712.

(*m*) Inquiry at the place where the bill was payable for the residence of the indorser, was held to be insufficient. *Beveridge* v. *Burgess*, 3 Camp. 262. Inquiry should be made from other parties to the bill or note, and of persons of the same name. Bayley on Bills, 229, citing *Beveridge* v. *Burgess*. It is said in one case to have been held to be sufficient, on a promissory note being dishonoured, to make inquiry at the maker's for the residence of the payee. *Harris* v. *Derrick*, Wight. 76. Calling on the last two indorsers, on the day after the bill became due, to know where the drawer lived, and on his not being in the way, calling again the next day, and then giving him notice, is (*semble*) sufficient. *Browning* v. *Kinnear*,[1] Gow. 81.

(*n*) *Vide infra*, 237. (*o*) *Potter* v. *Rayworth*, 13 East, 417.

(*p*) *Dunn* v. *O'Keefe*, 5 M. & S. 282. (*q*) *Leach* v. *Hewit*, 4 Taunt. 731.

(*r*) *Ex parte Heath*, 2 Ves. & B. 240; 2 Rose, 141.

(*s*) *Goodall* v. *Dolley*, 1 T. R. 712; Peake's C. 202. *Wilkes* v. *Jacks*, Peake's C. 202. And see *Sisson* v. *Tomlinson*, Sel. N. P. 324. *Brown* v. *Muffey*, 15 East, 216; where the defendant had indorsed for the accommodation of a subsequent indorser, but did not know that the acceptor had no effects of the drawer in his hands.

(*t*) *Free* v. *Hawkins*,[2] 1 Holt's C. 550, by Gibbs, C. J.

(*u*) *Nicholson* v. *Gouthit*, 2 H. B. 609. *A.* being insolvent, *B.* as a security indorsed a note made by *A.* payable to *B.* at the house of *D.* for a debt due from *A.* to *C.* *B.* being informed that *D.* had no effects of *A.*'s in his hands, desires *D.* to send the note to him, and says he will pay it, having then a fund in his hands for that purpose; the note was not presented at *D.*'s house till three days after it was due; and it was held that it was discharged.

(1) [See *Sturgis & al.* v *Derrick*, Wightwick, 78.]

(2) [In *Cory & al.* v. *Scott*, 3 B. & A. 619, where a bill was drawn for the accommodation of an indorsee, and neither he nor the drawer had any effects in the hands of the acceptor; it was held that the subsequent indorsee, in order to entitle himself to recover against the drawer, was bound to give notice of non-payment.

This case has greatly shaken, if not overturned, that of *Walwyn* v. *St. Quintin*, 1 B. & P. 652—but most of the American cases agree with it. See *Scarborough* v. *Harris*, 1 Bay, 175. *French's Executor* v. *Bank of Columbia*, 4 Cranch, 141. *Pons's Executors* v. *Kelly*, 2 Hayw. 45. *Smith* v. *M'Lean*, 2 Taylor, 72. *Buck* v. *Cotton*, 2 Conn. Rep. 126. *Crossen* v. *Hutchinson*, 9 Mass. Rep. 205. *Bond & al.* v. *Farnham*, 5 Mass. Rep. 170. *Sandford* v. *Dillaway*, 10 Mass. Rep. 52. *Farnum* v. *Fowle*, 12 Mass. Rep. 89. *Barton* v. *Baker*, 1 Serg. & Rawle, 334. In this last case, however, it was held that an acceptance by the indorser of an assignment of the drawer's estate, for the purpose of indemnifying him against his indorsement, rendered notice unnecessary. See post, 274, note (1).

Evidence of an agreement between the indorser and indorsee of a note taken after due, that the latter

[1] Eng. Com. Law Reps. v. 471. [2] *Id.* iii. 184.

dorser of the bill had received notice from the drawer that he would not pay the bill (*x*); that the indorsee being ignorant of the laches in the holder, paid the bill (*y*); that the indorsers had full knowledge of the bankruptcy of the drawer and of the acceptor before and at the time when the bill became due (*z*); that the indorsement was lent to the maker of a note, to enable the maker to raise money from the plaintiffs, who were bankers, and agreed to advance the money thereon for six months, and had renewed their advances at the end of six months, without the knowledge of the indorser (*a*). So, where a bill was drawn and indorsed by several indorsers for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, a prior indorser, it was held that he was entitled to notice of the dishonour, in order to enable him (if he had no remedy on the bill) to call immediately upon the last indorser, to whom he had lent his indorsement, and who had received the amount of the bill (*b*). So in the case of an indorsee, without consideration but without fraud, of a bill, the drawer and acceptor of which are fictitious persons (*c*). Proof of notice will be rendered unnecessary by *evidence of a promise to pay on the part of the defendant (*d*). But it *237
seems that an express promise is necessary, in order to discharge an indorser who has not had notice (*e*).

6thly. The proof of a protest has already been considered (*f*).

If an acceptance of the bill be stated unnecessarily, it need not be proved (*g*).—Such are the detailed proofs in these cases. Variance.

It is a general rule, that an admission (*h*) of the party's liability on the bill, made with a knowledge of the facts, will supersede the necessity of the usual regular proof in detail. Such an admission operates as *presumptive* evidence that all things have been *rite-acta*, or perhaps, in some cases, Presumptive evidence.

(*x*) 1 T. R. 171.
(*y*) *Roscow* v. *Hardy*, 12 East, 434.
(*z*) *Esdaile* v. *Sowerby*, 11 East, 114.
(*a*) *Smith* v. *Beckett*, 13 East, 187.
(*b*) *Brown and others* v. *Maffey*, 15 East, 216. Bayley, O. B. 137. Peake's C. 202. And see *Cory* v. *Scott*,[1] 3 B. & A. 619.
(*c*) *Leach* v. *Hewitt*, 4 Taunt. 731.
(*d*) *Wilkes* v. *Jacks*, Peake's C. 202.
(*e*) *Borrodaile* v. *Lowe*, 4 Taunt. 93.
(*f*) *Supra*, 232.
(*g*) *Supra*, 213.
(*h*) The whole of the admission must, according to the general rule, be taken. Where the defendant said, "I do not mean to insist upon the want of notice, but I am only bound to pay you 79*l*.," the bill being for 200*l*., Abbott, C. J., held that the plaintiff could not recover more than 70*l*. *Fletcher* v. *Froggatt*, 2 C. & P. 270. Assumpsit by the indorsee against acceptor, plea that the defendant did not accept the bill *modo et forma*, but generally, and it appeared that the acceptance had been, without his knowledge, altered by the addition of payment at a particular banker's, where, when presented, it was dishonoured, and on application to the defendant he denied having accepted it payable there, but was always ready to pay at his own place of residence; held, not to amount to an acknowledgement of a subsisting debt to entitle the plaintiff to recover on an account stated. *Calvert* v. *Baker*, 4 M. & W. 417; and 7 Dowl. (P. C.) 17.

should look to the drawer and not to the indorser, was admitted in South Carolina. *Rugely* v. *Davidson*, 2 Rep. Con. Ct. 33.

In Tennessee, it has been decided that notice is not necessary where the indorser and indorsee knew of the insolvency of the maker at the time of the indorsement. *Stothart* v. *Parker*, 1 Overton's Rep. 260. See also *Crossen* v. *Hutchinson*, ubi. sup. *Agan* v. *M'Manus*, 11 Johns. 180.

If a note be void in its creation, and known to the indorser to be so, demand and notice are not necessary to charge him. *Copp* v. *M'Dougall*, 9 Mass. Rep. 1. A waiver by an indorsee of a right to *notice* of non-payment by the maker, does not dispense with the necessity of a *demand* upon him. *Berkshire Bank* v. *Jones*, 6 Mass. Rep. 524. See *Hill* v. *Heap*, ante, p. 269, *note* (*o*). But when the maker has absconded before the note falls due, a *demand* is not necessary to charge the indorser. *Putnam & al.* v. *Sullivan & al.* 4 Mass. Rep. 45. *Widgery* v. *Monroe & al.* 6 Mass. R. 449.

In Virginia, the indorser of a note is not liable on non-payment by the maker, unless the maker is shown to be insolvent, or a suit has been brought against him and proved fruitless; although such indorser has been counter-secured by the maker of such indorsement. *Dulany* v. *Hodgkin*, 5 Cranch, 333.

See Mr. Day's notes to *Wilkes & al.* v. *Jacks*, Peake's C. 203, and *Smith & al.* v. *Becket*, 13 East, 189, Swift on Ev. and Bills, 287-290.]

[1] Eng. Com. Law Reps. v. 401.

even still more strongly as a *waiver* by the party of an irregularity as to presentment, notice, or protest (*i*), of which he actually was, or may be presumed to have been cognizant. These admissions consist either in part-payment, which is the strongest of all, or in asking for time, or in an express promise to pay the bill, or in other declarations, or conduct by which the party plainly acknowledges his liability (*k*) (A).

An agreement between the drawer and first indorser, stating the bill to be then over-due, and dishonoured, and stipulating for payment by weekly instalments, admits notice of the dishonour (*l*).

In an action against an acceptor, notice by his attorney to produce all papers relating to a bill, described as the bill in question, and as accepted by the said defendant, is *primâ facie* evidence of acceptance (*m*).

Part-payment of the amount of the bill by the drawer raises a presumption that he has received due notice of the acceptor's default (*n*).

*238 *An acceptor, who has credited or adopted the acceptance by an acknowledgement of his hand-writing, or by paying other similar bills, cannot afterwards insist that the alleged acceptance is a forgery (*o*). But the merely desiring the holder of the bill to call again does not exclude him from such a defence (*p*).

Where the declaration alleged a due presentment of the bill for payment, which had been drawn and accepted for the accommodation of the indorser, and the bill was not presented till after banking hours, when the answer was given "no effects," an application by the indorser, after declaration filed, for further time, was held to be evidence of the waiver of the objection, with notice of the fact of which he had the means of informing himself (*q*).

(*i*) *Gibbon* v. *Coggon*, 2 Camp. 188; 2 T. R. 713; 6 East, 16, 231; 13 East, 417; *Wood* v. *Brown*,[1] 1 Starkie's C. 217; Peake's C. 202. Where the defendant agreed to join with three others in several notes to the plaintiff to secure a debt; but after he had signed one refused, and never did in fact sign; and upon the first note becoming due the defendant, upon being applied to, offered a security; it was held, that it was for the jury to say whether he was cognizant of the refusal of the party to sign, and whether, by offering such security, he intended to waive the objection as to all the notes; as if he did, and obtained time in consequence, he was liable, otherwise not. *Leaf* v. *Gibbs*,[2] 4 C. & P. 466.

(*k*) See *Jones* v. *Morgan*, 2 Camp. 474. *Vaughan* v. *Fuller*, 2 Str. 1246; and tit. Admissions. An admission by one of several partners is evidence against the rest. *Hodenpyl* v. *Vingerhoed*, Chitty on Bills, 489, 5th ed.; Roscoe on Evidence, 207. *Sangster* v. *Mazzaredo*,[3] 1 Starkie's C. 161. But an admission by one of several acceptors, not parties, is not evidence against the rest. *Gray* v. *Palmer*, 1 Esp. C. 135. In an action by the indorsee against the maker, and issue on the fact of presentment, a promise by the defendant, after the note became due, to pay, was held to be a sufficient admission of the presentment having been duly made. *Croxon* v. *Worthen*, 5 M. & W. 5.

(*l*) *Gunson* v. *Metz*,[4] 1 B. & C. 193; 2 D. & R. 334.

(*m*) *Holt* v. *Squires*,[5] R. & M. 282.

(*n*) An offer to give another bill supersedes the proof of indorsement. *Bosanquet* v. *Anderson*, 6 Esp. 43, An admission by the defendant that the hand-writing to a promissory note is his, will be sufficient proof in the case of an unattested note, although it was made pending a treaty for a compromise. *Waldridge* v. *Kennison*, 1 Esp. C. 43.

(*o*) *Leach* v. *Buchanan*, 4 Esp. C. 226. *Barber* v. *Gingell*, 3 Esp. C. 60.

(*p*) *Barber* v. *Gingell*, 3 Esp. C. 60. And see tit. Admissions.

(*q*) *Greenway* v. *Hindley*, 4 Camp. 52. It operates as a *waver* of the want of notice (*Rogers* v. *Stephens*, 2 T. R. 713; Peake's C. 202; 6 East, 231; 13 East, 417); and where, on demand made, the drawer answered that the bill must be paid, it was held to be equivalent to a promise to pay; Ibid.; and see *Lundie* v. *Robertson*, 7 East, 231. The drawer on the first application promised the plaintiff that he would pay the bill if he

(A) If, after the dishonour of a note, the indorser promise to pay it, such promise is presumptive evidence of due demand and notice. *Breed* v. *Hillhouse*, 7 Conn. R. 523. Where *W. A.* the payee of a negotiable note, then payable, indorsed it thus, "*W. A.* holden," he was held liable without demand or notice. *Bean* v. *Arnold*, 16 Shepley, 251. The drawer of a protested bill of exchange being applied to on behalf of the holder for payment, acknowledges the debt to be just, and promises to pay it, saying nothing about his having received notice; the holder in an action of debt upon the bill against such drawer, is not bound to prove that notice was given to him of the protest. *Walker* v. *Laverty & al.* 6 Munf. 487. Vid. *Sice* v. *Cunningham*, 1 Cow. 397. *Myers* v. *Coleman*, Anth. N. P. 150.)

[1]Eng. Com. Law Reps. ii. 363. [2]*Id.* xix. 475. [3]*Id.* ii. 338. [4]*Id.* viii. 58. [5]*Id.* xxi. 439.

So where the drawer, knowing that time had been given by the holder to the acceptor, but supposing that he was still liable on the bill, in default of the acceptor, said, three months after the bill was due, that he was liable, and if the acceptor did not pay it, he would, it was held that he was bound by the promise (*r*). Where, however, a promise to pay has been made in ignorance of material facts, such as the holder's laches, it will not supersede the necessity or the usual proof of notice (*s*).

Where the indorsee of an inland bill presented it before it was due, for acceptance, and it was refused on the 4th of November, and the indorsee on the 6th of January following, (the bill expiring on the 11th of January,) gave notice generally of the dishonour of the bill, but without specifying the time or circumstances of the presentment, whereupon the defendants, the drawers, being ignorant of the circumstances, made a proposal the next day to pay the bill by instalments, it was held that they had not waived *the notice (*t*). So a promise made by the defendant when arrested, and *239
when he is ignorant of the facts, will not be a waver (*u*).

Where the defendant, being a foreigner, on being applied to to take up the bill, said, "I am not acquainted with your laws; if I am bound to pay it, I will," it was held that the declaration did not supersede the necessity of proving notice (*x*) (1).

A promise by one of several indorsers who are not partners is not evidence against the other indorsers (*y*). It has been said, that where an indorser has promised to pay the bill, payment must still be demanded before the action is brought (*z*); this, however, appears to be unnecessary.

would call again; upon a second application, he said that he had not regular notice, but that as the debt was justly due he would pay the bill (and see *Haddock* v. *Bury*, 7 East, 236, n; *Gibbons* v. *Coggan*, 2 Camp. 188; *Taylor* v. *Jones*, 2 Camp. 105). A waiver by a drawer may be implied, but *qu.* whether a waver by an indorsee must not be express. 4 Taunt. 93. In an action by an indorsee against a previous, but not immediate indorser, the defendant, on the bill being shown, said, "my affairs are deranged, I cannot take it up now, but I will do something in a fortnight," it was held to be sufficient on the account stated. *Wagstaff* v. *Boardman*, K. B. Hil. 1827. A letter written by the drawer, stating that the bill had been accepted for his accommodation, and would be paid, dispenses with notice. *Wood* v. *Brown*,[1] 1 Starkie's C. 217. But a letter written by an indorser who had been applied to for payment after several days laches, informing the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered him (the defendant) to be unsafe, to return the bill to a prior indorser, was held to be no such waiver of the laches, and promise to pay, as would entitle the plaintiff to recover. *Borrodaile* v. *Lowe*, 4 Taunt. 93. So where the drawer said, "If I am bound to pay it, I will." *Dennis* v. *Morris*, 3 Esp. C. 158. So where he merely offered to compromise. *Cuming* v. *French*, 2 Camp. 106. And see *Brett* v. *Levett*, 13 East, 213, *supra*. The drawer of a bill being applied to for payment, said, "If the acceptor does not pay I must; but exhaust all your influence with the acceptor first;" and afterwards directed the applicant to raise the money on the lives of himself and the acceptor, it was held that the admission was not conclusive evidence of the defendant's having received or waived notice of the dishonour of the bill. *Hicks* v. *Duke of Beaufort*,[2] 4 Bing. N. C. 229.

(*r*) *Stevens* v. *Lynch*, 12 East, 38.

(*s*) *Goodall* v. *Dolly*, 1 T. R. 712. *Blizard* v. *Hirst*, 5 Burr. 2670. 4 Taunt. 93. *Picken* v. *Graham*, 1 C. & M. 725. 3 Tyr. 923.

(*t*) 1 T. R. 712. 2 H. B. 336.

(*u*) *Rouse* v. *Redwood*, 1 Esp. C. 155; 4 Taunt. 93.

(*x*) *Dennis* v. *Morrice*, 3 Esp. C. 158.

(*y*) 1 Barnes, 317; 1 Esp. C. 15.

(*z*) *Brown* v. *Macdermot*, 5 Esp. C. 265, *tamen qu.*

(1) [A promise by an indorser to pay a note, after being discharged in law by neglect of due notice, is not binding, unless made with a knowledge of all the material facts. *Martin* v. *Winslow*, 2 Mason's Rep. 241. *Duryee* v. *Dennison*, 5 Johns. 248. *Fotheringham* v. *Price's Ex'or*, 1 Bay, 291. *Donaldson* v. *Means*, 4 Dallas, 109. *Tower* v. *Durrell*, 9 Mass. Rep. 332. And the promise must be explicit, and made out by clear and unequivocal evidence. *Miller* v. *Hackley*, 5 Johns. 375.

Where the indorser, knowing that a demand has not been made on the maker, promises to pay the note, it is a waiver of the necessity of proving demand and notice. *Hall* v. *Freeman*, 2 Nott & McCord, 479. *Hopkins* v. *Liswell*, 12 Mass. Rep. 58. *Pierson* v. *Hooker*, 3 Johns. 68. Such promise is an implied admission that the indorser has received notice—but where it is evident that such notice was not given, a promise by the indorser to pay, after he is legally discharged, and without any consideration, will not maintain an action. *Lawrence* v. *Ralston*, 3 Bib. 102. *Phillips* v. *M'Curdy*, 2 Har. & J. 187. *Walker* v. *Laverty*, 6 Munf. 487.]

[1]Eng. Com. Law Reps. ii. 363. [2]*Id.* xxxiii. 337.

A promise is binding although made under ignorance of the law (*a*).

An offer to pay part by way of compromise, and made for the purpose of buying peace, is not admissible in evidence (*b*); and a mere offer to compromise is no waiver of the want of notice (*c*).

Collateral liability. Drawer *v.* Acceptor.

III. Where the liability is consequent on the defendant's own default, as where, 1st, the drawer brings an action against the acceptor, or 2dly, the acceptor against the drawer. 1st. By the drawer against the acceptor (*d*); the plaintiff must prove,

1st. The acceptance of the bill by the defendant, which is *primâ facie* evidence that he has effects of the drawer in his hands (*e*).

2dly. Presentment to the acceptor, and the refusal by him to pay the bill.

3dly. The payment of the bill by the plaintiff, the drawer.

The indorsement of a general receipt on the bill *primâ facie* imports *payment* by the acceptor, although the bill be produced by the drawer; for it is rather to be presumed that the bill was delivered to him by the acceptor, on a settlement of accounts (*f*); and therefore the plaintiff should prove a payment to the holder by himself (*g*).

4thly. That the acceptor has effects of the drawer in his hands; of this fact the acceptance is *primâ facie* evidence (*h*). The bankruptcy of the acceptor is no defence against the drawer, who has paid the bill since the bankruptcy (*i*).

Acceptor *v.* Drawer. *240

The acceptor of an accommodation bill in an action against the drawer, must prove, 1st. The drawing of the bill by the defendant (*k*), by proof of *his hand-writing. 2dly. He must rebut the usual presumption of consideration, by evidence showing the absence of it. 3dly. Payment of the bill by himself (*l*), or execution against his person (*m*). The mere production of the bill will not afford even *primâ facie* evidence of payment, without showing that the bill has been in circulation since the acceptance; and payment is not to be presumed from a receipt indorsed on the bill, except it be in the hand-writing of some person entitled to demand payment (*n*).

Damages.

In order to prove the particular amount of damage which the plaintiff has sustained, the course of exchange, and the liability of the defendant to pay re-exchange, are questions for the jury (*o*) (A). Interest is recover-

(*a*) 12 East, 38; vide *supra*, 87.

(*b*) B. N. P. 236.

(*c*) *Cumming* v. *French*, 2 Camp. 106.

(*d*) The drawer may recover against the acceptor, having effects of the drawer in his hands, in his own name, without assignment from the payee.

(*e*) *Vere* v. *Lewis*, 3 T. R. 183. If *A.* & *B.* exchange acceptances, the one is a consideration for the other, each is liable on his own acceptance as an absolute debt; the engagement is not of a conditional nature for mutual indemnity, but constitutes at once an absolute debt on each part. Consequently either may prove the acceptance of the other as a debt under a commission of bankrupt against him previous to the payment of either acceptance. *Rolfe* v. *Caslon*, 2 H. B. 570. *A.*, on the bankruptcy of *B.*, will be compelled to pay the bill drawn by him, as well as the one accepted by him after the bankruptcy of *B.*; he cannot afterwards recover against *B.*, as on an implied contract to indemnify him. Per Lawrence, J. in *Cowley* v. *Dunlop*, 7 T. R. 567.

(*f*) *Scholey* v. *Walsby*, Peake's C. 24. So where an indorsee having been obliged to take up the bill, declares specially against the acceptor. *Mendez* v. *Carreroon*, Ld. Raym. 742.

(*g*) Peake's C. 26; Peake's L. E. 221.

(*h*) 10 Mod. 36, 37. *Parminter* v. *Simmons*, 1 Wils. 185; 3 T. R. 183; 3 East, 169; 3 Wils. 18.

(*i*) *Mead* v. *Braham*, 3 M. & S. 91.

(*k*) *Vide supra*, 222.

(*l*) *Taylor* v. *Higgins*, 3 East, 169; 3 Wils. 18. In the latter case the count must be special. Where *A.*, according to the ordinary course of dealing with *B.*, accepts bills for him, having funds of *B.*'s in his hands, and *B.* being bankrupt, *A.* compounded his acceptances with the holders for less than their amount, it was held, that in the account between *A.* and the assignees of *B.*, *A.* was entitled to charge the full amount. *Stonehouse* v. *Read*,[1] 3 B. & C. 669; 5 D. & R. 603.

(*m*) *Ibid.*

(*n*) *Pfiel* v. *Vanbatenburg*, 2 Camp. 439.

(*o*) *De Tastet & others* v. *Baring & others*, 2 Camp. 65; 11 East, 265; 2 H. B. 378; 2 B. & P. 335; Ambler, 634.

(A) (By the English law merchant, the acceptor of a foreign bill of exchange is not liable for the

[1] Eng. Com. Law Reps. x. 211.

able from the day when the bill became due to the day of signing judgment (*p*).

Where a sum is payable on a promissory note by instalments, and the whole is to become due on the first default, interest becomes due on the first default (*q*); and it is recoverable, although not stated in the particulars (*r*). Interest may be recovered against the drawer of an *inland* bill, without proof of a protest (*s*). Interest.

Where an accommodation acceptor was sued by a *bonâ fide* holder it was held that as he ought to have paid it when demanded, he could not recover the costs against the party to whom he had lent his acceptance (*t*).

An indorsee having received part of the contents from the drawer, cannot recover more than the residue from the acceptor (*u*).

The acceptor of a bill payable in England is liable only to the sum payable, and 5 per cent interest (*x*).

In an action on a foreign note payable in the currency of this country, interest is to be calculated according to the state of exchange at the time of the demand of payment (*y*).

Where a bill drawn on a party in a foreign country, after having been negotiated through another foreign country, is refused payment by the drawee, such payment being prohibited by the law of the country where he resides, the drawer is liable for the *whole* of the re-exchange between the different countries (*z*).

Where a foreign bill is dishonoured here for non-acceptance, and the plaintiff is allowed a per-centage in the name of damages, it seems that he is to recover interest from the day of payment only, and not from the time of non-acceptance (*a*); but where there is no allowance for damages, he *241 is to recover interest from the time of dishonour for non-acceptance (*b*).

Where a bill is made payable with interest, it is to be calculated from the date of the bill (*c*).

A plaintiff is entitled to recover the whole amount, although as to part he is only a trustee (*d*).

The rules of Hilary Term, 4 Will., declare that in all actions on bills of exchange and promissory notes (*e*) the plea of *non assumpsit* shall be inadmissible, and that in such actions a plea in denial must traverse some matter of fact, *e. g.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of the dishonour of the bill or note. The defendant in support of a plea, according to these rules, on which issue is taken, may Defence.

(*p*) *Robinson* v. *Bland*, 2 T. R. 58; 2 Burr. 1077. (*q*) 4 Esp. C. 147. (*r*) Ibid.

(*s*) *Windle* v. *Andrews*,[1] 2 Starkie's C. 425. Where a bill is accepted payable at a particular place, although it is unnecessary to show a presentment at such place, in order to entitle the party to recover the principal sum, yet it is to recover interest. *Phillips* v. *Franklin*, 1 Gow's C. 196. A note payable at a particular time carries interest after that time, and it ought not to be left to the discretion of the jury, unless the non-payment has been occasioned by the fault of the plaintiff. *Laing* v. *Stone*,[2] 2 M. & Ry. 561.

(*t*) *Roach* v. *Thompson*, 1 M. & M. 487. (*u*) *Bacon* v. *Searles*, 1 H. B. 88.

(*x*) *Woolsey* v. *Crawford*, 2 Camp. 445.

(*y*) *Pollard* v. *Herries*, 3 B. & P. 335. *Mellish* v. *Simeon*, 2 H. B. 378. But see *Houriet* v. *Morris*, 3 Camp. 303.

(*z*) *Ibid.*

(*a*) *Gantt* v. *Mackenzie*, 3 Camp. 51. (*b*) *Harrison* v. *Dickson*, 3 Camp. 52.

(*c*) *Doman* v. *Dibden*,[3] 1 R. & M. 381. (*d*) *Reid* v. *Furnival*, 1 C. & M. 538.

(*e*) Yet if an executor declare on a bill or note payable to his testator, laying a promise to him, the promise may still be denied by *non assumpsit*. *Timmins* v. *Platt*, 2 M. & M. 720.

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exchange, or any charge but interest, according to the rate established at the place of payment; and the statute of Pennsylvania, which gives liquidated damages as a substitute, has regard only to drawers and endorsers. *Wats* v. *Riddle*, 8 Watts, 545. In an action against the indorser of a promissory note, the fees of protest are a proper item in the assessment of damages. *Merritt* v. *Benton*, 10 Wend. 118.)

[1]Eng. Com. Law Reps. iii. 415. [2]*Id.* xviii. 320. [3]*Id.* xxi. 465.

show, 1st, no contract, or an insufficient one in point of law (*f*); 2dly, that the bill or note has been altered (*g*), (and in some instances) no consideration; or, 3dly, illegality or fraud; 4thly, that the plaintiff has no title by transfer to sue upon the bill; 5thly, that the bill has been released or satisfied; 6thly, discharge by laches, or giving time, or by waiver; 7thly, that it was an accommodation bill, &c. and indorsed after it became due; 8thly, that it is improperly stamped; 9thly, that it has been altered.

That the defendant, in point of fact, or of law, *did not contract* to pay the bill, as, that the defendant is an infant (A) (*h*), or a feme covert (*i*). But an acceptor cannot set up the infancy or coverture of the drawer as a defence (*k*) (1); nor can an indorsee defend himself by showing that the bill was drawn by a feme covert upon her husband, who indorsed it over (*l*). So he may show that one of the plaintiffs promised jointly with the defendants (*m*).

Proof to impeach the contract.

If a bill has been accepted by one of several partners in the name of all the copartners, the others being sued may prove fraud in defence, and show that the bill concerned the acceptor only in his private and individual capacity (*n*) (B). But where several persons trade together under different firms, it is not competent for one partner to show that the bill was drawn in respect of a firm in which he had no interest (*o*).

Collateral evidence.

It seems to be a general rule, that no extrinsic evidence is admissible to vary the contract apparent on the bill; as to show that the defendant did not accept the bill upon his own private account, but upon that of his principal (*p*); *or, that at the time of making the note, the plaintiff had agreed to take a renewal of the note in lieu of payment (*q*).

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The acceptor cannot give in evidence a parol understanding that the drawer was not to demand payment on the bill in case he could reimburse himself out of other funds (*r*). So the plaintiff cannot be permitted to prove in excuse for not giving notice of dishonour, a parol agreement that the

(*f*) It is a good defence to show that the plaintiff, who sues on a bill accepted by a company, is himself a member of that company. *Neale* v. *Turton*,[1] 4 Bingh. 149. In an action by an indorsee against acceptor, to prove the forgery by the drawer of the acceptance, the same evidence only is admissible as would have been so in the case of an indictment for forgery. *Griffiths* v. *Payne*, 3 P. & D. 107.

(*g*) An alteration of a bill of exchange after acceptance may be taken advantage of under a plea that the defendant did not accept the bill. *Cock* v. *Coxwell*, 2 C. M. & R. 291. See as to alterations, the cases cited below, in reference to the proper stamp on a bill or note.

(*h*) Carth. 160. *Ingledew* v. *Douglass*,[2] 2 Starkie's C. 36. [*Van Winkle* v. *Ketcham*, 3 Caine's Rep. 323.]

(*i*) 1 East, 432.

(*k*) 4 Esp. C. 187. Per Lord Hardwicke, *Haly* v. *Lane*, 2 Atk. 181, 2.

(*l*) 2 Atk. 181, 2.

(*m*) *Mainwaring* v. *Newman*, 2 B. & P. 120. Note, the objection was taken in this case by special demurrer, vide *supra*, note (*f*).

(*n*) *Pinkney* v. *Hall*, Salk. 126, vide *supra*, 205.

(*o*) *Baker* v. *Charlton*, Peake, S. C. 80. (*p*) Str. 955; Cas. T. Hardw. 1.

(*q*) *Hoare* v. *Graham*, 3 Camp. 57. See *Snowball* v. *Vicars*, Bunb. 175; *Moller* v. *Living*, 4 Taunt. 102, *infra*, tit. PAROL EVIDENCE.

(*r*) *Campbell* v. *Hodgson*,[3] 1 Gow. 74.

(A) (A negotiable note made by an infant is voidable and not void; and if he, after coming of age, promise the payee that it shall be paid, the payee may negotiate it, and the holder may maintain an action in his own name against the maker. *Reed* v. *Bachelder*, 1 Metcalf R. 539.) [A negotiable note given by an infant even for necessaries, is void. *Swasey* v. *Vanderheyden's Administrator*, 10 Johns. 33.] {*M'Crillis* v. *How*, 3 New Hamp. Rep. 648.}

(B) (Where a *partner* procures a note to be made to his firm as accommodation paper, and transfers it *for his sole benefit* in the partnership name, a *copartner*, although wholly ignorant of the transaction, is liable to a *third indorsee*. *Bank of St. Albans* v. *Gillilam*, 23 Wend. R. 311. See also *Smith* v. *Loring*, 2 Ohio R. 467.)

(1) [See *Nightingale* v. *Withington*, ante, *note*—and *Grey* v. *Cowper*, Lawes Plead. in assumpsit, 671, *in note*. See also Heineccius de Vitiis Negotiationis Collybisticæ vel Cambialis; Chap. II. sect. 7.]

[1]Eng. Com. Law Reps. xiii. 382. [2]*Id.* iii. 233. [3]*Id.* v. 468.

amount was not to be demanded until the estates of the drawer (for whose benefit the bill had been given) had been sold (*s*) (A).

A bill of exchange or promissory note expressed to be for value received is presumed to have been made upon a good consideration (*t*); but the failure of consideration may sometimes be proved as a defence against the payee of a bill although it would be no defence against a *bonâ fide* indorsee for value (*u*). As between the original parties to the bill, the *total failure* of consideration may be set up as a defence (*x*) (1) (B). It may be

Want of consideration.*

(*s*) *Free* v. *Hawkins*,[1] 1 Moore, 535; and see *Hoare* v. *Graham*, 3 Camp. 535; 4 Taunt. 731. {Or that the indorser, at the time of the transfer of a note by an indorsement in blank, agreed to be responsible at all events, without demand of the maker, or notice of non-payment. *Barry* v. *Morse*, 3 New Hamp. Rep. 182.}

(*t*) The presumption of consideration may be rebutted by evidence. Where a note expressed to be for value received was given to a boy only nine years old, whose father was living, the donor being in a state of imbecility, and not far from his death, it was a question for the jury whether it was given upon any *legal* consideration. Gratitude to the father, or affection to the son, is not, it seems, a sufficient consideration, and such a note is not good as a *donatio mortis causâ*. *Holliday* v. *Atkinson*,[2] 5 B. & C. 501. A cross-acceptance, with an exchange of securities, is a good consideration for a note. 1 Camp. 179; 3 East, 72; Co. B. L. 176, 510; Bayley, O. B. 205. *Cowley* v. *Dunlop*, 7 T. R. 571; and see *Buckler* v. *Buttivant*, 3 East, 72; *Ex parte Walker*, 4 Ves. 373.

(*u*) 2 T. R. 71; Com. 43. *Morris* v. *Lee*, Bayley on Bills, 397. *Snelling* v. *Briggs*, B. N. P. 284. *Puget de Bras* v. *Forbes*, 1 Esp. C. 117. Where, by the course of trade a bill was to be given by the drawer before the consideration was paid, and before payment the payee's agent became bankrupt, it was held that the payee could not recover against the drawer. Ibid. and see 1 Str. 674.

(*x*) 7 T. R. 121. Even although the defendant has promised to pay the bill, if no proof of payment be

* As to notice that the party relies on this defence, vide *supra*, 221.

(A) (Where a promissory note was given for the price of a horse, payable absolutely in ten days, and it was at the same time agreed, that if the horse did not meet the expectation of the person for whom he was purchased, and was returned within ten days, he should be received in lieu of the note, and the horse was in accordance with such contract returned, but not accepted by the vendor. It was held that it was not competent to give such collateral matter resting in parol in evidence in defence of the note. *Isaac* v. *Elkins*, 11 Vermont Rep. 679. See also *Cunningham* v. *Wardwell*, 2 Fairf. 466. [See *Thompson* v. *Ketcham*, 8 Johns. 189. *Dow* v. *Tuttle*, 4 Mass. Rep. 414. *Bausman* v. ——, stated 1 Dallas, 26.] But it has been held that evidence is admissible to prove that when a note was executed, there was an agreement to receive in part payment a debt on another person. *Murchie* v. *Cook & M'Nab*, 1 Alabama R. 41. In an action by the payee against the maker of a negotiable note in common form, the defendant cannot give in evidence, by way of defence, a parol agreement, that upon his giving a deed of real estate to the plaintiff, the note should be given up. *Spring* v. *Lovett*, Pick. R. 11, 417.)

(B) (In an action upon a promissory note, a total failure of consideration may be given in evidence to defeat it, when the suit is between the original parties; but it is otherwise where there is only a partial failure. That can only be remedied by a distinct suit. *Washburn* v. *Picot*, 3 Dev. 390; *Slade* v. *Halstead*, 7 Cow. 322; *Hills* v. *Bannister*, 8 Cow. 31. [*Schoonmaker* v. *Roosa & al.* 17 Johns. 301. *Pearson* v. *Pearson*, 7 Johns. 26. *Ten Eyck* v. *Vanderpool*, 8 Johns. 120. *The People* v. *Howell*, 4 Johns. 296. *Fink* v. *Cox*, 18 Johns. 145. Yelv. 4, b, *note*.] {In Massachusetts, it is held, that a note given without consideration, cannot for that reason be avoided, if no fraud or imposition has been practised. *Bowers* v. *Hurd*, 10 Mass. Rep. 427. And see Swift on Bills, 265.} A promissory note founded on the payee's agreement to convey to the promisor land belonging to a third person, is not invalid on the ground of want of consideration. *Trask* v. *Vinsion*, 2 Pickering, 105.)

(1) [Where a promissory note is given for the purchase of real property, and the title to the property fails, it is not a good defence against the note, unless the failure be total. *Greenleaf* v. *Cook*, 2 Wheat. 13. See *Smith* v. *Sinclair*, 15 Mass. Rep. 171. *Lloyd* v. *Jewell & al.* 1 Greenleaf, 352. *Frisbie* v. *Hoffnagle*, 11 Johns. 50. Although the consideration of a note fail by reason of the failure of the payee to perform an agreement, yet if a new agreement be made by the parties, as a substitute for the old, the failure of consideration creates no equity in favour of the maker against the indorsee, even in Virginia. *Young* v. *Grundy*, 7 Cranch, 548. A note given in consideration of the assignment of a patent right, which had been fraudulently obtained, was held to be void, although certain materials had been furnished, and certain instructions given by the payee to the maker. *Bliss* v. *Negus*, 8 Mass. Rep. 46. A note given on the sale of a chattel, fraudulently represented by the vendor to be of great value, when it was of *no value*, it was without consideration, and void, and evidence of these facts is admissible under the general issue, in an action on the note. *Still* v. *Rood*, 15 Johns. 230. So in an action on a note, the maker may show that the consideration was a quit-claim deed, executed by the plaintiff to him, of lands which the plaintiff induced him to purchase by fraudulently pretending to a title to them. *Hawley* v. *Beeman*, 1 Tyler, 238. Where the owner of a slave told him if he would procure good notes for $200, he should be immediately manumitted, and the slave procured the notes and delivered them to his master, who made out a deed of manumission, but refused to deliver the deed, and kept it and the notes for more than two years, during which time he held the slave as a slave; it was held in an action on one of the notes against the maker, that the consideration had wholly failed, and that the plaintiff could not recover. *Petry* v. *Christy*, 19 Johns. 53.]

[1]Eng. Com. Law Reps. ii. 105. [2]*Id.* xi. 286.

shown, that the *contract on which the bill was given is *wholly* rescinded, where it is entire; or, that it has been *partially* rescinded, where it consists of divisible parts (*y*).

Where a note was given by the defendant as an apprentice fee with his son, and the indentures were void for want of a stamp under the statute 8 Anne, it was held that the plaintiff could not recover, although he had maintained the defendant's son for the time (*z*); and in some cases, as between the original parties, the defendant may show what consideration was really given for the bill, and the plaintiff cannot recover more (*a*).

Where the defendant accepted a bill in consideration of partnership, and broke off the treaty, it was held that the plaintiff could recover no more than compensated the injury actually sustained (*b*). In order, however, to reduce the demand, the acceptor must prove a failure to a certain liquidated amount. It is now completely settled, that a partial failure which may be the subject of an action for unliquidated damages, and which leaves the whole of the contract still open and unrescinded, cannot be inquired into in an action on the bill or note (*c*), as, that the goods delivered are of bad quality (*d*); and in general, a party who has given a bill of exchange for the amount of a tradesman's bill, is precluded from the disputing the reasonableness of the charges (*e*).

Where the defendant having possession of the premises, gave a bill as a consideration for a lease, which the plaintiff refused to execute, it was held that the refusal constituted no defence to the action (*f*); but where a *par-*

given within a specific time which is elapsed. *Elmes* v. *Wills*, 1 H. B. 64. Where the defendant accepted bills for goods supplied on a contract "to be of good quality and moderate price," held that it was no answer to the action on the bills that the goods turned out to be of inferior quality, and that the defendant had paid to the plaintiff much beyond what they sold for; in an action for the price, the value only can be recovered; but in an action upon the security, the party holding it is entitled to recover, unless there has been a total failure of consideration. *Obbard* v. *Beetham*,[1] 1 M. & M. 483. Even the forcible re-taking of goods, two months after the sale, is no defence to an action on a bill given for the price of goods. *Stephens* v. *Wilkinson*,[2] 2 B. & Ad. 320. So it is no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that such estate had never been conveyed. *Spiller* v. *Westlake*,[3] 2 B. & Ad. 155. Held also, Parke, J. *dissentiente*, that in all cases where, from defect of consideration, the original payees cannot recover on the note or bill, the indorsee to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. *Heath* v. *Sansom & Evans*,[4] 2 B. & Ad. 291. In *assumpsit* on a bill accepted by the defendant, plea, stating a contract for certain work and payment in part by money, and the residue by the bill, averring the insufficiency of the work done, and that the money paid exceeded the value thereof; held, on motion for judgment *non obstante vered.* that the plea was bad, as showing only a partial failure of consideration for the money and the bill, alike applicable to both. *Trickey* v. *Larne*, 6 M. & W. 278; 8 Dowl. (P. C.) 174.

(*y*) Bayley on Bills, 236. *Barber* v. *Backhouse*, Peake's C. 61; where, in an action by the payee against the acceptor of a bill, the defendant paid part of the money into court, and proved that there was no consideration for the residue, the jury, under the direction of Lord Kenyon, found for the defendant.

(*z*) 7 T. R. 121.

(*a*) *Darnell* v. *Williams*,[5] 2 Starkie's C. 166. And see *Wiffen* v. *Roberts*, 1 Esp. C. 261. He may show that it was accepted for value as to part, and as an accommodation bill as to the residue. 2 Starkie's C. 166.

(*b*) Peake's C. 216.

(*c*) *Morgan* v. *Richardson*, 1 Camp. R. 40, n.; 2 Camp. R. 346. *Fleming* v. *Simpson*, 1 Camp. R. 40, n. *Moggridge* v. *Jones*, 14 East, 486; 3 Camp. C. 38; Bayley, O. B. 235. *Day* v. *Nix*,[6] 9 Moore, 159. See also *Gascoyne* v. *Smith*, 1 M. & Y. 338. Where the indorsee of a note for which the consideration was the transfer of a ship, was held to be entitled to recover, although the transfer was void for non-compliance with the Registry Acts, there being evidence to show that the defendant had been in possession for two years.

(*d*) *Morgan* v. *Richardson*, 7 East, 483; 3 Smith, 487; 1 Camp. 40; Camp. 346; 1 Esp. 159. *Moggridge* v. *Jones*, 3 Camp. 38; 14 East, 86. *Tyers* v. *Gwynne*, 2 Camp. 346.

(*e*) 1 Esp. C. 159, 261. *Solomon* v. *Turner*,[7] 1 Starkie's C. 51.

(*f*) 3 Camp. 38; 14 East, 484. *Moggridge* v. *Jones*, 3 Camp. 38.

[1]Eng. Com. Law Reps. xxii. 363. [2]*Id.* xxii. 86. [3]*Id.* xxii. 49. [4]*Id.* xxii. 78. [5]*Id.* iii. 296. [6]*Id.* xvii. 121. [7]*Id.* ii. 291.

tial failure arises from fraud it is a defence to the action (*g*). Thus, where the bill is given for the price of goods fraudulently sold under a warranty, the breach of warranty is a bar to an action on the bill, if the defendant has tendered back the goods (*h*).

The failure of consideration is no defence against an indorsee for value(*i*) (A); neither is it any defence against a *bonâ fide* indorsee for value, that the bill was an accommodation bill, and that he knew it to be such (*k*) (B).

*It is no defence to an action by an indorsee against the acceptor, that the drawer of a bill, payable to his own order, had committed a secret act of bankruptcy, and that the assignees under the commission had withdrawn from the defendant a lease, pledged by the drawer to him as a security against the acceptance (*l*). If the indorsee knew that the bill was an accommodation bill, he can recover no more than the value he has paid; but if the bill was made upon a good consideration, he may recover the whole; and if he has not paid full value for it, he is a trustee for the indorser in respect of the surplus (*m*). *244

Where no consideration was given for the bill originally, or where it has been obtained by fraud or duress, it is, as has been seen, incumbent on the plaintiff to prove that he gave value for the bill (*n*). And though the bill was drawn on a good consideration, yet if it was afterwards lost or stolen, and afterwards came into the hands of an indorsee for value, yet it would be a good defence to show that he took it *malâ fides* with a knowledge of the circumstances; or even under circumstances which ought to have excited his suspicion as to the title of the party from whom he received it (*o*).

As the law presumes a bill to have been made on a good consideration, when the issue is joined on a replication that there was a consideration for the bill (*p*) to a plea that there was no consideration (*q*), the proof lies on the defendant (*r*). But where, to a general plea of no consideration, the plaintiff pleads some particular consideration, concluding with a verification which the defendant traverses, the plaintiff, by his form of pleading, takes,

(*g*) 2 Taunt. 2. *Ledger* v. *Ewer*, Peake's C. 216. *Fleming* v. *Simpson*, 1 Camp. 40. *Secus*, where a purchaser who has given the bill in payment does not repudiate the contract. *Archer* v. *Bamford*,[1] 3 Starkie's C. 175.

(*h*) *Lewis* v. *Cosgrave*, 2 Taunt. 2. The jury found for the plaintiff; but the court granted a new trial, on the ground of fraud. And see *Solomon* v. *Turner*, 1 Starkie's C. 51.

(*i*) *Boehm* v. *Sterling*, 7 T. R. 423. Even although it was indorsed over after it was due, the drawers (the defendants) having issued it nine months after the date.

(*k*) *Smith* v. *Knox*, 3 Esp. 46. But it would be otherwise if he knew that the bill was drawn for a particular purpose, 3 Esp 46. And see *Charles* v. *Marsden*, 1 Taunt. 224; *Fentum* v. *Pocock*,[2] 5 Taunt. 193; and per Eldon, C. *Bank of Ireland* v. *Beresford*, 6 Dow. 237.

(*l*) *Arden* v. *Watkins*, 3 East, 317. (*m*) *Wiffen* v. *Roberts*, 1 Esp. 261.

(*n*) *Supra*, 220.

(*o*) *Supra*, Ib. Co-executors cannot recover as *bona fide* holders for valuable consideration without notice, where one of them has notice, though in a different capacity, that the bill was accepted for accommodation. —— v. *Adams*, 1 Younge, 117.

(*p*) Such a replication is good on special demurrer. *Prescott* v. *Long*, 1 Mo. & R. 382, (*n.*)

(*q*) Such a plea is bad on special demurrer. *Stoughton* v. *Earl of Kilmorey*, 2 C. M. & R. 72; *Mills* v. *Oddy*, Ib. 103.

(*r*) *Lucy* v. *Forrester*, 2 C. M. & R. 59. *Batley* v. *Catterall*, 1 Mo. & R. 379. *Percival* v. *Framplin*, 2 C. M. & R. 180. In a similar case, *Morgan* v. *Cresswell*, 1 Mo. & R. 180, n., the plaintiff was nonsuited, but the court set aside the nonsuit. *Ib.*

(A) (A failure of the consideration of a promissory note by the misconduct of the holder, without the fault of the maker, will discharge the latter from his obligation to such holder. *Kernier's Syndic* v. *Jumonville De Villier*, 8 Louis. R. 550.)

(B) (S. P. *Grant* v. *Ellicott*, 7 Wend. 227.)

[1]Eng. Com. Law Reps. xiv. 176. [2]*Id.* i. 72.

as it seems, the burthen of proof upon himself (*s*); unless, however, it thus appear from the form of pleading that the plaintiff meant to rely on the particular consideration alleged, and not simply to deny the truth of the plea, the proof of consideration will still, it seems, be incumbent on the defendant (*t*).

Action by an indorsee against the acceptor, plea, that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give nor the defendant receive any consideration for his accepting or paying the bill, that the drawer indorsed to the plaintiff without any consideration, and that the plaintiff held the bill without consideration, and it was held that it was not incumbent on the plaintiff to begin and prove that
*245 he gave value for *the bill, but that it is otherwise when the title of the plaintiff is impeached on the ground of fraud, duress, or of the bills having been lost or stolen (*u*). In an action by an indorsee against the acceptor, it is not sufficient in order to prove no consideration, to show that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, to enable the action to be brought by the indorsee, upon the understanding that the money should be divided between one of the indorsees and the drawer; the want of consideration between the defendant and the drawer must be proved (*x*).

The declarations of a former holder are not evidence to prove want of consideration (*y*) (1), unless the title of the plaintiff be identical with that of the party who made the declaration; as where he took the bill from him after it became due (*z*), or sues as agent of the declarant (*a*).

Illegality. As against an original party to the bill or note, the defendant may give the *illegality* of the consideration in evidence in bar of the action (*b*). And

(*s*) *Batley* v. *Catterall*, 1 Mo. & R. 379. In which case Alderson B. stated that he had so ruled in a previous case.

(*t*) *Lowe* v. *Burrows*,[1] 1 Mo. & R. 381; 4 N. & M. 366. There, to a general plea of no consideration, the plaintiff replied that the defendant did receive consideration for the said acceptance, *videlicet* two cows sold and delivered by the plaintiff to the defendant, and concluded to the country. Ld. Denman held that proof of consideration lay on the defendant, the replication being in substance a traverse of the plea, the *videlicet* and conclusion to the country showing that the words under the *videlicet* were not meant as introductory of new matter; and the Court refused a new trial.

(*u*) *Mills* v. *Barber*, 1 M. & W. 425. In *Edwards* v. *Groves*, 2 M. & W. 642, which was an action by the indorsee against the maker of a promissory note, the defendant pleaded that the note was given for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration; replication, that the note was indorsed to the plaintiff without notice of the illegality, and for a good consideration, on which issue was joined, and it was held that the illegality was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration in the first instance, but that in order to do so, the defendant ought to have proved the illegality by evidence. Upon a traverse of the indorsement of an accommodation bill to the plaintiff after it was due, it is for the defendant to begin and show that the bill when indorsed was due. *Lewis* v. *Lady Parker*,[2] 4 Ad. & Ell. 838.

(*x*) *Whitaker* v. *Edmonds*,[3] 1 Ad. & Ell. 638; 1 Mo. & R. 366.

(*y*) *Smith* v. *De Wruitz*,[4] R. & M. 212. *Shaw* v. *Broom*,[5] 4 D. & R. 730. *Beauchamp* v. *Parry*,[6] 1 B. & Ad. 19. *Barough* v. *White*,[7] 4 B. & C. 325.

(*z*) See the observations of Parke, B. *infra*, 261, note (*y*), *Benson* v. *Marshall*, cited 4 D. & R. 732.

(*a*) *Benstead* v. *Levy*, 1 B. & Ad. 89; 1 Mo. & R. 138.

(*b*) As where the bill had been accepted in a smuggling transaction. 1 Camp. C. 383. A bill given to a creditor to induce him to sign the certificate of a bankrupt is void in whatsoever hands it may be, and whatever the consideration given by the holder; but if given merely to keep him from taking steps to oppose the bankrupt in obtaining it, it will be good in the hands of a holder for value without notice. *Birch* v. *Jervis*,[8] 3 C. & P. 379. See Bankrupt Act, s. 125. A bill given for a wager exceeding 10*l*., although on a legal horse-race, is nevertheless void, even in the hands of an innocent indorsee. *Shillito* v. *Thede*,[9] 7 Bing. 405. See 16 C. 2, c. 7, 1, 3. Where the bill was given by the acceptor to the drawer for "difference in consols,"

(1) [Declarations of the payee of a note, when the note was in his hands, that he gave no consideration for it, cannot be given in evidence in an action by an indorsee against the maker. *Burough* v. *White*, Eng. Com. Law Reps. x. 345.]

[1] Eng. Com. Law Reps. xxix. 152. [2] *Id.* xxxi. 200. [3] *Id.* xxviii. 171. [4] *Id.* xxi. 419. [5] *Id.* xvi. 220. [6] *Id.* xx. 351. [7] *Id.* x. 345. [8] *Id.* xiv. 358. [9] *Id.* xx. 181.

so he may as against an indorsee who was privy to the illegal transaction (*c*). But no illegality between the original parties will affect an indorsee (except under the statutes against gaming and usury) (*d*), unless he had notice (*e*) of *the illegality, or took the bill after it become due, from one who had notice (*f*) (A). The question of *malâ fides* in such cases is usually a question of fact for the consideration of the jury (*g*). *246

Where a bill is given for the differences in a stock-jobbing transaction, an indorsee who is *privy* to the transaction cannot recover (*h*). Where the payee of such a bill indorsed it after it was due, it was held that the indorsee could not recover (*i*). Where part of the consideration is illegal the bill is void for the whole (*k*) (B).

Illegality of consideration.

In an action by an indorsee against the maker of a note, letters from the payee to the maker, proved to be contemporaneous with the making of the note, have been held to be evidence (*l*) to prove that it was illegal in its creation.

By the provisions of the stat. 9 Ann. c. 14, s. 1, securities for money or valuables won by gaming, &c. (*m*), or for repaying money knowingly lent for gaming, are void; and by the stat. 12 Ann. stat. 2, c. 16, s. 1, so are contracts for the payment of money lent on usury (*n*). And a *bonâ fide* holder

it was held that the Court could not say that it necessarily meant illegal differences; and even if paid, it was available in the hands of a *bona fide* indorsee without notice. *Day* v. *Stuart*,[1] 6 Bing. 109; and 3 M. & P. 334. So a bill drawn by the broker for stock-jobbing differences, paid by him for the defendant, is not absolutely void, and the amount may be recovered by an innocent indorsee. *Greenland* v. *Dyer*,[2] 2 M. & Ry. 422. Where the bill was dated on a Sunday, the Court, in the absence of evidence, would not presume the acceptance to have been written on that day; and even if it had, such an act would not be an act of ordinary calling within the st. 29 C. 2, c. 7. *Begbie* v. *Levy*, 1 Cr. & J. 180. See ASSUMPSIT.

(*c*) 1 Esp. C. 389; 2 Esp. C. 589. [*Brisbane* v. *Lestarjette*, 1 Bay. 113. *Wiggins et. al.* v. *Bush*, 12 Johns. 306.]

(*d*) And now even such securities are (by st. 5 & 6 W. 4, c. 41, s. 1) not to be void, but to be decreed to have been given for an illegal consideration.

(*e*) Doug. 632. *Wyatt* v. *Bulmer*, 2 Esp. C. 538. *Strongitharm* v. *Lukyn*, 1 Esp. C. 389. *Dugnall* v. *Wigley*, 11 East, 43, where a broker got the bill discounted for illegal brokerage. An agreement between a petitioning creditor who has sued out a fiat in bankruptcy, and the bankrupt, for abandoning the prosecution, and the bankrupt's acceptance of a bill is void, *inter partes*. *Davis* v. *Holding*, 1 M. & M. 159. Where a statute prohibits a thing to be done, and does not expressly avoid the securities affected by the illegality, it is an available security unless the illegality appears on the face of the instrument, or unless the holder has notice. *Broughton* v. *Manchester Waterworks*,[3] 3 B. & A. 10.

(*f*) Doug. 632. [*Perkins* v. *Challis*, 1 N. Hamp. Rep. 254.]

(*g*) Per Lord Mansfield, Doug. 632. Although gross negligence be evidence of *mala fides*, it is not equivalent to it, and ought not to be left so to a jury. *Goodman* v. *Harvey*,[4] 4 Ad. & Ell. 870. See *Crooke* v. *Jadis*,[5] 6 C. & P. 191. *Foster* v. *Pearson*, 1 C. M. & R. 855. *Backhouse* v. *Harrison*, 3 Nev. & M. 388.

(*h*) *Steers* v. *Lashley*, 6 T. R. 61; 7 T. R. 630. Time bargains in foreign funds are not within the provisions of the st. 7 G. 2, c. 28, nor are they illegal at common law. *Elsworth* v. *Cole*, 2 M. & W. 31.

(*i*) 7 T. R. 630. *Brown* v. *Turner*, 2 Esp. C. 631.

(*k*) 2 Burr. 1002. *Scott* v. *Gilmore*, 2 Taunt. 226. *Cruikshanks* v. *Rose*, 1 Mo. & R. 101.

(*l*) *Kent* v. *Lowen*, 1 Camp. 177. *Walsh* v. *Stockdale*, *cor.* Abbott, J. Guildhall Sitt. after. Trin. Term, 1818.

(*m*) Bills substituted for those illegally given are equally void.

(*n*) The mere negotiation of a bill by a broker at exorbitant brokerage, the broker advancing no money himself, and being no party to the bill, will not avoid the bill under the stat. *Dagnall* v. *Wigley*, 11 East, 43. As to proof of *usury*, see the title.

(A) (In Pennsylvania the *bona fide* holder of a note given on an usurious contract will not be affected by the unlawfulness of the transaction, if he took it without knowledge of the usurious consideration. *Creed* v. *Stephen*, 6 Wharton, 223. So in New York, *Huckley* v. *Sprague*, 10 Wend. 113. *Steele* v. *Whipple*, 21 Id. 103. But in Kentucky and Louisiana it has been held that gaming and usurious considerations are exceptions to the general rule, and render the bill entirely void even in the hands of a *bona fide* holder without notice. *Early* v. *M'Cart*, 2 Dana, 415. *Leblanc* v. *Sanglair*, 12 Martin, 402.)

(B) (A promissory note given in consideration of the purchase of an improvement upon vacant government land, is for an illegal consideration and cannot be recovered. *Merrell* v. *Legrand*, 1 Howard, 150. So a note made in pursuance of a contract to suppress a prosecution for an assault and battery without leave of the court, is illegal and void. *Vincent* v. *Groom*, 1 Yerger, 430.)

[1]Eng. Com. Law Reps. xix. 20. [2]*Id.* xvii. 315. [3]*Id.* v. 215. [4]*Id.* xxxi. 212. [5]*Id.* xv. 350.

could not recover on a bill usurious in its origin (*o*), or on a bill legal in its inception, but indorsed by the payee upon the usurious contract (*p*).

By the stat. 58 Geo. 3, c. 93, no bill or note, although it may have been given for an usurious consideration, shall be void in the hands of a *bonâ fide* indorsee who has discounted or paid value for it (*q*), without notice of the usury (*r*). And an innocent holder of a bill accepted to secure a gaming debt may recover against the drawer or indorser; the construction of the stat. (9 Anne, c. 14) is, that such a security shall not be used to enforce payment from the loser (*s*); but no illegality of this nature, after an indorsement in blank, will prejudice an innocent indorsee (*t*).

By 2 & 3 Vic. c. 37, bills and notes at less than 12 months' date, above 10*l.*, are not to be affected by the usury laws (*u*).

*247 *It has been held, that as between the original parties to the bill, the plaintiff could not recover where the consideration was money lent to the defendant, to obtain the liberation of the parties, and the ransom of the defendant's ship, contrary to the stat. 45 Geo. 3, c. 72 (*x*) (1); the sale of spirituous liquors in less quantities than 20*s.* value, although part of the consideration was also money lent (*y*); the executing a composition-deed, where the note or bill was given to secure a fraudulent preference over the other creditors (*z*); an illegal binding of an (*a*) apprentice for want of inserting the premium in the indentures (*b*).

A substituted bill, unless it be relieved from an illegality to which the original was liable, is open to the same objection, although it be given to a *bonâ fide* indorsee for value (*c*). But a security for no more than the prin-

(*o*) *Lowe* v. *Waller*, Doug. 735. See *Lowes* v. *Mazzaredo*,[1] 1 Starkie's C. 385.

(*p*) *Lowes* v. *Mazzaredo*, 2 Starkie's C. 385. *Chapman* v. *Black*, 2 B. & A. 589. But see *Parr* v. *Eliason*, 1 East, 92; *Daniel* v. *Cartony*, 1 Esp. C. 274.

(*q*) The statute does not extend to one who takes an usurious bill in payment of an antecedent debt, although without notice. *Vallance* v. *Siddell*,[2] 6 Ad. & Ell. 932.

(*r*) Since the above statute a *bona fide* indorsee of such a bill for value, may recover upon it. *Wyatt* v. *Campbell*, Chitty's Stat. 181, n.; M. & M. 80.

(*s*) *Edwards* v. *Dick*,[3] 4 B. & A. 212. In the case of *Bowyer* v. *Bampton*, (Str. 1155) the action was brought against the loser.

(*t*) See *Parr* v. *Eliason*, 3 Esp. 210; 1 East, 92. *Daniel* v. *Cartony*, 1 Esp. C. 274, *i. e.* if he does not by his declaration claim title through an usurious indorsement. See *Lowes* v. *Mazzaredo*,[1] 1 Starkie's C. 385.

(*u*) The exemption of 58 Geo. 3, c. 93, of bills and notes given for usurious consideration in the hands of innocent holders, was confined to the cases where such holders discount or *pay* a valuable consideration for such bills, and not where they receive them (although innocently) in satisfaction of an antecedent debt; the provisions of 3 & 4 Will. 4, c. 98, are not confined merely to bills drawn for a time certain, not having more than three months to run, but apply also to such as are payable on demand. *Vallance* v. *Siddell*,[3] 6 Ad. & Ell. 932.

(*x*) *Webb* v. *Brooke*, 3 Taunt. 6.

(*y*) *Scott* v. *Gillmore*, 3 Taunt. 226. See *Witham* v. *Lee*, 4 Esp. 264.

(*z*) *Cockshott* v. *Bennett*, 2 T. R. 763. Recognized by Ld. Ellenborough in *Steinman* v. *Magnus*, 11 East, 390. *Middleton* v. *Lord Onslow*, 1 P. Wms. 768. *Jackson* v. *Lomas*, 4 T. R. 166. So if the stipulation were not for a larger sum, but for better security. *Leicester* v. *Rose*, 4 East, 372.

(*a*) Although the plaintiff had maintained the apprentice till he absconded. The stat. 8 Ann. c. 9, avoids such indentures. (*Jackson* v. *Warwick*, 7 T. R. 121.) *Aliter*, if the indentures be merely voidable, the binding being for less than seven years. *Grant* v. *Welchman*, 16 East, 207.

(*b*) For other instances, see above, 49, 71. It seems to have been held, in some cases, that a bill or note might be enforced which had been substituted for a bill, or given as a security for a debt which could not have been enforced. See *Witham* v. *Lee*, 4 Esp. C. 264; 3 Camp. 9, n. where the bill had been given for liquors contrary to 24 Geo. 2, c. 40, s. 12. But see 2 B. & P. 375. Although a bill drawn abroad in favour of an alien enemy cannot be enforced, it will be a good consideration for a subsequent promise in time of peace. *Duhammel* v. *Pickering*,[4] 2 Starkie's C. 90. And see *Antoine* v. *Morshead*,[5] 6 Taunt. 237.

(*c*) *Chapman* v. *Black*, 2 B. & A. 588.

(1) [A bill of exchange, expressed to be for the ransom of a vessel, and given as collateral security for the payment of the ransom bill, is a contract on which an action may be sustained in a court of common law—the plaintiff and payee being an alien friend. *Maisonaire & al.* v. *Keating*, 2 Gallison, 325. In an action on such bill, capture must be taken to be justifiable, and the ransom regular. *Ibid.*]

[1] Eng. Com. Law Reps. ii. 438. [2] *Id.* xxxiii. 249. [3] *Id.* vi. 405. [4] *Id.* iii. 260. [5] *Id.* i. 370.

cipal and legal interest being substituted for an usurious bond or bill, is binding (*d*).

Where the *bonâ fide* indorsee of a bill delivered it up to the payee, who informed him that the acceptance was forged, and received in place of it a bill on the defendant, it was held that the plaintiff might recover on the latter bill, though accepted by the defendant without consideration, unless it could be proved that the plaintiff had compounded a felony (*e*).

A note given to officers of Excise for the amount of penalties in which the defendant had been convicted, the conduct of the officer having been sanctioned by the commissioners, was held to be legal (*f*); so was a note given by the defendant who had been convicted of a misdemeanor at the quarter sessions, for which the parish officers had been bound over to prosecute, under the 32 Geo. 3, c. 57, and which was considered by the court in adjusting the *quantum* of punishment (*g*). So where the note was given to procure the discharge of a receiver appointed by the Court of Chancery, in custody *under the warrant of a Chancellor for not accounting, being for the amount of the debt and costs (*h*). So where the note was given by a friend of a debtor, to secure 5*s*. in the pound, in consideration that the plaintiff would sue out a commission of a bankrupt against the debtor (*i*). But as between the original parties to the bill, it is a defence to show that it was procured by fraud (*k*); and such a defence is also available against any indorsee with notice of the fraud (*l*); but not against a *bonâ fide* indorsee for value (*m*). *248

An agreement to forego a prosecution for a misdemeanour is illegal (*n*). But the plaintiff may recover on a bill given by the defendant for the costs of a civil suit, although the plaintiff has also instituted a prosecution against the defendant which is afterwards abandoned, unless it be distinctly proved that the abandonment was part of the consideration for the bill (*o*).

A declaration by an indorser, not proved to be the agent of the plaintiff, is inadmissible to prove usury (*p*).

If the consideration involve a fraud upon a third person, the plaintiff can- Fraud.
not recover. *A.* as a friend of the defendant agreed to give the plaintiff 70*l*. for certain goods on account of the defendant; a note given by the defendant to the plaintiff without the knowledge of *A.* to secure an additional sum cannot be enforced (*q*) (A).

(*d*) *Barnes* v. *Hedley*, 2 Taunt. 184. *Wicks* v. *Gogerly*, R. & M. 123. *Preston* v. *Jackson*,[1] 2 Starkie's C. 238. So if where part of the consideration being illegal, and part legal, two securities are substituted, and the giver manifest his election to ascribe the illegal claim to one he will be liable on the other. *Habrey* v. *Richardson*, Bayley on Bills, 59.

(*e*) *Wallace* v. *Hardacre*, 1 Camp. 45. And see *Harding* v. *Cooper*,[2] 1 Starkie's C. 467.

(*f*) *Pilkington* v. *Green*, 2 B. & P. 151. See also *Sugars* v. *Brinkworth*, 4 Camp. 46.

(*g*) *Beeley* v. *Wingfield*, 11 East, 46; 2 Wils. 341; 2 Esp. C. 643; 5 East, 294.

(*h*) *Brett* v. *Close*, 16 East, 293. Although only one of the parties to the suit assented to the discharge.

(*i*) *Fry* v. *Malcolm*,[3] 5 Taunt. 117. *Bryant* v. *Christie*,[4] 1 Starkie's C. 329.

(*k*) *Ledger* v. *Ewer*, Peake, 216; 2 Taunt. 24. (*l*) *Ibid.*

(*m*) *Ibid.* See 13 East, 182. *Williams* v. *Thomas*, 6 Esp. C. 16.

(*n*) *Harding* v. *Cooper*,[5] 1 Starkie's C. 467. In *Collins* v. *Blantern*, 2 Wils. 341, it was held that the compounding an indictment for perjury was a great offence, and that whether it was between the parties to the action (on a bond) or strangers, was immaterial.

(*o*) *Ibid.*

(*p*) *Basset* v. *Dodgin*,[6] 10 Bing. 40. To establish such a defence usury must be distinctly proved. *Ib.*

(*q*) *Jackson* v. *Duchaire*, 3 T. R. 551. On issue taken on a plea of no consideration (which is demurable) the defendant may show that the bill was void *ab initio* for fraud. *Mills* v. *Oddy*, 2 C. M. & R. 103.

(A) (The payment of a note cannot be avoided, in a suit at law, (by way of defence) upon the ground of fraud, unless the fraud goes to the whole consideration. *Harlan* v. *Read*, 3 Ohio, 285. *Powell* v. *Waters*, 8 Cow. 449. *Vallett* v. *Parker*, 6 Wend. 615. It is no fraud in the holder of a bill of exchange to make

[1]Eng. Com. Law Reps. iii. 332. [2]*Id.* ii. 470. [3]*Id.* i. 34. [4]*Id.* ii. 412. [5]*Id.* ii. 470. [6]*Id.* xxv. 21.

Want of title in plaintiff.

The defendant may also prove in bar the want of title in the plaintiff; as, that one of the parties through whom the plaintiff claims had no legal right or authority to transfer the bill. In an action by the indorsee of a bill against the acceptor, the latter may prove the bankruptcy of the payee previous to the indorsement (*r*).

In an action by the indorsee against the drawer, a plea alleging that the plaintiff was never a *bonâ fide* holder for a good consideration does not admit proof of *fraud*, the *malâ fides* not being sufficiently alleged (*s*).

Satisfaction.

The defendant may, under the proper issue, give evidence to show that the bill has been discharged by *payment* or other satisfaction (*t*), or by the *assent* or *laches* of the holder (*u*) (A).

*249 *The acceptor may prove in bar that the holder has received satisfaction from the drawer (*x*); after payment by the drawer (who is not also the payee), the bill is no longer negotiable (*y*); and if a bill be paid, and re-issued after maturity, the holder cannot recover (*z*); but a promissory note paid and re-issued before maturity is available in the hands of a *bonâ fide* holder, without notice (*a*). If the drawer, who is also payee of a bill, take it up, he may indorse it over after it is due, without a fresh stamp (*b*); but it is otherwise where the bill is made payable to a third person (*c*). After twenty years, it is to be presumed that a promissory note or bill of exchange has been satisfied (*d*); and such a presumption may be left to a jury after the lapse of a much shorter period, although the Statute of Limitations has not been pleaded. The holder of a bill gives in a blank schedule under an insolvent act: this is not conclusive evidence to discharge the acceptor (*e*). Satisfaction to one of two parties is satisfaction to both (*f*). The payment of part by the acceptor to the payee, cannot be set up as a defence by the

(*r*) 2 Esp. C. 611; 3 East, 322. But a bill payable to the order of the drawer, and accepted for his accommodation, does not pass to the assignees; and therefore an indorsement for value after the bankruptcy gives a right of action. *Watson* v. *Hardacre*, 1 Camp. 46, 173; 3 East, 321; 12 East, 656. See above, title by transfer.

(*s*) *Ulber* v. *Rich*, 2 P. & D. 579. Where in trover for a bill the defendant pleaded that the plaintiff indorsed it in blank, and that the party who became the holder pledged it with the defendant as a security for a debt; replication, that at the time the defendant received it, he knew that the party had no authority to pledge it; held good. *Hilton* v. *Swan*,[1] 5 Bing. N. C. 413.

(*t*) In *assumpsit* by holder against a prior indorsee of a note; plea, that the note was drawn for a debt, and indorsed by the defendant expressly as a security for the debt, and that such debt had been paid and the note delivered back to the party ultimately liable; held, on general demurrer, that the facts stated in the plea sufficiently showed that the note had been satisfied, and by the Stamp Act no longer negotiable. *Bartrum* v. *Caddy*, 1 P. & D. 207. And see *Freakley* v. *Fox*,[2] 9 B. & C. 130; and *Thorogood* v. *Clarke*,[3] 2 Starkie's C. 251. No presumption will, it seems, be drawn as to payment or satisfaction of a bill from the mere lapse of 20 years, unless the Statute of Limitations be pleaded. *Du Belloix* v. *Lord Waterpark*,[4] 1 D. & R. 17.

(*u*) Where a promissory note has been received in satisfaction of a bill sued upon, a replication of the non-payment of the note, is no answer to the plea. *Sard* v. *Rhodes*, 1 M. & W. 153. See note (*l*) *post*.

(*x*) 12 East, 317; 1 H. B. 89, n. Either wholly or in part, for the holder can recover the residue only from the acceptor. *Bacon* v. *Searles*, 1 H. B. 88. *Pearson* v. *Dunlap*, Cowp. 571.

(*y*) *Beck* v. *Robley*, 1 H. B. 89. But see the explanation of this doctrine in *Callow* v. *Lawrence*, 3 M. & S. 95.

(*z*) 3 Camp. 194. As to re-issuing notes, see 48 Geo. 3, c. 149, s. 13.

(*a*) 3 Camp. 149. *Beck* v. *Robley*, 1 H. B. 89; Bayley, O. B. 63.

(*b*) *Callow* v. *Lawrence*, 3 M. & S. 95.

(*c*) *Beck* v. *Robley*, 1 H. B. 89, n.

(*d*) *Duffield* v. *Creed*, 5 Esp. C. 52.

(*e*) 3 Camp. 13.

(*f*) *Jacaud* v. *French*, 12 East, 317. *Ellison* v. *Dezell*, 1 Sel. N. P. 172.

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an arrangement with one of the indorsers, by which it is agreed that the whole burden shall be thrown upon the other indorsers; and that the indorser first mentioned is to be liable only in case they should be unable to pay. *Farmers' Bank, &c.* v. *Vanmeter*, 4 Rand. 553.)

(A) (The drawer's possession of a note with payee's indorsement is *prima facie* evidence of payment. *Miller* v. *Reynolds*, 5 Martin, N. S. 667.)

[1]Eng. Com. Law Reps. xxxv. 156. [2]*Id.* xvii. 342. [3]*Id.* iii. 337. [4]*Id.* xvi. 12.

acceptor against an indorsee, without notice (*g*). The holder may sue a prior indorser, although he has taken in execution and discharged a subsequent one (*h*); and an acceptor sued by the holder, and discharged under an insolvent act, is still liable to the drawer (*i*).

Where a defendant gave his acceptance as a security for the acceptances of a third person, but allowed his own acceptance to remain, knowing that the former acceptances had been paid by means of fresh acceptances, it was held that it must be presumed that he allowed his acceptance to remain as a security for such fresh acceptance. (*k*).

A composition with the acceptor, and the taking a third person's note as a security for the composition-money, operate as a satisfaction of the bill (*l*).

*The taking the separate notes of one of three partners after a dissolution *250
of partnership, under an agreement by deed with one partner, the holder strictly reserving his right as against all three, and retaining possession of the bills, does not, in the event of the new bills turning out to be unproductive, exclude the holder from his remedy against the other partners (*m*), although the separate bills have been from time to time renewed.

In *assumpsit* by the indorsee against maker; the plea alleged the making of a former note for the accommodation of the drawer and indorsement to the plaintiff, and that the indorsement of the note in the declaration was made and given to take up the former note, and had been paid; held, that the former allegation was surplusage, and that the defendant was not bound to produce the former note, nor give any evidence in support of that allegation (*n*).

Where in *assumpsit* against the maker of a joint and several note, the Release.
defendant pleaded a release to one of the joint makers, replication, that the release was given at the defendant's request, and in consideration thereof the defendant promised to pay as if no release had been given, held bad, as setting up a parol contract to avoid the release (*o*).

Prior parties are not discharged by a release to subsequent parties (*p*). It will be seen that an acceptor cannot be discharged without proof of express assent by the holder (*q*).

Where a bill has been renewed, and a warrant of attorney given to enter up judgment, the new security is no defence, unless judgment has been entered up (*r*); and it is no defence to an action on the first bill that the second is outstanding (*s*).

(*g*) *Cooper* v. *Davies*, 1 Esp. 463; 1 Camp. 35; Doug. 235. But see 2 Camp. 185. Although the holder has taken security from another party, or discharged him out of execution. 3 Esp. 46; 2 Bl. 1235; 2 B. & P. 62. *A.* makes a note in favour of *B.* without consideration, which *B.* indorses to *C.*, with notice: *B.* becomes bankrupt, *C.* takes a dividend under the commission, and covenants not to sue *B.*; *A.* is still liable on the note (*Mullett* v. *Thomson*, 5 Esp. C. 178), *sed quære*, for the discharge of the principal discharges the surety.

(*h*) *Hayling* v. *Mulhall*, 2 Bl. R. 1523. *English* v. *Darley*, 2 B. & P. 62. So he may sue the drawer, after having taken the acceptor in execution, who has been discharged under the Lords Act. *Macdonald* v. *Bovington*, 4 T. R. 825. And the drawer may still recover from the acceptor, for the being taken in execution is no satisfaction as between the drawer and acceptor. *Ibid.*; and see 12 East, 317.

(*i*) 4 T. R. 825; 2 B. & P. 61. (*k*) *Woodroffe* v. *Hayne*,[1] 1 Carr. & P. 600.

(*l*) *Lewis* v. *Jones*,[2] 4 B. & C. 513. *Perfect* v. *Musgrave*, 6 Price, 111.

(*m*) *Bedford* v. *Deakin*, 2 B. & A. 210.

(*n*) *Shearm* v. *Burnard*, 2 P. & D. 365. And see further as to surplusage, *Fitzgerald* v. *Williams*, 6 Bing. N. C. 69.

(*o*) *Brooks* v. *Stuart*, 1 P. & D. 615; 10 Ad. and Ell. 854.

(*p*) *Smith* v. *Knox*, 3 Esp. C. 46; 2 Bl. 1235. *Carstairs* v. *Rolleston*,[3] 5 Taunt. 551; 1 Marsh. 207, where it was held, on demurrer, that a release by the holder to the payee of an accommodation note did not discharge the maker, the holder not having notice of the want of consideration.

(*q*) Vide *infra*, 252. (*r*) *Norris* v. *Aylett*, 2 Camp. 329; 3 East, 251.

(*s*) 3 East, 251; 5 T. R. 513.

[1]Eng. Com. Law Reps. xi. 490. [2]*Id.* x. 393. [3]*Id.* i. 184.

The acceptor who has paid the amount under a forged indorsement is still liable to the supposed indorser (*t*). A tender of the amount after the day of payment is not available (*u*).

Discharge by laches.

It has been seen, that where the action is brought against a drawer or indorser of a bill, it is incumbent on the plaintiff to prove that due diligence has been used in making presentment of the bill and giving notice of default. But an acceptor is not discharged by the neglect of the holder to present the bill (*x*).

Where a party accepted a bill payable at his banker's, and it was held that he was not discharged by the neglect of the holder to present it for several months after it had become due, although the bankers had funds of the acceptor in their hands, and in the meantime became bankrupts (*y*).

Giving time, &c. *251

The giving time to the principal (*z*) in general discharges the surety; *hence it is a good defence by a drawer or indorser of a bill to show that the holder has given time to the acceptor of a bill or maker of a note (*a*), or has compounded with him (*b*), or has taken a renewed bill from him (although the indorser afterwards approve of it) (*c*), or any other security (*d*) (A); but if the drawer or indorser consent to this, he is not dis-

(*t*) *Cheap* v. *Harley*, 3 T. R. 127. *Smith* v. *Sheppard*, Sel. Cas. 243.

(*u*) *Hume* v. *Peploe*, 8 East, 168; 5 Ves. 350.

(*x*) *Farquhar* v. *Southey*[1], 1 M. & M. 14. (*y*) *Sebag* v. *Abitbol*,[2] 1 Starkie's C. 79.

(*z*) The principle as to the indorsees is, that if the holder give time to a prior indorser, and then sue a subsequent one, he in effect breaks his faith with the former. Per Ld. Eldon, *English* v. *Darley*, 2 B. & P. 61. But it seems that the time must be given in such a way as to preclude the party who gives it from suing for that time. Time given to a subsequent indorser does not discharge a prior indorser. Giving time to the acceptor after judgment against him does not discharge the drawer. *Pole* v. *Ford*, 2 Ch. 125. Where the acceptor gave a second bill after the dishonour of the first, it was held to be a mere collateral security which did not discharge the drawer. *Pring* v. *Clarkson*,[3] 1 B. & C. 14; 2 D. & R. 78.

(*a*) 3 B. & P. 366; 2 Ves. jun. 540. *Nisbit* v. *Smith*, 2 Bro. C. C. 579; 2 B. & P. 61. *Ex parte Smith*, 3 Bro. C. C. 1. *Tindal* v. *Brown*, 1 T. R. 167; 2 T. R. 186. Even although the drawer had no effects in the hands of the acceptor. *Gould* v. *Robson*, 8 East, 567. Where time is given to the principal without communication with the surety, the latter is discharged, the creditor has made a new contract. See *Boultbee* v. *Stubbs*, 18 Ves. 20. Forbearance to sue the acceptor after protest and notice does not discharge the drawer. *Walwyn* v. *St. Quintin*, 1 B. & P. 652. *Aliter*, if the forbearance be before protest, or if the holder take security from the acceptor after protest. *Ibid.* A conditional agreement to give time to the acceptor on his paying part, which condition is not fully performed, does not discharge the indorsees. *Badnall* v. *Samuel*, 4 Price, 174. A bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, without any communication with him respecting the first; the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff; it was held that the second bill *was merely a collateral security*, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. *Pring* v. *Clarkson*,[3] 1 B. & C. 14. See also *Adams* v. *Bingley*, 1 M. & W. 192 The taking a cognovit from the acceptor, by which the time of obtaining judgment against him is not deferred, will not discharge the drawer. *Jay* v. *Warren*,[4] 1 C. & P. 532. *Price* v. *Edmonds*,[5] 10 B. & C. 579. *Lee* v. *Levi*, 4 B. & C. 390.

(*b*) *Ex parte Smith*, Co. B. L. 6th edit. 168; 3 B. C. C. 1.

(*c*) 2 Camp. 179. And see *Gould* v. *Robson*, 8 East, 576. There the holder, after taking part payment from the acceptor, took another acceptance, payable at a future date; it was agreed that the holder should keep the original bill as a security, but the indorser, who was no party to the agreement, was held to be discharged. See also *English* v. *Darley*, 2 B. & P. 61. *Hull* v. *Pitfield*, 1 Wils. 48. *Dillon* v. *Rimmer*,[6] 1 Bing. 100. *Kendrick* v. *Lomax*, 2 C. & J. 405. Where on the defendant's asking for time on an acceptance, he gave another bill for the same amount, the plaintiff telling him that something was due for interest, and continuing to hold the first bill, the second being paid when due, it was held that the plaintiff was entitled to recover interest on the first bill. *Lumley* v. *Musgrove*, 4 Bing. 9.

(*d*) 2 B. & P. 60, per Ld. Eldon. But where an indorsee commenced actions against the acceptor and indorser, and without the privity of the latter took from the acceptor a warrant of attorney for debt (and costs, it was held, that as the fact could not have been pleaded generally in bar, it was inadmissible under the general issue. *Lee* v. *Levi*,[7] 4 B. & C. 390; 6 D. & R. 475.

(A) (But a mere agreement by the holder with the drawer for delay, without any consideration for it, and without any communication with the indorser, will not discharge the latter from a liability previously

[1]Eng. Com. Law Reps. xxii. 234. [2]*Id.* ii. 304. [3]*Id.* viii. 10. [4]*Id.* xi. 460. [5]*Id.* xxi. 135. [6]*Id.* viii. 263. [7]*Id.* x. 364.

charged (*e*), and consequently evidence of assent may be adduced in reply to such evidence on the part of the defendant (*f*). Evidence of the mere forbearance to sue the acceptor is not sufficient (*g*). Where a party on the face of a note is liable as a principal, it is not competent to him to prove his liability only as surety (*h*).

*An acceptance is *primâ facie* evidence of the acceptor's having in his *252 hands effects of the drawer sufficient to answer the amount of the bill; he Waver (A).

(*e*) *Clarke* v. *Devlin*, 3 B. & P. 363. And see *Withall* v. *Masterman*, 2 Camp. 178. So in case of a promise to pay the bill after notice that time has been given. *Stevens* v. *Lynch*, 12 East, 38.

(*f*) 1 B. & P. 419; 10 East, 34; 11 Ves. jun. 411; 8 East, 576; 2 Esp. C. 515; 1 B. & P. 652; *supra*, note (*e*).

(*g*) *Walwyn* v. *St. Quintin*, 1 B. & P. 652. *English* v. *Darley*, 2 B. & P. 62, 3 Price, 533.

(*h*) *Price* v. *Edmunds*,[1] 10 B. & C. 578. And see *Fentum* v. *Pococke*, 5 Taunt. 192. *Raggit* v. *Axmore*, 4 Taunt. 730. *Kerrison* v. *Cooke*, 3 Camp. 362. The case of *Laxton* v. *Peat*, 2 Camp. 185, in which Lord Ellenborough ruled that in the case of a bill for the accommodation of the drawer, a holder, knowing the fact, who gave time to the drawer, discharged the acceptor, seems therefore to have been overruled. And see *Harrison* v. *Courtald*,[2] 3 B. & Ad. 36. *Nicholls* v. *Norris*, *Ib.* 41. The drawer is not discharged by giving time to an accommodation acceptor, *Collott* v. *Haigh*, 3 Camp. 281. Nor by giving time to the acceptor where the latter is the agent of the drawer. *Clarke* v. *Noal*, 3 Camp. 411.

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fixed upon him. *M'Lemore* v. *Powell*, 12 Wheat. 554. The acceptance by the holder of a note, of a bond and warrant of attorney to confess judgment from the *maker* and *first indorser*, will not discharge the *second indorser*, although time for payment be given to the maker and first indorser, if the time so given be not greater than would have elapsed, had a suit been brought against the parties, and prosecuted with due diligence. *Sizer* v. *Heacock*, 23 Wendell, R. 81. Though where the holders of a promissory note on the day that it became due, accepted from the maker a cheque drawn upon a bank, by a firm consisting of the maker and a third person, dated six days afterwards, which check was to be in full satisfaction of the note, in case it was paid at maturity; it was held that this amounted to a suspension of the remedy against the maker, and discharged the indorser. *Okie* v. *Spencer*, 2 Whart. 253.)

[In Virginia, it has been decided that the holder of a note, who gives further time to the drawer, or enters into a new contract with him, does not thereby discharge the indorser. *Bennett* v. *Maule*, Gilmer, 305. In other states the English rule is enforced. *Scarborough* v. *Harris*, 1 Bay, 177. *Haslett* v. *Ehrick*, 1 Nott & McCord, 116. *Moodie* v. *Morall*, 1 Rep. Con. Ct. 371—*Shaw* v. *Griffith*, 7 Mass. Rep. 494—*Crain* v. *Colwell*, 8 Johns. 384. *Lynch* v. *Reynolds*, 16 Johns. 41. *Hubbly* v. *Brown et al.* ib. 70—*Henry* v. *Donaghy*, Addison's Rep. 39. *M'Fadden* v. *Parker*, 4 Dallas, 275, S. C. 3 Yeates, 496.] {But giving time to the drawer, by forbearing to proceed to the recovery of the money by legal process, and delaying to sue the indorsers for several years, will not operate as a discharge to the indorser, provided no time be given until after the note is protested. *Sterling* v. *The Marietta, &c. Company*, 11 Serg. & Rawle, 179.}

(A) (A stipulation by the indorser of a note to waive a notice of demand of payment, does not dispense with the demand itself. *Backus* v. *Shepherd*, 11 Wend. 629. And if the indorser of a dishonoured note says that the note would be paid, this is not a waver of notice. *Creamer* v. *Perry*, 17 Pick. 332. So the offer made by an indorser on demand of payment from him, to indorse another note, is no evidence of waver of notice. *Laporte* v. *Landry*, 5 Martin, N. S. 360. A subsequent promise to pay, is a waver by the indorser of the want of notice of non-payment by maker. *Dulreys* v. *Mollere*, 3 Martin, N. S. 320. See also *Walker* v. *Laverty*, 6 Munf. 487. *Higgins* v. *Morrison's Ex'rs*, 4 Dana, 102. But to make a promise of payment operate as a waver of demand and notice, the holder must show affirmatively and clearly, that the indorser promised with a full knowledge that he had not been charged as indorser by a regular demand and notice. *Sice* v. *Cunningham*, 1 Cow. 397. *Jones* v. *Savage*, 6 Wend. 658. *Richter* v. *Selin*, 8 Serg. & R. 438. *Walters* v. *Swallow*, 6 Whart. 446. *Laurence* v. *Ralston*, 3 Bibb. 102. *Miller* v. *Hackley*, 5 Johns. 385. *May* v. *Coffin*, 4 Mass. 347. *Warder* v. *Tucker*, 7 Mass. 452. *Craig* v. *Brown*, 3 Wash. C. C. 506. *Fotheringham* v. *Rice*, 1 Bay. 291. See also *Ralston* v. *Bullits*, 3 Bibb. 261. *Aliter*, if he have full knowledge of the facts. Ib. *Richter* v. *Selin*, 8 S. & R. 438. But where the fact of laches was not known, a *promise* by an indorser or drawer after maturity to pay the note or bill, is *presumptive proof* of demand and notice. *Tebbetts* v. *Dowd*, 23 Wend. 379.) {Parol evidence is not admissible to prove, that at the time a note of hand was transferred, by an indorsement in blank, the indorser agreed to be liable at all events, without a demand on the maker, and notice of non-payment. *Barry* v. *Morse*, 3 N. Hamps. Rep. 132.} (But see *Brent's Ex'rs* v. *The Bank of the Metropolis*, 1 Peters, 89.) [Where a party relies on a waver of demand and notice, he must allege the demand and notice in his declaration, in the same manner as if actually given, and proof of the waver is equivalent to proof of demand and notice. *Norton* v. *Lewis*, 2 Conn. Rep. 478. S. P. *Williams* v. *Matthews*, 3 Cowen, 252. And an agreement by an indorser, after the note was due, but before the days of grace had expired, to pay the amount, in consideration of time being given, was held to be a waver of demand and notice. *Norton* v. *Lewis*, ubi. sup. So if the indorser receive security of the maker to meet the indorsement. *Bond & al.* v. *Farnham*, 5 Mass. Rep. 170. *Tower* v. *Durell*, ubi. sup. *Mead* v. *Small*, 2 Greenleaf, 207. See *Agan* v. *M'Manus*, 11 Johns. 180, where it is said the doctrine as to waver of notice does not apply to *promissory notes*.]

[1]Eng. Com. Law Reps. xxi. 135. [2]*Id.* xxiii. 25.

is the principal debtor, and primarily liable to all parties, and cannot be discharged but by express agreement (*i*).

A complete acceptance may, in some instances, be waved by an *express* agreement to consider the acceptance at an end. *Walpole*, being the holder of a bill accepted by *Pulteney*, agreed to consider his acceptance as at an end, and wrote in his bill-book, "Mr. *Pulteney's* acceptance at an end." *Walpole* kept the bill three years without calling upon *Pulteney*, and then brought his action; the jury found for the plaintiff, but the Court of Exchequer granted a new trial, and the jury then found for the defendant (*k*).

The indorsees of a bill knowing that it had been accepted for the accommodation of the drawer, and possessing goods of the drawer, from the produce of which they expected payment, said, at a meeting of the acceptor's creditors, that they looked to the drawer, and should not come upon the acceptors, in consequence of which the latter assigned their property for the benefit of their creditors, and paid them 15*s.* in the pound. The drawer's goods turned out to be of little value, and the indorsees sued the acceptors; and Lord Ellenborough said, that if the plaintiffs' language amounted to an unconditional renunciation of all claim upon the acceptors, the latter were discharged; if only to a conditional promise not to resort to the acceptors, if they were satisfied elsewhere, they were not discharged; and the jury found for the plaintiffs (*l*).

Black arrested *Peele* as acceptor of a bill drawn by *Dallas*, but his attorney, on finding that the bill was for the accommodation of *Dallas*, took a security from *Dallas*, and sent word to *Peele*, that he had settled with *Dallas*, and that he (*Peele*) need give himself no farther trouble; *Dallas* became bankrupt, and *Black* sued *Peele*; but it was held, that as *Black* had in express words discharged *Peele* no action could be maintained (*m*). It is, however, to be observed, that a mere agreement, without proof of consideration, not to sue the acceptor, will not discharge him unless he be a surety for the drawer (*n*). But a verbal agreement by the indorsee at the time of the indorsement to him, that he should sue the acceptor only, was held to be a good bar to an action brought against a party by the indorsee (*o*).

The defendant may show that the plaintiff has received the whole of the consideration for the defendant's acceptance of the bill, for that is a waver of the acceptance in point of law (*p*); as, where the whole of the consideration was the consignment of goods to the defendant, and the policy of insurance upon them, and the plaintiff, the holder of the bill, signed a memorandum, stating that the defendant had refused to accept the bill, and
*253 *that he the plaintiff accepted the bill of lading and policy, and undertook to apply the proceeds in payment of the bill (*q*).

If the holder of the bill receive part of the money from the drawer, and

(*i*) *Vere* v. *Lewis*, 3 T. R. 182.
(*k*) *Walpole* v. *Pulteney*, cited Doug. 236, 237, 248, 249.
(*l*) *Whatly* v. *Tricker*, 1 Camp. 35.
(*m*) *Black* v. *Peele*, cited Doug. 236; see also, *Mason* v. *Hunt*, Doug. 284, 297, and *Dingwall* v. *Dunster*, Doug. 235, 247. *A. & Co.* having accepted a bill for *B.*'s accommodation, paid it into the hands of his banker without notice, who retained it in his possession several years, charging interest, but never debiting him with the amount of the bill. During this time they became bankers to *A. & Co.* but gave them no notice. The balance of *B.*'s account was always against him, that of *A. & Co.* in their favour, but seldom to the amount of the bill. Held that *A. & Co.* were not discharged unless the jury could infer an express agreement to discharge, or an express renunciation. *Farquhar* v. *Southey*,[1] 1 M. & M. 14.
(*n*) *Parker* v. *Leigh*,[2] 2 Starkie's C. 228. It was so held in *Wilson* v. *Smith*, on demurrer, K. B. Trin. T. 58 Geo. 3.
(*o*) *Pike* v. *Street*,[3] 1 M. & M. 226.
(*p*) Doug. 284, 297; Bay. 91.
(*q*) *Mason* v. *Hunt*, Doug. 284.

[1]Eng. Com. Law Reps. xxii. 234. [2]*Id.* iii. 327. [3]*Id.* xxii. 299.

take a promise from him upon the back of the bill for the payment of the residue at an enlarged time, it is for the jury to say whether this is not a waver of the acceptance: but it is said, that it ought to be left to them with strong observations to show that it is (*r*). No neglect to call on the acceptor, or indulgence given to the other parties, will be evidence of a waver, so as to discharge the acceptor (*s*).

The acceptor of a bill for the accommodation of the drawer is not discharged by giving time to the drawer (*t*).

The payee and holder of a promissory note appointed the maker his executor; and it was held that it was a discharge of the note, and that an indorsement could not give a third person the right of action (*u*).

Indorsement after due.

It is no defence that the indorsement was made after an action had been commenced by the indorser (*x*).

The defendant, by proof that the bill was indorsed to the plaintiff after it became due, places the plaintiff in the situation of the indorser, and may give any evidence in bar of the plaintiff's claim which would have defeated that of the indorser (*y*) (1); and therefore, an indorsee for value by the payee, after the bill has become due, cannot recover against the acceptor of an accommodation bill (*z*); but if the holder before the bill became due, could have recovered, so also may the indorsee of the bill indorsed after it has become due (*a*). But if the drawer of a cheque issue it long after the date, a *bonâ fide* holder for value without notice may recover against the drawer, although the consideration for which the drawer delivered the bill has failed (*b*).

*If the bill be substituted for another, it is liable to the equities incident to *254

(*r*) *Ellis* v. *Galindo*, B. R. Mich. 24 Geo. 3, cited Doug. 270; Bayley, O. B. 91, *quære.*

(*s*) *Dingwall* v. *Dunster*, Doug. 247; and see note (*m*) *ante.*

(*t*) *Raggit* v. *Axmore*, 4 Taunt. 730. And the taking a *cognovit* for payment by instalments, from the drawer of a bill accepted for his accommodation does not discharge the acceptor, although the holder knew that it was an accommodation bill. *Fentum* v. *Pocock*,[1] 5 Taunt. 192; and see *Bank of Ireland* v. *Beresford & others*, 6 Dow. 237; *Harrison* v. *Courtald*,[2] 3 B. & Ad. 36; *Nicholls* v. *Norris*, ib. 41. See, on the contrary, *Luxton* v. *Peat*, 2 Camp. C. 185. *Collott* v. *Haigh*, 3 Camp. C. 281. *Hill* v. *Read*,[3] 1 D. & R. (N. P. C.) 26. Where a bill was accepted for the accommodation of the drawer, and time was given to the acceptor, it was held that the drawer was not discharged. *Kerrison* v. *Cooke*, 3 Camp. C. 362.

(*u*) *Freakley* v. *Fox*, 9 B. & C. 130. And see *Wankford* v. *Wankford*, 1 Salk. 290; *Cheetham* v. *Ward*, 1 B. & P. 630.

(*x*) *Columbies* v. *Slim*, 2 Ch. Ca. T. M. 637; yet *qu.* if the indorsee took the bill with knowledge of the fact.

(*y*) 3 T. R. 80, and in note; 7 T. R. 431. *Good* v. *Coe*, cited in *Boehm* v. *Sterling*, 7 T. R. 427; 7 T. R. 630. [*Bowman* v. *Wood*, 15 Mass. Rep. 535; *Field* v. *Nickerson*, 13 ib. 137; *Gold* v. *Eddy*, 1 ib. 2.]

(*z*) 1 Camp. 19. *Charles* v. *Marsden*, 1 Taunt. 224.

(*a*) 1 Camp. 383. But the taker of a banker's cheque for value nine months after the date, does not take it charged with the equity with which it was charged in the hands of the person from whom he received it, if he took it for value and without notice. *Boehm* v. *Sterling*, 2 Esp. C. 575; 7 T. R. 423. *Morris* v. *Tee*, Bayley on Bills, 4; 1 Taunt. 224; 3 Burr. 1516. Where the defendant gave to the husband a note payable to the wife, or order, which the husband, after it was due, indorsed to the plaintiff, held, first, that as the husband had a right to treat it as separate property, and had done so by indorsing it, no set-off could be maintained by the maker in respect of a debt due by the wife *dum sola;* and secondly, that the indorsee of the note, after it was due, was liable only to such equities as attached to the note itself, and not to claims arising out of collateral matters, *Burough* v. *Moss*,[4] 10 B. & C. 558. See as to a promissory note payable on demand, indorsed before any demand made. *Banks* v. *Colwell*, cited in *Brown* v. *Davis*, 3 T. R. 80.

(*b*) *Boehm* v. *Sterling*, 7 T. R. 423.

(1) [But the same demand and notice are required when a note is indorsed after it becomes due, as in the case of an indorsement before. *Course* v. *Shackleford*, 2 Nott & M'Cord, 283. *Ecfert* v. *De Condres*, 1 Rep. Con. Ct. 69. *Rugely* v. *Davison*, 2 ib. 33. *Poole* v. *Tolleson*, 1 M'Cord, 199. *Stockman* v. *Riley*, 2 M'Cord, 398. *Berry* v. *Robinson*, 9 Johns. 121. *Dwight* v. *Emerson*, 2 N. Hamp. Rep. 159. *Bishop* v. *Dexter*, 2 Conn. Rep. 419. *Thayer* v. *Brackett*, 12 Mass. Rep. 450. In Pennsylvania, however, it has been held that an indorsement of a note after it becomes due, is an original undertaking, and no demand on the former drawer or indorser, or notice to the indorser, is necessary. *Bank of North America* v. *Barrier*, 1 Yeates, 360.]

[1]Eng. Com. Law Reps. i. 72. [2]*Id.* xxiii. 25. [3]*Id.* xvi. 418. [4]*Id.* xxi. 128.

the one in lieu of which it was given; and, therefore, where a former bill was indorsed over in breach of trust after it was due, although for a valuable consideration, it was held that the indorsee could not recover on a bill substituted for this, the defendant having received notice from the party entitled not to pay it (*c*).

Where the defendant, the acceptor of a bill, would be entitled, on a recovery by the plaintiff against him, to recover back the amount, on an agreement by the plaintiff to indemnify him, it was held that the action was not maintainable (*d*).

The want of a proper stamp may be taken advantage of under a traverse of the drawing or acceptance (*e*).

Stamp.—Alteration (A). An objection to a bill or note for want of a proper stamp must be taken before the bill is read.

By the stat. 31 Geo. 3, c. 25, bills and notes cannot be stamped after they are made; but if a bill properly stamped be offered in evidence, the court will not inquire when it was so stamped.

By the stat. 43 Geo. 3, c. 127, a stamp of higher value, but of the same denomination, is sufficient (*f*).

A bill or note made abroad must be stamped according to the law of the country where it is made (*g*).

Where partners resident in Ireland, signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, and name of the drawee, and transmitted it to *B.* in England, it was held to be a bill of exchange, by relation, from the time of signing in Ireland, and that an English stamp was unnecessary (*h*).

Protest.—Alteration of bill. A protest must be stamped (*i*). Where a bill on the face of it appears to have been altered, it is for the plaintiff to show that such alteration was not improperly made (*k*).

If a complete bill be altered in a material point (*l*), after negotiation, or

(*c*) *Lee* v. *Zagury*,[1] 1 Moore, 556.

(*d*) *Carr* v. *Stephens*,[2] 9 B. & C. 758. But where at the time of the defendant's lending his name to several bills as security for the acceptor, the holder stipulating not to sue the defendant on the bills, until the effects of the acceptor, which were thereby assigned to a trustee should have been sold, and the proceeds applied in payment of the bills and expenses; but the trustee, with the knowledge and assent of the defendant, omitted to take possession of the goods, and they were seized under a commission of bankruptcy; such an undertaking by the plaintiff does not operate as a covenant not to sue, nor furnish any answer to the action against the defendant on the bills. *Lancaster* v. *Harrison*,[3] 6 Bing. 726.

(*e*) *Dawson* v. *M'Donald*, 2 M. & W. 26. *M'Dowell* v. *Lyster*, 2 M. & W. 52. In proof of a traverse of making a cheque, the defendant may show that it was post-dated. *Field* v. *Woods*,[4] 7 Ad. & Ell. 114.

(*f*) See *Taylor* v. *Hague*, 2 East, 414; *Farr* v. *Price*, 1 East, 55; *Chamberlain* v. *Porter*, 1 N. R. 30.

(*g*) *Alves* v. *Hodgson*, 7 T. R. 241. See *Farr* v. *Price*, 1 East, 55; *Taylor* v. *Hague*, 2 East, 414. An I O U does not require a stamp, either as a note or as a receipt (1 Esp. 426; 1 Camp. 499; Chitty, 345), *infra*, tit. STAMP.

(*h*) *Snaith* v. *Mingay*, 1 M. & S. 87. (*i*) Sel. 312.

(*k*) *Henman* v. *Dickenson*,[5] 5 Bing. 183, doubting the authority of *R.* v. *Cliviger*, 2 T. R. 263.

(*l*) A party to a joint and several note paid part, and signed a joint note for the residue, an alteration

(A) (Where, in a note intended to be made for eight hundred dollars, indorsed by the payee for the accommodation of the maker, and delivered to him, the words "hundred dollars" were omitted, so that it purports to be a note for eight , the maker, without the assent of the indorser, may insert the words "hundred dollars." *Boyd* v. *Brotherson*, 10 Wend. 93. See however *Norwich Bank* v. *Hyde*, 13 Conn. R. 279. A joint and several promissory note was signed by *A. B.* and *C.*, and afterwards *A.* acknowledged his signature to a witness who subscribed his name in the presence of *A.* and of the payee, without stating that he witnessed only the signatnre of *A.* In an aetion against the three makers it was held that this was not such an alteration of the instrument as to discharge *B.* and *C.* *Beary* v. *Haines*, 4 Wharton, 17. An alteration made in a note (increasing the amount for which it was given) without the knowledge or assent of the drawer, renders the note void. *Pankey* v. *Mitchell*, 1 Breese, 301. A memorandum put at the bottom of a note "payable at the house of *A.* &c." is not such an alteration as avoids the note. *Nugent* v. *Delhomme*, 2 Mart. R. 312.)

[1]Eng. Com. Law Reps. iv. 38. [2]*Id.* xvii. 491. [3]*Id.* xix. 216. [4]*Id.* xxxiv. 47. [5]*Id.* xv. 409.

after it has become due (*m*), though before negotiation, a fresh stamp is *necessary. But, in general, an alteration, to correct a mistake before negotiation, and with the acquiescence of the parties, is immaterial (*n*). An alteration in the sum or date is a material alteration (*o*). So is the alteration of the word "date" into the word "sight" (*p*), or of the name of the banking-house where it is payable (*q*) (1). So, where a promissory note on the day after the delivery to the payee, and expressed to be for value received, was altered by the addition of the words "for the good-will of a lease and trade" (*r*), the Court held that this alteration was material, because it afforded evidence of a fact which otherwise must have been proved *aliunde*, and pointed out to the holder to inquire whether the consideration had really passed. *255

The introduction of words after the acceptance of a bill which do not affect the responsibility of the parties, is immaterial (*s*). Thus it has been held that the introduction of a place of payment without the knowledge of the acceptor was immaterial, since it did not alter his liability (*t*).

without his knowledge, by interlining the words *jointly and severally*, avoids the note as to him; although to a letter requesting him to pay his joint and several note, he answered that it should meet his earliest intention. *Perring* v. *Hone*,[1] 4 Bingh. 28.

(*m*) *Bowman* v. *Nichol*, 1 Esp 81; 5 T. R. 537. Although altered with the consent of the acceptor (Ibid.) The bill in this case was originally drawn payable twenty-one days after date; whilst it was in the hands of the drawer it was altered, with the consent of the acceptor, to fifty-one days after date, and again, to twenty-four days after date, after the time of payment had expired.

(*n*) *Kennerly* v. *Nash*,[2] 1 Starkie's C. 452. *Walton* v. *Hastings*,[3] Ibid. 515. *Jacobs* v. *Hart*,[4] 2 Starkie's C. 45. Where the note, after being signed, but before it was given to the payee, with consent of all the parties, was altered, by erasing the words "on demand," and inserting "one month after date," and striking out the words "with interest," held, that it was to be considered as all one transaction, and not issued at the time of the alteration. *Sherrington* v. *Jermyn*,[5] 3 C. & P. 374. So where after an acceptance generally, it was altered with the consent of the acceptor, and whilst it remained in the drawer's hands by inserting a particular place of payment in the acceptance. *Stevens* v. *Lloyd*,[6] M. & M. 292. See also *Leykariff* v. *Ashford*,[7] 12 Moore, 281. So an alteration in the date, according to the original intention of the parties, and to correct a mistake, does not vitiate the instrument, nor render a fresh stamp necessary; nor does a subsequent addition of a place where to be made payable in the acceptance with the acquiescence of the acceptor. *Jacob* v. *Hart*, 2 M. & S. 143. But now see 1 & 2 Geo. 4, c. 78, s. 1.

(*o*) *Cordwell* v. *Martin*, 1 Camp. 79, 180; 9 East, 190. *Master* v. *Miller*, 4 T. R. 320; 5 T. R. 367; 2 H. B. 141; 1 Anst. 225. *Trapp* v. *Spearman*, 3 Esp. 57.

(*p*) *Long* v. *Moore*, 3 Esp. C. 155; but see 1 Taunt. 20.

(*q*) *Tidmarsh* v. *Grover*, 1 M. & S. 735. (*r*) *Knill* v. *Williams*, 10 East, 431.

(*s*) *Marson* v. *Petit*, 1 Camp. 82, n. *Jacobs* v. *Hart*, 2 Starkie's C. 45.

(*t*) *Marson* v. *Petit*, 1 Camp. 82, n. 3 Esp. C. 57. Such an alteration would now be material, in consequence of the late decision in the House of Lords, in *Rowe* v. *Young*, *supra*, 209, and so held in *Cowie* v. *Halsall*,[8] 4 B. & A. 197. *M'Intosh* v. *Haydon*,[9] 1 R. & M. 362. But see *Fayle* v. *Bird*, *supra*, 209. It has

(1) [In a note payable in "merchantable neat stock," an insertion of the word "young," after the word "merchantable" is a material alteration, and if made by the promisee designedly, destroys the validity of the note; and the promisee is not at liberty to prove the contract by other evidence. *Martendale* v. *Follett*, 1 N. Hamp. Rep. 95. But by inserting the word "good" before "merchantable wool," the note is not avoided; for the law would have intended that the wool should be good. *The State* v. *Cilley*, cited *Ibid.* p. 97. So in *Hunt* v. *Adams*, 6 Mass. Rep. 519, the insertion of the word "year," in the date of a note, was held not to avoid it, because the law would have supplied the word. But where a person not present at the execution of a note, afterwards subscribed his name thereto as a witness, at the instigation of the payee, it was held to avoid the note—as by a statute of Massachusetts, a note that has an attesting witness is not within the statute of limitations. *Homer* v. *Wallis*, 11 Mass. Rep. 309.

An alteration in the date of a note by the payee, {without the consent of the drawer,} whereby the time of payment is retarded, avoids it, although in the hands of an innocent indorsee for a valuable consideration. *Bank of U. States* v. *Russel*, 3 Yeates, 391. {As will an alteration of the date, though it does not appear from what date it was altered. *Stephens* v. *Graham*, 7 Serg. & Rawle, 505.} But an alteration in the date of an *assignment* on a note does not affect the claim of an assignee on the *drawer*. *Griffith* v. *Cox*, 1 Overton's Rep. 210.

In *Peepoon* v. *Stagg*, 1 Nott & M'Cord, 102, it was held that the insertion, by *the holder* of a due bill or promissory note, of the words "or order," destroyed its validity.

The law will not presume that an alteration, apparent on the face of a note, was made after its execution —but this, it seems is a question for the jury to decide. *Cumberland Bank* v. *Hall*, 1 Halstead's Rep. 215.]

[1]Eng. Com. Law Reps. xiii. 328. [2]*Id.* ii. 466. [3]*Id.* ii. 362. [4]*Id.* iii. 237. [5]*Id.* xiv. 356. [6]*Id.* xxii. 310. [7]*Id.* xxii. 450. [8]*Id.* vi. 399. [9]*Id.* xxi. 456.

An exchange of acceptances is a sufficient negotiation to render a new stamp necessary (*u*); and so it is said is the delivery to the drawer of a bill drawn for his accommodation, and payable to his own order (*x*). So where a bill indorsed by the drawer was left with the drawee for acceptance, who altered the *date* before he accepted it (*y*).

Where the drawee, upon presentment of the bill for acceptance, altered it as to the time of payment, and accepted it so altered, it was held that he thereby vacated the bill as to the drawer and indorsers; but that as the holder acquiesced, it was good as against him and the acceptor (*z*).

*256 *An alteration of the bill in the hands of the payee will defeat the action of the indorser, although he was not privy to the alteration (*a*).

If a note be signed by *A.*, and in consequence of a subsequent arrangement *B.* sign the note as a surety, he is not bound without a new stamp (*b*).

Where a bill or a note is void for want of a proper stamp, the plaintiff may go into evidence of the original consideration (*c*).

Where the alteration is made by consent of the parties, and *before negotiation*, a new stamp is unnecessary (*d*); as, where *A.* being indebted to *B.*, the latter drew a bill upon him at three months for the amount, and the bill being sent to *A.* for acceptance, he requested the time to be altered from three months to five, to which the drawer consented (*e*).

It is, it seems, incumbent on the plaintiff to prove that an alteration apparent on the face of the bill was made previous to negotiation (*f*).

Where the alteration is made to *correct a mistake*, and in furtherance of the intention of the parties, a new stamp is unnecessary: as where, in a bill intended to be negotiable and payable to the defendant, the drawer, the words "or order" were omitted, and the bill having been indorsed over to the plaintiff the next day, was returned by him to the drawer on the same day, and the mistake was then rectified (*g*); the jury finding upon the evidence that such was the original intention of the parties, the Court of King's Bench afterwards held that the alteration was allowable. But where a bill dated on the 1st of August, was drawn at two months date, payable to the order of the drawer, and after acceptance by the defendant was re-delivered by him to the drawer as a security for a debt, and after the latter had kept it twenty days the date was altered to the twenty-first, by the consent of the acceptor, and before the indorsement and delivery to a third person, it was held that a new stamp was necessary, since the bill was drawn according to the original intention of the parties, and was available in that form (*h*).

since been held that an alteration of a general acceptance of a bill by the addition of a place of payment without the privity of the acceptor discharges him. *Desbrow* v. *Wetherley*, 1 Mo. & R. 438.

(*u*) *Cardwell* v. *Martin*, 1 Camp. 79, 180; 9 East, 190.

(*x*) *Calvert* v. *Roberts*, 3 Camp. 342.

(*y*) *Outhwaite* v. *Luntley*, 4 Camp. 179.

(*z*) *Paton* v. *Winter*, 1 Taunt. 420. And held that no action would lie at the suit of the holder against the acceptor for rendering the bill invalid. But see *Walton* v. *Hastings*,[1] 1 Starkie's C. 215; 4 Camp. 223. *Long* v. *Moore*, 3 Esp. 155.

(*a*) *Master & others* v. *Miller*, 4 T. R. 320; 5 T. R. 367; 2 H. B. 141; 1 Ans. 225.

(*b*) *Clerk* v. *Blackstock*,[2] Holt's C. 474.

(*c*) 1 East, 258; 6 T. R. 52; 7 T. R. 241; 2 B. & P. 118. *Brown* v. *Watts*, 1 Taunt. 353.

(*d*) *Johnson* v. *The Duke of Marlborough*,[3] 2 Starkie's C. 313. *Kennerley* v. *Nash*,[4] 1 Starkie's C. 452.

(*e*) *Kennerley* v. *Nash*,[4] 1 Starkie's C. 452.

(*f*) *Johnson* v. *The Duke of Marlborough*,[3] 2 Starkie's C. 313; Phillips on Evidence, 495, edit. 1824.

(*g*) *Kershaw* v. *Cox*, 3 Esp. C. 246, *cor.* Le Blanc, J. and afterwards by the Court of K. B. And see *Bathe* v. *Taylor*, 15 East, 412; *Cole* v. *Parkin*, 12 East, 471; *Brutt* v. *Picard*,[5] 1 R. & M. 37. The remedying an accidental omission by inserting the words *or order* does not vitiate the bill. *Byron* v. *Thompson*, 3 P. & D. 71. In *assumpsit* by indorsee against acceptor, plea, that before the bill became due and was in full force and effect, the date was altered; held bad, as not alleging the alteration to have been made after acceptance. *Langton* v. *Lazarus*, 5 M. & W. 629.

(*h*) *Bathe* v. *Taylor*,[6] 15 East, 412.

[1]Eng. Com. Law Reps. ii. 362. [2]*Id.* iii. 159. [3]*Id.* iii. 360. [4]*Id.* ii, 486. [5]*Id.* xxi. 376. [6]*Id.* xii. 180.

A bill properly stamped and put into circulation, and afterwards taken up by the drawer, may again be circulated without a new stamp. It is negotiable in *infinitum*, till it has been paid by or discharged on behalf of the acceptor (*i*); and therefore, where the drawer of a bill payable to his own order, indorsed it over to *A.*, who indorsed it to *B.*, who returned it to the drawer on payment of the amount by the latter, having first struck out his own and *A.*'s indorsement, and the drawer indorsed it to the plaintiff after *it was due, it was held that he might recover against the acceptor *257 without a new stamp.

In order to prove that a bill dated at Paris was drawn in England, it has been held to be insufficient to prove that the drawer was in England at the time of the date (*k*).

The drawer may prove that he tendered the amount in a reasonable time after notice of the dishonour (*l*). A tender on the day following that of the notice was held to be in time (*m*).

III. It was a general rule in criminal cases, that no one could prove that a bill drawn, accepted or indorsed in his name, was a forgery (*n*); but it seems that the rule was confined to criminal proceedings, although it has been held in a civil case that the supposed drawer of a bill was not competent to prove that he did not draw it (*o*). This anomalous rule is now defeated by the late statute. A party to a bill is competent to prove that it is void (*p*), although the contrary was once held (*q*) (A); and a party to a

Competency.

(*i*) Per Lord Ellenborough, in *Callow* v. *Lawrence*, 3 M. & S. 97. Note, this case was held to be distinguishable from that of *Beck* v. *Robley* (1 H. B. 89, in the note), for there the bill was payable not to the order of the drawer, but of a third person; and if the drawer, on taking up the bill, could have transferred it, the payee would have been wrongfully made liable. } *Contra Bire* v. *Moreau*, 2 Carr. & Payne, 376.}

(*k*) *Abraham* v. *Du Bois*, 4 Camp. 269. (*l*) *Walker* v. *Barnes*,[1] 1 Marsh. 36.

(*m*) *Ibid.* (*n*) Unless he has been rendered competent by payment, &c. See tit. FORGERY.

(*o*) 12 Mod. 345; Holt, 297. But see tit. FORGERY.—INTEREST.

(*p*) *Walton* v. *Shelley*, 1 T. R. 296, where it was held that an indorser was not competent to prove the consideration to have been usurious.

(*q*) 7 T. R. 62; Esp. C. 332; Peake's L. Ev. 181.

(A) (The decisions in the United States, on this subject vary. There is a difference between the questions, as to the validity of a defence impeaching the character of an instrument, and the competency of a witness invalidating a paper, to which he may have given currency, or his sanction. The case of *Fox et al.* v. *Whitney*, 16 Mass. Rep. 118, was decided without regard to this distinction; but it was made the foundation of the opinion of one of the judges in *Winton* v. *Saidler*, 3 Johns. C. 185.

The principle laid down in *Walton* v. *Shelly*, 1 T. R. 296, has been, almost wherever it has been adopted, confined to *negotiable* instruments, which *have been negotiated*. *Blagg* v. *Phœnix Ins. Co.*, 3 Wash. C. C. R. 5. The rule has been further restrained, so as to permit a party to a negotiable paper, to prove facts subsequent to the due execution of the note, and which do not invalidate it in its inception, though they go to destroy the title of the holder. *Woodhull* v. *Holmes*, 10 Johns. R. 231. *Skilding et al.* v. *Warren*, 15 Johns R. 270. An indorsee of a promissory note is a competent witness to prove a payment of it by the maker. *White* v. *Kibling*, 11 Johns. R. 128; and an indorser may prove an agreement between the maker and the payee, and may show that it had not been performed, and that the indorsee had notice at the time of the indorsement to him of the condition on which the note was given. *M'Fadden* v. *Maxwell*, 17 Johns. R. 188. Thus a second indorser of a note is a competent witness to prove, that the third indorser had said, that he had received and discounted it at usurious interest. *Powell* v. *Waters*, 17 Johns. R. 176. So likewise an indorser of a note is a good witness to prove, that the indorsement was made after the note was due. *Baker* v. *Arnold*, 1 Caines' R. 258. The payee of a note, who had indorsed it with a saving of his own liability, was received as a competent witness, to prove an alteration of the note after its execution. *Parker* v. *Hanson*, 7 Mass. Rep. 470.

The decisions confining the rule to negotiable instruments are numerous. A grantor was admitted to prove, that he never had any interest in the lands granted, and that the conveyance from him under which the defendants claimed was without consideration. *M'Ferran* v. *Powers*, 1 Serg. & Rawle, 102. *Brown* v. *Downing et al.* 4 Serg. & Rawle, 494. *Loker* v. *Haynes*, 11 Mass. Rep. 498. *Doe* v. *Stokes*, 2 Hawks. 235. *Croft* v. *Arthur*, 3 Desauss, 223. *Wilson* v. *Speed*, 3 Cranch, 283. The assignor of a bond is a competent witness, to show, that he obtained it fraudulently. *Baring* v. *Shippen*, 2 Binn. 154. In *Pleasants* v. *Pemberton*, 2 Dall. 196, a guardian whose ward was the plaintiff, was admitted to prove, that a receipt given by him to the defendant for so many thousand dollars, meant continental dollars. Even an indorser will not

[1] Eng. Com. Law Reps. i. 91.

bill is competent to defeat or support the action, unless he be directly interested in the event, or unless the verdict would be evidence for or against him.

The incompetency of a party to the bill results from the consideration, that if his testimony were to prevail he would stand in a better relative situation than he would do if a contrary verdict were given. In the usual and natural course of a bill *in theory*, every party to it seems to be competent. The transfer of the bill is the assignment of a debt due from the drawee to the drawer, the drawee having money of the drawer in his hands. In such a state of things, the drawer and indorsers, and drawee or acceptor, must, it seems, in general be competent, since ultimately the drawer or acceptor will be liable for the amount in case it should be recovered from any other party; and no party can either gain or lose by aiding or opposing a recovery in an action between any other parties. In *practice*, this relative situation of the parties is liable to constant disturbance; and as bills of exchange are used as the instruments of adjusting the most complicated and varied transactions, the relative situation of the parties is frequently altered. The following decisions have taken place on this subject:

Drawer. In an action by an indorsee against the acceptor of a bill payable to the

be precluded from giving evidence to destroy a note, which has not been negotiated until after the day of payment. *Baird* v. *Cochran et al.* 4 Serg. & Rawle, 397; and so it would seem, where it has never been negotiated. *Fox et al.* v. *Whitney*, 16 Mass. Rep. 118. For the purpose of discrediting a bill of lading, if not of denying its authenticity, the testamentary declaration of the captain of a vessel was received in evidence, though the instrument purported to have been signed by him. *Blagg* v. *Phœnix Ins. Co.* 3 Wash. C. C. R. 5. After an indorsement in blank of a bill of lading, an indorser, the consignee of the goods to which the bill referred, was admitted as a witness for his consignors in an action brought by them against the purchasers of the goods for their price. *Brown et al.* v. *Babcock et al.* 3 Mass. Rep. 29.

In opposition to the case just cited, several are found, which extend the rule beyond negotiable instruments, and reject the distinction as to facts subsequent to the execution of the paper. It has been held that the trustees under a deed, could not be admitted to give parol evidence to defeat or destroy the trust deed. *Wilson* v. *Wilson*, 1 Desauss, 230. To prove that the day of payment in a bond was by mutual mistake, ante-dated, the assignor was offered as a witness in an action brought against the obligee; but his testimony was rejected. *Davis* v. *Cammel*, 1 Addison, 233. So the assignor of a bond was refused as a witness to prove payment. *Canty* v. *Sumter*, 2 Bay, R. 93; or that the contract between the assignees and obligor was founded on an usurious transaction, *Gilliam* v. *Clay et al.* 3 Leigh, R. 590. It has been decided that a captain of a vessel should not be allowed to prove, that he did not receive the goods mentioned in his bill of lading. Anonymous—cited in *Pleasants* v. *Pemberton*, 2 Dall. 196.

The rule that a party to a negotiable instrument shall not be permitted to impeach it, has been adopted in N. Hampshire, Massachusetts, Pennsylvania, and it would seem, Virginia and South Carolina. *Bank of U. S.* v. *Dunn*, 6 Peters, 51. *Houghton* v. *Page*, 1 N. Hamp. Rep. 60. *Warren* v. *Merry*, 3 Mass. Rep. 27. *Parker* v. *Lovejoy*, 3 Id. 565. *Churchill* v. *Suter*, 4 Id. 156. *Barker* v. *Prentiss*, 6 Id. 430. *Jones* v. *Coolidge*, 7 Id. 199. *Manning ex.* v. *Wheatland*, 10 Id. 506. *Hartford Bank* v. *Barry*, 17 Id. 94. *Packard* v. *Richardson et al.* 17 Id. 122. *Knights* v. *Putnam*, 3 Pick. R. 184. *Stills* v. *Lynch*, 2 Dallas, 194. *Respublica* v. *Ross*, 2 Id. 242. *Shaw* v. *Wallis*, 2 Yeates, 17. *Hepburn* v. *Cassell*, 6 Serg. & Rawle, 113. *Bank of Montgomery* v. *Walker*, 9 Id. 229. *Wilson* v. *Lennox*, 1 Cranch, 194, but *qu.* as to the dictum of Chase, J., that upon the statutes of gaming, usury and the like, but in no other cases, are the drawers, indorsers, &c., competent witnesses. 1 Id. 202, n. It was held, however, in *Taylor et al.* v. *Beck*, 3 Randolph, 316, that the indorsee of a note, whether negotiable or not, is a competent witness in a suit between the holder and maker, to prove that the note was given for an usurious consideration.

In Connecticut, the English doctrine is adopted, that a party to a negotiable instrument, who is divested of his interest, is a competent witness to prove it void in its creation. *Townsend* v. *Bush*, 1 Conn. Rep. 260.

In New York, although the rule that a party to a negotiable paper shall not be permitted to invalidate it, was in several instances acknowledged, *Winton* v. *Saidler*, 3 Johns. C. 185, *Coleman* v. *Wise*, 2 Johns. 165, *Mann* v. *Swann*, 14 Id. 270; it must now be considered as there exploded. One whose name appears upon negotiable paper, may notwithstanding be a witness to prove that it was void in its inception for usury. *Stafford* v. *Rice*, 5 Cowen, 23. The maker, or other person whose name appears upon a promissory note is a competent witness to show that it was void in its creation. *Utica Bank* v. *Hilliard*, 5 Cowen, 153. *Jackson* v. *Packard*, 6 Wendell, R. 415.

In *Haig* v. *Newton*, 1 Rep. Consti. Ct. 423, it was questioned whether this rule was the law of South Carolina. It appears to be doubtful, whether this rule has been adopted in Kentucky. Although one who gives currency to a note, cannot (as some judges say) be received as a witness to invalidate it; yet the rule cannot apply to prevent the witness to depose to *subsequent* facts, unless he be interested. *Duncan* v. *Pindell*, 2 Pirtle's Dig. 539. (4 Bibb, 330–2). The assignor of a note is a competent witness to prove usury in an action by the assignee *v.* the payor. 2 Pirtle's Dig. 542. (5 Munroe, 215).)

order of the drawer, the latter is competent to prove usury (*r*), or that the bill has been paid (*s*); but it would be otherwise if the bill were accepted *for the accommodation of the drawer, who would then be liable to the *258
costs of the defendant, if the plaintiff succeeded (*t*). He would still be competent if he had become bankrupt and obtained his certificate (*u*).

In an action by the indorsee against the acceptor, the drawer is competent to prove the defendant's hand-writing (*x*) (A).

A joint maker of a note is a competent witness for the plaintiff, for he Maker.
stands indifferent, being liable, in the event of the plaintiff's failure, to an action at the suit of the plaintiff for the whole, with a claim on the defendant for a moiety, and in case the plaintiff should succeed, being liable to the defendant for contribution (*y*) (1).

In an action against the indorser of a note the maker is competent to prove that the date has been altered (*z*).

But a joint maker of a promissory note is not competent to prove a plea of illegality of consideration, in an action brought against the other maker alone (*a*).

In an action by the holder against the drawer, the acceptor is competent Acceptor.
to prove that he had no effects of the drawer in his hands (*b*).

An acceptor is not competent to prove for the defendant, in an action by the indorsee against the drawer, that he accepted the bill in discharge of part of a debt due from him to the plaintiff, and that it was delivered to the plaintiff on condition that if he obtained cash for it he might deduct the amount of the debt due to him from the acceptor; for he would be bound to indemnify the defendant against the costs, if the plaintiff succeeded (*c*).

(*r*) *Beard* v. *Ackerman*, 5 Esp. 119. Where the defence was a gaming consideration, the drawer was called by the defendant. It was objected that he was interested to defeat the plaintiff, being liable for treble penalties if he recovered, but not if he failed. But it was held that the witness was competent, since if the plaintiff failed the witness was liable to him; if he succeeded, the witness might deliver himself from the penalties by refunding within the time. *Habner* v. *Richardson*, Holroyd, J., 1818, Manning's Index, 327.

(*s*) *Hamphrey* v. *Moxon*, Peake's C. 52. See also *Phetheon* v. *Whitmore*, Peake's C. 40. Contra, *Adams* v. *Lingard*, Peake's C. 117. Accord. *Jordaine* v. *Lashbrook*, 7 T. R. 604. See also *Williams* v. *Keats*,[1] 2 Starkie, 290. It is no objection that the witness is a prisoner on a charge of having forged the bill. *Barber* v. *Gingle*, 3 Esp. C. 62. In an action by the indorsee against the acceptor, the drawer is a competent witness for the plaintiff, although he state that the defendant has taken the benefit of the Insolvent Act, and that his name was inserted as a creditor in the schedule. *Cropley* v. *Corner*,[2] 4 C. & P. 21.

(*t*) *Jones* v. *Brooke*, 4 Taunt. 464. *Hardwick* v. *Blanchard*,[3] Gow. 113.

(*u*) In an action by the indorsee against the acceptor, the drawer is a competent witness for the latter, although he state that the defendant has taken the benefit of the Insolvent Act, and that his name is inserted as a creditor in the schedule. *Cropley* v. *Corner*,[2] 4 C. & P. 21.

(*x*) *Dickins* v. *Prentice*, 4 Esp. C. 32. The objection in this case was, that forgery was imputed to the witness by the defendant.

(*y*) *York* v. *Blott*, 5 M. & S. 71. See Str. 35.

(*z*) *Levy* v. *Essex*, Chitty, O. B. 284; 4 Esp. 37; Peake's L. Ev. 102. And he may be called in such an action to prove a notice. *Venning* v. *Shuttleworth*, Bayley on Bills, 422. *Ashton* v. *Longes*, 1 Mo. & M. 127.

(*a*) *Slegg* v. *Phillips*, 4 B. & Ad. 852. Nor is he rendered competent by having paid half the amount of the note before action brought, the note on the face of it bearing interest, and a year's interest having been due at the time of the payment, for he is liable to contribution in respect of interest. *Ib.*

(*b*) *Staples* v. *Okines*, 1 Esp. C. 332; Peake's L. E. 154. *Legge* v. *Thorpe*, 2 Camp. 310. It has been held, that in an action against the drawer the acceptor is not a competent witness for the defendant, to prove a set-off. *Mainwaring* v. *Mytton*,[4] 1 Starkie's C. 83. But *qu.* and see Vol. I. p. 131. Bayley on Bills, 424, 4th ed. *Reed* v. *Furnival*, 1 C. & M. 538.

(*c*) *Edmonds* v. *Lowe*,[5] 8 B. & C. 407.

(A) (In a suit brought by the indorsee of a bill against the acceptor, the drawer is a competent witness, unless there are circumstances in the case showing a greater interest in favour of one party than the other. *Jackson* v. *Packer and others*, 13 Connecticut R. 342.)

(1) [In an action upon a promissory note against one of several makers, another of the makers is a competent witness for the defendant, being released by him from all claims to contribution in case the plaintiff should recover. *Ames* v. *Withington*, 3 New Hamp. Rep. 115.]

[1]Eng. Com. Law Reps. iii. 351. [2]*Id.* xix. 256. [3]*Id.* v. 480. [4]*Id.* ii. 306. [5]*Id.* xv. 250.

Indorser. An indorser is in general a competent witness in an action by an indorsee against the drawer or acceptor, either for the plaintiff or defendant; for the plaintiff, because though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the indorser, it is not certain that it will, and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor; for the defendant, for if the plaintiff fail against the drawer or acceptor, he is entitled to recover against the indorsee (*d*). He may be called for the plaintiff to prove his own indorsement (*e*).

A payee is competent in an action by an indorsee against the acceptor, to prove that the bill was originally void for want of a proper stamp (*f*), having been made in London, although dated at Hamburgh.

*259 *A prior indorser of a bill, in an action by an indorsee against the drawer, is competent to prove a promise to pay the bill after it became due (*g*). (A)

The payee of a bill (drawn for his accommodation) who has indorsed it to the plaintiff, is competent, in an action against the drawer, to prove that he indorsed it for a valuable consideration; for if the plaintiff should fail, he would be liable to him to the amount of the bill; if he should succeed, he would be liable to the same amount to the defendant (*h*).

An indorsee was held to be competent, in an action by the holder against the drawer, to prove the payment by the drawer of money into his hands, to take up the bill, and that he had satisfied the bill; for he is liable, at all events, either to the holder or the drawer, for the amount of the bill (*i*). In an action against the maker of a note, an indorser is a competent witness to prove that it has been paid (*k*) (B). But a drawer or indorser of a bill or note

(*d*) Bayley on Bills, 422, 4th ed.

(*e*) *Richardson* v. *Allen*,[1] 2 Starkie's C. 334.

(*f*) 7 T. R. 601; Esp. C. 10, 85, 298, 332; Peake's C. 40. *Rich* v. *Topping*, Peake's C. 224; Esp. C. 177. See also *Cooper* v. *Davis*. 1 Esp. C. 463.

(*g*) *Stevens* v. *Lynch*, 2 Camp. 332; 12 East, 38.

(*h*) *Shuttleworth* v. *Stevens*, 1 Camp. 407. [*Hewit* v. *Thompson*,[2] 2 C. & P. 372.] In an action against the drawer of a bill payable to his own order, but for the accommodation of the first indorsee, since become bankrupt, the latter is a competent witness to prove notice to defendant of the dishonour, as coming to speak against his own interest; but the defendant cannot be deemed a person, surety, or liable for a debt of the bankrupt, within the 49 Geo. 3, c. 121, s. 8, so as to be barred by the certificate. *Mayer* v. *Meakin*, 1 Gow's C. 183.

(*i*) *Birt* v. *Kershaw*, 2 East, 458. The Court seems to have considered that the further liability of the witness to the drawer in respect of the costs of the action, occasioned by the neglect of the witness to pay over the money, made no difference (according to *Ilderton* v. *Atkinson*, 7 T. R. 481). It would be difficult to support, upon principle, the position, that the getting rid of a legal liability to the costs of an action did not disqualify a witness; but the decision itself may be sustained upon the consideration that, as a mere indorser, the witness was competent, and that as the mere agent of the drawer in paying the money over to the holder of the bill, he was also competent to prove such payment according to the general rule as to the competency of agents (*inf.* INTEREST). In strictness, the objection to his competency rested on his liability to the drawer for the consequences of his negligence in not having paid over the money, which was wholly independent of his being a party to the bill; if he had been a mere stranger to the bill, but employed as agent to pay over the money, the same objection might have been taken and overruled on the ground of the general competency of an agent. In assumpsit on a bill by the indorsee against the acceptor, and plea of payment, a prior indorsee was held to be a competent witness for the defendant, although on the *voir dire* he acknowledged that he received money from the defendant to pay the plaintiff the amount of the bill. 8 Ad. & Ell. 917. [See Phil. Ev. 15.]

(*k*) *Charrington* v. *Milner*, Peake's C. 6. *Birt* v. *Kershaw*, 2 East, 458; or that an unstamped bill dated abroad was in fact made here. *Jordaine* v. *Lashbrooke*, 7 T. R. 601.

(A) (In an action by an indorsee against the maker of a promissory note, the payee is a competent witness to prove the time of the indorsement. *Spring* v. *Lovett*, 11 Pick. R. 417. But he is not a competent witness in an action by the indorsee against the maker, to prove that the plaintiff agreed with the defendant at the time the note was given and indorsed to the plaintiff, that if the defendant would sign the note, the plaintiff would not in any event call on him for payment. *Jarden* v. *Davis*, 5 Whart. 338.)

(B) (The indorser of a promissory note is incompetent to testify in an action between the holder and drawer, although the note was not protested for non-payment at maturity, or notice given him, if the failure

[1] Eng. Com. Law Reps. iii. 371. [2] *Id.* xii. 178.

accepted for his accommodation is not a competent witness for the defendant in an action against the acceptor or maker; for he would be liable for the costs if the plaintiff succeeded (*l*). The st. 3 & 4 Will. 4, c. 21, makes no difference in this respect (*m*).

*It has been said, that one whose name is on the bill as an indorser is not competent to prove that the property is in himself, and that he indorsed it to the plaintiff without consideration (*n*). *260

In an action against the indorser of a bill, a prior indorsee for whose accommodation the bill was indorsed by the defendant, and who has become bankrupt and obtained his certificate, is a competent witness for the defendant (*o*). (A)

A party in prison on a charge of having forged the bill is competent to prove payment of it, in an action brought to recover it (*p*).

Where a bill has been drawn by one partner in fraud of the rest, to pay a separate creditor, a co-partner is a competent witness for the acceptor in an action against him by the creditor, to prove the want of authority, for if Partner.

(*l*) *Jones* v. *Brook*, 4 Taunt. 464. *Maundrell* v. *Kennett*, 1 Camp. 408. *Bottomley* v. *Wilson*,[1] 3 Starkie's C. 148. *Williams* v. *Keates*, Mann. Ind. WITNESS, 106. *Secus*, if he has subsequently become a bankrupt, and obtained his certificate. *Brind* v. *Bacon*,[2] 5 Taunt. 183. For by the stat. 49 Geo. 3, c. 121, s. 8, the drawer is discharged of the costs, (vid. *infra*, SURETY,) to which he would otherwise be liable; the cases of *Maundrell* v. *Kennett*, 1 Camp. 408; *Pinkerton* v. *Adams*, 2 Esp. C. 612; were previous to the stat. See also *Scott* v. *Lifford*, 1 Camp. 249. Where *A.* and *B.* having dissolved partnership, an action was brought by the acceptor of a bill afterwards drawn in the name of the firm, and *A.* pleaded his subsequent bankrupcy and certificate, and *nol. pros.* as to him; it was held that *A.* was a competent witness for *B.* on the ground that the bill (as stated by *A.*) was drawn for his accommodation alone, and was therefore barred by the certificate. *Moody* v. *King*,[3] 2 B. & C. 558.

One who having received a bill to get it discounted for the drawer, delivers it to the plaintiff, in payment of a debt, is not competent to prove the fact in an action against the drawer, for he would be liable to the costs if the plaintiff succeeded. *Harman* v. *Lasbrey*,[4] Holt's C. 390.

(*m*) *Burgess* v. *Cuttill*,[5] 6 C. & P. 282.

(*n*) 1 Esp. C. 85. *Buckland* v. *Tankard*, 5 T. R. 570; B. N. P. 288. But *qu.*, for if the plaintiff recovered he would still be but a trustee for the witness. And see *Birt* v. *Kershaw*, 2 East, 458; and see *Jordaine* v. *Lashbrooke*, 7 T. R. 601. An indorsee is competent to prove property in a bill to be in either of two persons. *Winlow* v. *Daniel*, 1 T. R. 298, (2.)

(*o*) *Bassett* v. *Dodgin*,[6] 9 Bing. 653.

(*p*) 3 Esp. C. 62.

to protest it was occasioned by a special agreement between the indorser and holder. *Hanckley* v. *Walters*, 9 Watts, 179. An indorser may prove an alteration of the note made after the indorsement. *Shamburg* v. *Commagere*, 10 Mart. R. 18. In an action against the maker of a note, by the holder, whether the indorser he a competent witness for the defendant, depends upon the character of the evidence which he is to give: he is incompetent to establish a want of consideration for the note, but it seems he would be competent to prove a direct payment of it by the maker. *Harrisburgh Bank* v. *Forster*, 8 Watts, 304.

(A) (A maker of a note may prove its execution in a suit by the indorsee against the indorser. *Abat* v. *Rian*, 9 Mart. R. 465. But he is not a competent witness in an action by the holder against the indorser, to prove that the plaintiff was an original party to the drawing of the note, and agreed not to hold the defendant responsible for his indorsement. *Emerick* v. *Harley*, 2 Whart. 50. See also *Smith* v. *Thorne*, 9 Watts, 144. In a suit against the indorser, the drawer is incompetent to prove the extinguishment of the note. *Abat* v. *Dolisle*, 3 Mart. 659. *Bank of the Metropolis* v. *Jones*, 8 Peters, 12. In an action by an indorsee against an indorser, the drawer of the note is a competent witness to prove, that the note, although purporting to be negotiable, was not so in fact as between the parties to the action: and that the indorsements upon the note did not exhibit truly the order in which they were made. *O'Brien* v. *Davis*, 6 Watts, 498. [In South Carolina and Massachusetts, the maker of a note, unless released, is not a competent witness for the indorser in an action by the indorsee against him. *Haig* v. *Newton*, 1 Rep. Con. Ct. 423. *Pierce* v. *Butler*, 19 Mass. Rep. 303. But it is held differently in England and in New York, *unless* the note was made and indorsed for the accommodation of the maker (4 Taunt. 464)—in which case, as the indorser is regarded as a surety, and would, if the indorsee recovered against him, be entitled to charge the maker not only with the amount of the note, but also with the costs he had been compelled to pay, his liability for costs renders him interested to defeat the action. *Hubbly* v. *Brown & al.*, 16 Johns. 70. See also *Skilding & al.* v. *Warren*, 15 Johns. 275. *Wilson* v. *Lenox & al.*, 1 Cranch. 194. *Duncan* v. *Pindall*, 4 Bibb. 330.] The maker of a note who has been released by the defendant, the payee and first indorser, is an admissible witness to prove the note usurious in its inception. *Stump* v. *Napier*, 2 Yerg. 35.)

(2) {The case of *Buckland* v. *Tankard*, was denied to be law in *Page* v. *Weeks*, 13 Mass. Rep. 201.}

[1]Eng. Com. Law Reps. xiv. 172. [2]*Id.* i. 68. [3]*Id.* ix. 177. [4]*Id.* iii. 138. [5]*Id.* xxv. 398. [6]*Id.* xxiii. 409.

the plaintiff should succeed, and the acceptor recovered against the firm, the witness would have his remedy over against the fraudulent partner (*q*) (1); and it was held that the intervening bankruptcy of the debtor partner made no difference.

The effect of the late statute 3 & 4 Will. 4, c. 42, on cases of this description, has already been observed upon (*r*).

Declarations by holders.

In general a declaration made by a prior indorsee or holder of a bill or note is not evidence against a subsequent one, for, according to the elementary rule, he ought to be called as a witness (*s*). Such declarations are admissible upon general principles when they have any legal operation or effect on the instrument in the hands of the plaintiff, or where the plaintiff is identified in interest with the party who made the declaration (*t*).

*261 *Where the question is whether a note was originally void for usury, it seems that letters written by the payee to the maker, proved to be cotemporaneous with the making of the note, are admissible to prove that it was illegal in its creation (*u*).

In an action by the indorsee against the maker of a promissory note for 100*l.*, with interest, payable to *Arnet* or order on demand, and where there was evidence of value given by the plaintiff to *Arnet*, it was held that declarations made by *Arnet* whilst he held the note, that he gave no value to the maker, were not admissible in evidence against the plaintiff, without proof that when the plaintiff took the note he gave no consideration; for it was held that the note could not be considered as having been indorsed after it was due; and that there was evidence of value given by the plaintiff,

(*q*) *Ridley* v. *Taylor*, 13 East, 176.

(*r*) See Vol. I. p. 127, and the cases of *Burgess* v. *Cuthill*,[1] 6 C. & P. 282. 1 Mo. & R. 315, S. C. *Faith* v. *M'Intyre*,[2] 7 C. & P. 44.

(*s*) A declaration by a holder, under whose indorsement the plaintiff claims, that after the bill was due the amount was settled between himself and the acceptor, is not evidence for the latter, for such holder may be called. Per Ld. Ellenborough, *Duckham* v. *Wallis*, 5 Esp. C. 251. And see *Shaw* v. *Broom*,[3] 4 D. & R. 730; and *Smith* v. *De Wruitz*,[4] 1 R. & M. 212. In *Pocock* v. *Billing*,[5] 2 Bingh. 269, it was held that declarations made by a former holder of a bill after he had parted with the possession were not receivable in evidence. It is observable that in that case no circumstances appear which would have warranted the reception of the evidence, had the declarations been made during the possession of the bill. In *Collenridge* v. *Farquharson*,[6] 1 Starkie's C. 259, where *A.* indorsed a bill to *B.* as a security for a running account, and after the bill became due *B.* indorsed it to *C.*, it was held that an entry or declaration by *B.* as to the state of the accounts was not evidence for *A.*, unless at least it was cotemporary with the indorsement to *B.* Where a note, which was alleged to have been substituted for a bill originally given for money lost at play, had been indorsed by the plaintiff, held that declarations by the payee at the time when he agreed to take the substituted note, as to the consideration of the original bill, were not admissible against the plaintiff, a third person, unless the indorsement were shown to have been made after the note became due. *Beauchamp* v. *Parry*,[7] 1 B. & Ad. 89. In an action against the maker of a note, letters of the indorser are not admissible evidence to impeach the indorsee's title, though the indorsement was made after the note was payable. *Clipsam* v. *O'Brien*, 1 Esp. C. 10. In the case of *Banks* v. *Colwell*, cited in *Brown* v. *Davis*, 3 T. R. 80, Buller, J. is stated to have ruled, that in an action on a note payable on demand, evidence was admissible to show that the note had been indorsed to the plaintiff a year and a half afterwards, and to impeach the consideration by showing that it had originally been given for smuggled goods. But see the observations of Bayley, J. on that case in *Barough* v. *White*,[8] 4 B. & C. 325.

(*t*) Per Parke, J. in *Woolway* v. *Rowe*,[9] 1 Ad. & Ell. 116. See the observations of Parke, B. in that case on the former case of *Barough* v. *White*, *infra*, note (*y*), and the observations of Bayley, J. in the case of *Barough* v. *White*, *supra*, tit. Admission. Declarations of a person who held a negotiable security under the same circumstances with the party to the action have been considered admissible against such party.

(*u*) *Kent* v. *Lowen*, 1 Camp. 177. *Walsh* v. *Stockdale*, *cor.* Abbot, J. sitt. after T. T. 1818.

(1) {So where a promissory note has been drawn by one partner in fraud of another, for the payment of a debt due by himself and a person, who with him at a former period constituted another firm, the partner in fraud of whom the note has been drawn is a competent witness for the indorsers of the note, in a suit against them by the holder, to show a want of authority to draw the note. *Charzournes* v. *Frost*, 3 Pick. Rep. 5. In this case the witness was objected to at the trial as interested, but being released he was admitted.}

[1]Eng. Com. Law Reps. xxv. 398. [2]*Id.* xxxii. 430. [3]*Id.* xvi. 220. [4]*Id.* xxi. 419. [5]*Id.* ix. 409. [6]*Id.* ii. 381. [7]*Id.* xx. 351. [8]*Id.* x. 345. [9]*Id.* xxviii. 52.

and consequently, that the plaintiff could not be considered as identified in interest with *Arnet* (*x*).

But if the plaintiff's right or interest in the bill or note be identical with that of the prior indorser; as, where the plaintiff either gave no value to such indorser or took it after it was due; it seems that declarations made by such prior indorser, whilst he was in possession of the bill, would be admissible in evidence against the plaintiff (*y*). It seems, however, that such declarations made *after the transfer* (*z*) would not be admissible unless the plaintiff sued merely as a trustee for the party making the declaration, the action being brought for his benefit and with his privity (*a*).

IV. A promissory note is *primâ facie* evidence of money lent by the payee to the maker (*b*), or of a balance due from the maker to the payee upon an account stated (*c*) (1). And the acceptance of a bill of exchange payable to the order of the drawer is *primâ facie* evidence of money had and received by the acceptor to the use of the drawer (*d*). A bill is also, it is said, evidence *of money lent by the payee to the drawer (*e*). So it has been said, *262 that either a bill or note is evidence of money had and received by the acceptor or maker to the use of the holder (*f*) (2). Effect of a bill or note in evidence.

The theory of a bill of exchange is, that a bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer to the amount of the bill; hence it has been said that the effect of the transaction is to appro-

(*x*) *Barough* v. *White*,[1] 4 B. & C. 325.

(*y*) See the observations of Bayley, J. in *Barough* v. *White*, 4 B. & C. 325. And see the observations of Parke, J. in *Woolway* v. *Rowe*,[2] 1 Ad. & Ell. 116. In *Barough* v. *White*, the interest of the plaintiff was not identical with the interest of the payee. The declarations of a person who held a security under circumstances identical with those under which the party to the action holds it, have been considered admissible against such party; but the title of a person holding by a good title is not to be cut down by the acknowledgement of a former holder that he had no title. In the case cited, the holder had a better title than the party had whose declarations were proposed to be proved.

(*z*) *Pocock* v. *Billing*,[3] 2 Bing. 269, *supra*. In an action by the indorsee of a bill of exchange against the acceptor, the defendant proved that the plaintiff held the bill as indorsee from the payee for a purpose which had been satisfied, but the Court held that this bill did not warrant the reception of declarations made by the payee subsequent to the indorsement, to show that the bill had been accepted without consideration. K. B. Trin. T. 1824.

(*a*) *Pocock* v. *Billing*,[3] 2 Bing. 269, *supra*, note (*s*). And see *Shaw* v. *Broom*,[4] 4 D. & R. 730.

(*b*) *Carter* v. *Palmer*, 12 Mod. 380, per Holt, C. J.; Burr. 1525. *Clarke* v. *Martin*, Ld. Raym. 758.

(*c*) *Storey* v. *Atkins*, 2 Str. 719; B. N. P. 136–7. *Harris* v. *Huntbach*, 1 Burr. 373. *Pawley* v. *Brown*, *cor.* Abbott, J. Devon Lent Ass. 1818.

(*d*) *Thompson* v. *Morgan*, 3 Camp. 101. *Scholey* v. *Walsby*, Peake's C. 24. Where the bill is payable to a third person, the presumption does not arise without proof of consideration, and his remedy against the acceptor is confined to the bill. Per Lawrence, J., *Cowley* v. *Dunlop*, 7 T. R. 579. And it is evidence under the account stated. Per Abbott, J., *Rhodes* v. *Gent*,[5] 5 B. & A. 245.

(*e*) Bayley, O. B. 163, citing *Clerke* v. *Martin*, Ld. Raym. 758; 12 Mod. 380; Burr. 1525. *Smith* v. *Kendall*, 6 T. R. 123.

(*f*) Bayley on Bills, 287. 2 Phill. Ev. 39. But it seems from later authorities, that this position must be restricted to cases where the bill or note is attempted to be enforced against an immediate party. See below, and *Exon* v. *Russell*, 4 M. & S. 507. *Waynam* v. *Bend*, 1 Camp. 175. *Wells* v. *Girling*,[6] Gow. 22. *Thompson* v. *Morgan*, 3 Camp. 101. *Eales* v. *Dicker*,[7] M. & M. 324. But this, however, is too large a position. A promissory note is not evidence under the money counts in an action by the indorsee against the maker of a note. *Bentley* v. *Northouse*,[8] 1 M. & M. 66. A party to a bill of exchange is not liable for money paid to his use by a person who takes up the bill for his honour, unless formal protest be made before payment. *Vandewall* v. *Tyrrell*,[9] 1 M. & M. 87.

(1) [An action cannot be supported upon the common money counts against one of the makers of a promissory note, who signed it as surety only for the other maker. *Wells* v. *Girling*, 3 Moore, 79, S. C. 8 Taunt. 737.]

(2) {See *Smith* v. *Smith*, 2 Johns. 235. *Cruger* v. *Armstrong*, 2 Johns. Cas. 5. *Arnold* v. *Crane*, 8 Johns. 79. *Saxton* v. *Johnson*, 10 Johns. 418. *Raborg & al.* v. *Peyton*, 2 Wheat. 385. *Mandeville & al.* v. *Riddle*, 1 Cranch, 290. *Lindo* v. *Gardner*, ibid. 343. Appendix to 1 Cranch.}

[1]Eng. Com. Law Reps. x. 345. [2]*Id.* xxviii. 52. [3]*Id.* ix. 409. [4]*Id.* xvi. 220. [5]*Id.* vii. 84. [6]*Id.* v. 445. [7]*Id.* xxii. 323. [8]*Id.* xxii. 251. [9]*Id.* xxii. 258.

priate, by an agreement between the parties, so much property to the account of the holder of the bill (*g*). It is also said, that a bill or note is evidence of money paid by the holder to the use of the acceptor or maker (*h*). This doctrine has, however, been questioned (*i*), and it may be doubted whether the plaintiff, if he resort to the common counts, must not *prove that the defendant has in fact received the amount of the bill (A). At all events, whenever there is a doubt whether the plaintiff can recover on the special counts, it is desirable to be prepared with evidence (according to the fact) to show that the defendant has received money for the purpose of the bill.

When evidence on money counts.

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An action of *indebitatus assumpsit* will not lie upon the acceptance of a bill of exchange (*k*); for an acceptance is but a collateral engagement, it must be used as evidence of some duty; as money lent, or money had and received, for which an *indebitatus assumpsit* will lie (*l*). And in such case, it is but evidence, and consequently the presumption which the writing affords may be encountered, and contradicted by other evidence, and the jury are to draw the conclusion of fact, that so much money was lent, or

(*g*) *Vere* v. *Lewis*, 3 T. R. 182, where it was held that the acceptance of a bill payable to a fictitious payee was evidence of value received by the acceptor from the drawer, to support an action by the holder for money paid, or money had and received. But note, that the Court were of opinion that the plaintiff might recover on the second count, as on a bill payable to the bearer. The giving a bill is, as it were, an *assignment* of so much property, which becomes money had and received to the use of the holder; per Yates, J. in *Grant* v. *Vaughan*, cited 3 T. R. 182, by Lord Kenyon in giving judgment. In *Tatlock* v. *Harris*, 3 T. R. 174, where an indorsee recovered against the acceptor on a similar bill, there was proof of value received by the acceptor from an indorser. In *Dimsdale* v. *Lanchester*, 4 Esp. C. 201, Lord Ellenborough said, "Where a person puts his name to a promissory note, he thereby acknowledges that he has money in his hands of the payee of the note, and undertakes to pay it to the party legally entitled to receive it, that is, to the person who has paid for it a good consideration, and thereby become the legal holder of the note." In *Grant* v. *Vaughan*, Burr. 1516, it was held by Ld. Mansfield and the other Judges, to be clear beyond dispute that the *bona fide* bearer might recover against the maker as for money had and received to his use. But see *Williams* v. *Everett*, 14 East, 582; *Johnson* v. *Collings*, 1 East, 98, and *Waynam* v. *Bend*, 1 Camp. 175; where, in an action by the indorsee against the maker of a promissory note for value received, and payable to the bearer, Lord Ellenborough was of opinion that the note was not evidence under the money counts, without proof of value received by the defendant to the use of plaintiff; but the cause was not decided on this ground. See also *Hard's Case*, 1 Salk. 23; *Hodges* v. *Steward*, 1 Salk. 125; and below, note (*i*).

(*h*) Bayley, O. B. 163. *Vere* v. *Lewis*, 3 T. R. 182. *Tatlock* v. *Harris*, 3 T. R. 147.

(*i*) See *Gibson* v. *Minett*, 1 H. B. 569, where it was held that a *bona fide* indorsee for value might recover against the acceptor of a bill of exchange made payable to a fictitious payee, as upon a bill payable to the bearer. In that case L. C. B. Eyre, who gave his opinion in a very elaborate judgment against the decision of the Court of K. B. in favour of the plaintiff, seems to have admitted that the acceptance of a bill would be evidence of a duty as for money lent, or money had and received, upon those counts, but considered those counts to be out of the question, the finding by the special verdict being insufficient to raise the question upon these points. He said, "It has been expressly determined that a general *indebitatus assumpsit* will not lie upon a bill of exchange, but the *indebitatus assumpsit* must be for some duty, such as money lent, &c., and the bill is offered as evidence of that duty." He adds, "The presumptions of evidence which the writing affords have no application to the *assumpsit* for money paid by the payee or holder of the bill to the use of the acceptor; it must be a very special case which will support such an *assumpsit*." See also *Waynam* v. *Bend*, 1 Camp. 175; *supra*, note (*g*). At common law, if a promissory note was made payable to *J. S.* or bearer, the bearer could not bring an action on the note in his own name, but was obliged to sue in the name of the principal. See *Nicolson* v. *Sedgwick*, 3 Salk. 67; 1 Ld. Raym. 180; a difficulty which could not have arisen, if he could have maintained the action for money had and received.

In the case of *Were* v. *Taylor*, *cor.* Ld. Ellenborough, C. J. (cited 1 Camp. 130), where the bill was made payable to a fictitious payee, and declared on as payable to the bearer, Ld. Ellenborough said that the cases on the subject had been much doubted; and the plaintiffs failing to show that the value of the bill had been received by the defendant were nonsuited. And in the subsequent case of *Bennett* v. *Farnell*, 1 Camp. 130, where the payee was also a fictitious person, Ld. Ellenborough said that he would admit evidence of value having been received by the defendant; and that if the plaintiff's money had found its way into the defendant's hands, he should not be allowed to retain it, for then he had money in his hands belonging to another person, which might be recovered from him as money had and received. The plaintiff failing to prove this was nonsuited.

(*k*) *Hard's Case*, 1 Salk. 23; and per C. B. Eyre, *Gibson* v. *Minett*, in error, 1 H. B. 602.

(*l*) Per Eyre, L. C. B., 1 H. B. 602, *supra*, note (*i*).

(A) (The holder of a note transferred by delivery or indorsement, may recover on it under the money counts. *Olcott* v. *Rathbone*, 5 Wend. 490. *Ellsworth* v. *Brewer*, 11 Pick. 316.)

so much money was had and received, from all the evidence in the case (*m*).

In the case of *Whitwell* v. *Bennett* (*n*), where the plaintiff, an indorsee, could not recover on the special counts by reason of variance, and it was proved that when the defendant accepted the bill (for 30*l.*), he stated that although the drawer had not remitted the amount, he expected that he would do so, and that as he had a bill of his for 80*l.*, which would be paid, he would take all risks upon himself, the Court held, that if the bill had been paid, the count for money had and received would have been maintainable, on the ground of the specific appropriation of the particular sum to the payment of the plaintiff's demand; but that as the action was on the bill for 30*l.*, it was a surprise on the defendant to call for proof of the non-payment of the other bill, and therefore that payment ought not to be be presumed. Resort to the common counts.

But the acknowledgement by the defendant of his acceptance of a bill of exchange is evidence on the account stated (*o*).

*An indorsement of a bill or note is evidence of money lent by the indorsee to the indorser (*p*). *264

It has also been said that a bill is *primâ facie* evidence of money had and received by the drawer to the use of the holder, or of money paid by such holder to the use of the drawer (*q*). This, however, appears to be very questionable (*r*) (1). And the contrary has since been ruled (*s*).

(*m*) Ibid. (*n*) 3 B. & P. 559.

(*o*) *Leaper* v. *Tatton*, 16 East, 420; and per Bayley, J. an acknowledgement of his acceptance, and that he has not paid it, *creates* a debt. And it was held to be sufficient to take the case out of the Statute of Limitations, although the defendant at the time said that he had been liable, but was not then liable because it was out of date. In an action by the indorsee against the acceptor, the declaration containing also the money counts, the stamp turned out to be insufficient, and the bill could not be read; but two letters were produced from the defendant, the first addressed "To the gentleman that calls with the bill," expressing his regret at not being able to take up the bill for £100, and desiring the holder to allow him to renew it for a month; and the second being an answer to an application by the attorney, requiring payment of the bill in favour of Mr. T. for £100, but not stating in whose behalf the application was made, in which the defendant stated that it was impossible he could take up the bill, but that if T. would draw at one month he should then be prepared, there being nothing in the letter acknowledging a liability to the plaintiff, nor admitting him to be the holder, it was held that plaintiff was bound to show, by proof of the indorsement on the bill, that he was entitled to it, and that no proof of the indorsement, without proof also of the contents of the bill to identify with it the defendant's letter, would be sufficient; the contents of the bill were a necessery part of the plaintiff's title, and could not be looked at by the jury to ascertain that fact. *Jardine* v. *Payne*,[1] 1 B. & Ad. 663, overruling *Bishop* v. *Chambre*, 1 Dans & Lloyd, 83. On a declaration by the payee against the acceptor containing counts on the bill and the money counts, the defendant having paid the balance due on the bill into court on the latter counts, held that there being but that one matter in dispute, the demand in respect of the bill was discharged by such payment; but *semble*, if the only evidence in the case had been the acceptance of the bill, the plaintiff being the payee, and the bill drawn by another, he could not have recovered on the account stated. *Early* v. *Bowman*,[2] 1 B. & A. 889.

(*p*) Bayley, O. B. 164, cites *Kessebower* v. *Sims*, MS. C.

(*q*) See the authorities cited Bayley on Bills, 163.

(*r*) *Vide supra*, p. 202, note (*i*). [2 Phil. Ev. 14.] (A)

(*s*) *Eales* v. *Dicker*,[3] 1 M. & M. 324.

(A) (The giving of a note is no extinguishment of the prior cause of action, and where there is a count upon a note as well as the general counts, a recovery may be had upon the general counts, though the note is alleged to be lost. *Kiddie* v. *Debrutry*, 1 Hay. 420. *Bill* v. *Porter et al.* 13 Conn. Rep. 23. The mere giving, for an antecedent debt, of a note or bill which turns out to be unproductive, is not, in the absence of any agreement to receive it as payment, an extinguishment of such debt. *Davidson* v. *The Borough of Bridgeport*, 8 Conn. R. 472. If a creditor actually receives bank bills of his debtor, though he protests that he will not receive them unless the difference between their value and that of specie shall be allowed to him, and the debtor refuses to make, or to promise to make such allowance, the creditor cannot maintain an action to recover the amount of such difference. *Phillips, Judge* v. *Blake*, 1 Metcalf R. 156.)

(1) [It has been decided in New York that an indorsed note is evidence, under a count for money had and received, {or for money lent and money paid,} in an action by the indorsee against the maker. *Pierce* v. *Crafts*, 12 Johns. 90.] {*Wild* v. *Fisher*, 4 Pick. Rep. 421.}

[1]Eng. Com. Law Reps. xx. 463. [2]*Id.* xx. 502. [3]*Id.* xxii. 323.

A receipt upon a bill is *primâ facie* evidence of payment by the acceptor (*t*).

If the plaintiff fail to prove the bill by reason of variance, or where the bill is void for want of a proper stamp, he may resort to the common counts if they be applicable (*u*), and there be a privity of contract between the parties, and may give evidence of the original consideration on which the note was given (*x*).

In an action by the indorsee of a bill against one who has received money from the acceptor for the purpose of taking up the bill, any defence may be set up of which the acceptor could have availed himself (*y*).

An accommodation acceptor, who defends for the drawer, may recover costs as money paid to the use of the drawer, without an undertaking in writing (*z*).

Where an acceptor of a bill, finding that he cannot discharge it, pays part to the drawer to take it up, the money is had and received to the use of the holder (*a*).

Proof of the delivery and payment of a cheque is not *primâ facie* evidence of a debt, or of a set-off, unless it be shown under what circumstances it was given (*b*).

Operation of, in payment, &c.

In general a bill of exchange or note is no satisfaction of any debt or demand for which it is given, but is only *primâ facie* evidence of payment, which renders it necessary that the party who receives it should account for it before he will be entitled to recover the consideration (*c*).

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Effect of in payment.

*If a draft or bill given in payment be dishonoured, the party receiving it may consider it as a nullity (*d*).

Formerly, where a bill was paid in discharge of a debt, but there was no contract that the taking the bill should be a discharge of the debt, it was held to be no payment, unless the creditor received the money (*e*), although the creditor had neglected to present the bill for payment, or to give notice of the dishonour. But by the stat. 4 & 5 Ann. c. 9, s. 7, the acceptance of

(*t*) Peake's C. 26. Peake's L. E. 221. [See 2 Camp. 439.]

(*u*) *Alves* v. *Hodgson*, 7 T. R. 241. *Tyte* v. *Jones*, 1 East, 58; 1 Esp. C. 245; 4 T. R. 320. But he cannot, where the bill is made payable to a fictitious payee, and declared on as payable to the bearer (1 H. B. 313, 569). Neither can he where he proves a mere promise to pay without producing the bill, or proving its destruction. *Dangerfield* v. *Wilby*, 4 Esp. C. 159.

(*x*) *Farr* v. *Price*, 1 East, 55. *Brown* v. *Watts*, 1 Taunt. 353. *Wilson* v. *Kennedy*, 1 Esp. C. 245. *Manby* v. *Peel*, 5 Esp. 121. *Wade* v. *Beasley*, 4 Esp. C. 7.

(*y*) 1 Camp. 372; Cro. J. 687; 2 Roll. C. 440.

(*z*) 1 Esp. C. 162.

(*a*) *Baker* v. *Birch*, 3 Camp. 107.

(*b*) *Aubert* v. *Walsh*, 3 Taunt. 277; 4 Taunt. 293.

(*c*) Bayley on Bills, 265; *Kearslake* v. *Morgan*, 5 T. R. 513. A bill of exchange, unless there be an agreement that it should be so, is no satisfaction of a debt; but it is otherwise of a bill accepted by the debtor, and *negotiable* per Lord Mansfield; in *Richardson* v. *Rickman*, cited 5 T. R. 518; and see 10 Mod. 37. But the creditor cannot resort to the original consideration where a bill has been so accepted without showing that it has not been negotiated. *Kearslake* v. *Morgan*, 5 T. R. 513. If the purchaser of goods pay by a bill, which the vendor indorses, a judgment obtained by the indorser does not operate as satisfaction. See tit. PAYMENT, and *Tarleton* v. *Allhusen*,[1] 2 Ad. & Ell. 32. Where the creditor received an acceptance of the debtor as payment, held that proof of its having been lost was not sufficient to render the latter liable to the debt. without going further, and showing it to be destroyed, although an indemnity was offered. *Woodford* v. *Whitely*,[2] 1 M. & M. 517. The vendor of goods is paid by a bill drawn by the vendee on a third person, and after acceptance alters the bill as to the time of payment; by doing so he makes the bill operate in satisfaction of the debt, and cannot afterwards recover for the goods sold. *Alderson* v. *Langdale*,[3] 3 B. & A. 660.

(*d*) *Puckford* v. *Maxwell*, 6 T. R. 52; where a draft had been given when the defendant was arrested, it was held that he might be again arrested on the same affidavit, the draft having been dishonoured. And see *Brown* v. *Kewley*, 2 B. & P. 518. Where the dishonoured bill has been given in payment for goods, the payee may maintain an action for goods sold and delivered, although the time of credit has not expired, and although he has not returned the bill. *Hickling* v. *Hardy*,[4] 7 Taunt. 312. *Mussen* v. *Price*, 4 East, 147.

(*e*) *Clark* v. *Mundall*, 1 Salk. 124.

[1]Eng. Com. Law Reps. xxix. 20. [2]*Id.* xxii. 372. [3]*Id.* xxiii. 155. [4]*Id.* ii. 118.

such a bill in satisfaction of a debt shall be deemed payment to the creditor if he do not take his due course to obtain payment of it (*f*).

Where a bill has been delivered in payment, the party receiving it cannot resort to the original consideration, without either producing the bill, or showing that the defendant can no longer be liable upon it. It is not sufficient to show that the bill or note is lost (*g*), without proof that under the circumstances the defendant cannot be legally called on to pay (*h*).

The statute does not require notice to any stranger to the bill, but only to parties. If one deliver a bill to another without indorsing his name upon it, he does not subject himself to any obligation by the law of merchant *on the bill;* neither, on the other hand, is he entitled to the same advantages (*i*). If in such case the party who takes the bill take it as an absolute discharge, agreeing to run all risks in the absence of fraud, the delivery *operates as an absolute discharge (*k*). But it is not to be inferred, from the *266
mere fact of delivering a bill, that it is received in absolute discharge.

If a bill or note be delivered in payment of an antecedent debt, without indorsement by the debtor, and the creditor be guilty of laches in procuring payment or giving notice of dishonour to the debtor, the latter, it seems, will be discharged by such laches, if he may have been prejudiced by it. For if the creditor mean to repudiate the payment, he ought to apprise the debtor of his intention, and of the circumstances, as soon as he can with convenience (*l*).

If a party agree to take the notes of a third person, payable to the bearer as money, absolutely and without condition, and they are what they purport to be, they operate as a satisfaction of the debt, though the maker be insolvent; it would be otherwise if the notes were not what they purported to be, but were forged. If they be taken not absolutely and unconditionally, but merely as negotiable instruments in the ordinary course, they are taken subject to a condition that the holder will use due means to obtain

(*f*) And therefore the general rule seems to be, that in all cases where a bill to which the debtor is a party is given in discharge of a debt, notice of dishonour must be given to every party sued on such bill, who on keeping the bill would be entitled to a remedy over against any other party. See *Cory* v. *Scott*, 3 B. & A. 619. A bill was drawn for the accommodation of an indorsee, and neither the indorsee nor the drawer had effects in the hands of the acceptor; it was held that in an action by a subsequent indorsee against the drawer, proof of notice was necessary; for the drawer might, on notice, have resorted to the indorsee. See *Brown* v. *Maffey*, 15 East, 216.

(*g*) *Dangerfied* v. *Wilby*, 4 Esp. C. 159. *Powell* v. *Roach*, 6 Esp. C. 76. *Williamson* v. *Clements*, 1 Taunt. 523. *Poole* v. *Smith*,[1] Holt's C. 144. *Champion* v. *Terry*,[2] 3 B. & B. 295. So where half the note was lost. *Mayor* v. *Johnson*, 3 Camp. 224. *Secus*, *semble*, where the bill is still within the plaintiff's control, though it has not been delivered up. *Hadwen* v. *Mendisabal*,[3] 2 C. & P. 20.

(*h*) As by proof that the plaintiff, the payee of the bill accepted by the defendant for goods sold to him by the plaintiff, lost the bill previous to indorsement. *Rolt* v. *Watson*,[4] 4 Bing. 273.

(*i*) *P. C. Van Wart* v. *Woolley*,[5] 3 B. & C. 430. *A.*, to whom *B.* was indebted for goods sold, drew a bill on *C.*, who was *B.*'s debtor, with *B.*'s consent, for the amount, which bill *C.* accepted, but afterwards dishonoured; it was held that *B.* was not entitled to notice of the dishonour. *Swinyard* v. *Bowes*, 5 M. & S. 62.

(*k*) *Swinyard* v. *Bowes*, 5 M. & S. 62.

(*l*) *Camidge* v. *Allenby*,[6] 6 B. & C. 373. *Van Wart* v. *Woolley*,[7] 3 B. & C. 430, and *infra* note (*m*). *Waud* v. *Evans*, 2 Lord Kenyon, 928; 2 Salk. 442; 6 Mad. 56. *Owenson* v. *Morse*, 7 T. R. 64; Str. 415, 416, 508, 550; 6 T. R. 52; 8 T. R. 451; 2 B. & P. 518. So in the case of a guarantee, in respect of goods to be paid for by a bill, although the guarantee be not a party to the bill, and therefore, although notice of the dishonour be not essential to his liability, according to the ordinary rule, yet he will be discharged by the omission of the creditor to take the necessary steps to obtain payment on the security. As in *Phillips* v. *Astling*, 2 Taunt. 206. There the drawer (the principal) and the acceptor remained solvent for many months after the bill was dishonoured, and it was not until they had become bankrupts that payment was demanded of the defendant, the guarantee. It is otherwise where the defendant has sustained no detriment by the want of presentment or notice, as in *Warrington* v. *Furbor*, 8 East, 242, where a commission of bankrupt had issued against the acceptor (the principal) before the bill became due, and *Holbrow* v. *Wilkins*,[8] 1 B. & C. 10, where the acceptors were known to be insolvent before the bill became due, and the bill, if presented, would not have been paid.

[1]Eng. Com. Law Reps. iii. 55. [2]*Id.* vii. 443. [3]*Id.* xii. 7. [4]*Id.* xiii. 430. [5]*Id.* x. 145. [6]*Id.* xiii. 201. [7]*Id.* x. 145. [8]*Id.* viii. 8.

payment, and then they ought to be presented for payment within a reasonable time. There is no guarantee in such case, on the part of him who passes such a note, that the maker is solvent at the time (*m*) (A).

A distinction has been taken between the payment of a bill or note in discharge of an antecedent debt, and a delivery at the time of sale. But it is obvious that the same principle must govern both cases; each must depend on the intention of the parties. If the facts show that at the time of the
*267 *mutual delivery of a bill or note for a chattel, the parties intended an absolute exchange, each taking the thing delivered with all faults, the delivery of the bill in the absence of fraud must operate as a discharge; but if the bargain was not for the delivery of the bill specifically, but for a money price, and the bill was merely taken in payment of that price, there seems to be no distinction in principle between a delivery contemporaneous with the sale, and one made at a subsequent time (*n*).

Where an acceptor, in order to pay his acceptance, drew another bill which was dishonoured by the drawee, but no notice was given, it was held that the acceptor was entirely discharged (*o*).

If *A.* and *B.* exchange bills absolutely, the property is changed, and does not revest in either, although the bill which he has received is dishonoured (*p*); otherwise, when the exchange is *conditional* (*q*). But it seems, that if *B.* knew that his own bill was worthless, the whole transaction would be vitiated by the fraud, and the property in *A.*'s bill would not be altered.

Bank-notes cannot be followed by the legal owners into the hands of *bonâ fide* holders who took them in payment, without notice (*r*).

The giving a bill in payment excludes all objections to previous accounts (*s*).

For the evidence upon an indictment for forgery, see tit. FORGERY.

(*m*) *Camidge* v. *Allenby*,[1] 6 B. & C. 373. And therefore, where *A.* paid notes of the Huddersfield Bank to *B.*, at York, at three in the afternoon of the 10th, in payment for goods, the bank having stopped payment at eleven o'clock in the forenoon of the same day, but neither of the parties knew of the stoppage or of the insolvency, and *B.* neither circulated the notes, nor presented them, but afterwards required *A.* to take them back, and pay him the amount; it was held that the debt was satisfied. See also *Moore* v. *Warren*, Str. 415, *Holme* v. *Barry*, Ib, where it was laid down that if a party taking a banker's note is guilty of *laches*, he gives new credit to the banker, and the party who paid it is discharged. Where the plaintiff's servant received banker's notes in payment for cattle at a fair, fourteen miles distant from home, on Friday afternoon, and his master not being at home on his return, did not settle his accounts till Saturday evening, the bankers having stopped in the middle of the day; it was held that the master was not guilty of laches in not presenting the bills on the Saturday. *James* v. *Holditch*,[2] 8 D. & R. 40. In *Owenson* v. *Morse*, 7 T. R. 64, *A.* agreed to buy articles of plate from *B.*, who was to get *A.*'s arms engraved on it, and the plate was delivered to an engraver for that purpose. *A.* gave in payment for the goods the notes of a banker who had then stopped payment, and in an action of trover by *A.* for the plate, it was held that *B.* might stop the goods *in transitu*, there being no delivery or payment. See also *Tapley* v. *Martens*, 8 T. R. 458; *Dangerfield* v. *Wilby*, 4 Esp. C. 159.

(*n*) See[2] 6 B. & C. 381, and Mr. Long's excellent Work on Sales, 286.

(*o*) *Bridges* v. *Berry*, 3 Taunt. 130. See also *Bevan* v. *Hill*, 2 Camp. 381.

(*p*) *Hornblower* v. *Proud*, 2 B. & A. 327. And see *Cowley* v. *Dunlop*, 7 T. R. 565. (*q*) Ibid.

(*r*) *Lowndes* v. *Anderson*, 13 East, 130. *Solomons* v. *Bank of England*, Ibid. 135.

(*s*) *Knox* v. *Walley*, 1 Esp. C. 159; 9 Mod. 23.

(A) (A draft or bill of exchange upon a third person given by a debtor to a creditor who stipulates that it shall be in *full satisfaction* of the debt *when paid*, is *prima facie* evidence of payment of the original debt; and to rebut such evidence the creditor is bound to show, in an action for the recovery of the original debt, *diligence* in obtaining payment of the bill, and if not paid, notice of non-payment; or he must *excuse* the non-presentment and produce the bill in the trial to be cancelled. *Dayton* v. *Trull*, 23 Wend. 315. Although the taking of the note of a third person as collateral security for a pre-existing debt without more, will not place the taker in the situation of a holder for value, so as to protect him against the equities subsisting between the original parties to the note; yet it is otherwise if there is a new and distinct consideration, as if time was given in consideration of obtaining the note as security for the debt, &c. *Depeau* v. *Waddington*, 6 Whart. R. 220.)

[1]Eng. Com. Law Reps. xvi. 332. [2]*Id.* xiii. 201.

BILL OF EXCEPTIONS. *See* VOL. I.

BILL OF LADING.

A BILL of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight (*t*). Such instruments are negotiable by the custom of merchants (*u*), and are transferred by the shipper's indorsement (*x*); and there is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person (*y*). Effect of.

The indorsement and delivery of a bill of lading is *primâ facie* an immediate transfer of the legal interest in the cargo (*z*). And a bill of lading signed by a deceased master of a vessel for the delivery of goods to a consignee, is evidence of property in the consignee to show an insurable interest in the goods (*a*) (1).

The bill of lading as between the original parties is merely a receipt, but not conclusive as to the quantity of the goods shipped, and may be opened by evidence of the real facts (*b*).

An assignment of the bill of lading to a third person for a valuable consideration devests the consigner's right of stoppage *in transitu* (*c*).

*BILL OF PARTICULARS. *See* PARTICULARS. *268

BOND.

THE proof in an action on a bond depends entirely upon the issue taken upon the plea of *non est factum*, payment, performance of conditions, &c. Proof.

By the rules of Hil. Term, 4 Will. 4, in an action of debt on specialty, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

(*t*) Per Ld. Ellenborough, 1 H. B. 358. (*u*) 5 T. R. 683. *Lickbarrow* v. *Mason.*
(*x*) *Lickbarrow* v. *Mason*, 2 T. R. 63. *Haille* v. *Smith*, 1 B. & P. 564.
(*y*) 2 T. R. 63. (*z*) 1 T. R. 215, 216. *Hibbert* v. *Carter*, T. R. 745.
(*a*) *Haddow* v. *Parry*, 3 Taunt. 305. (*b*) *Bates* v. *Todd*, 2 M. & M. 106.
(*c*) *Lickbarrow* v. *Mason*, 2 T. R. 63. 5 T. R. 367, 683. *Secus*, where a bill of lading is assigned by the vendee to his factor, although he has drawn upon him to the amount of the consignment, it being clear that it was not intended that the goods in question should be appropriated to the payment of the particular bills, and the goods not having reached the factor's hands, and no specific pledge having been made. *Patten* v. *Thompson*, 5 M. & S. 350. See *Kinloch* v. *Craig*, 3 T. R. 119, 783. [See *Moore* v. *Sheridene*, 2 Har. & M'Hen. 453.]

(1) [A bill of lading stating the property to belong to A. & B. is not conclusive evidence, and does not estop A. from showing that the property belongs to another, in an action against an insurer. *Maryland Insurance Co.* v. *Ruden's Administrator*, 6 Cranch, 338. A bill of lading subscribed by the owner of a vessel, and by the master, is evidence against the owner of the goods, of the amount freighted, but cannot be declared on as the foundation of an action for the freight. *Shalzell* v. *Hart*, 2 Marsh. 192. In an action for wages, by the executors of a master of a vessel, against the owners, a bill of lading, signed by the captain in the foreign port, was allowed to be given in evidence, to show that by the usage of trade at a certain port, the captain was entitled to certain privileges. *Vicary's Executors* v. *Ross & al.* 1 Yeates, 38. But a copy of a bill of lading, not signed by the captain, but verified by an affidavit, was ruled not to be admissible. *Wood* v. *Roach*, 2 Dallas, 180. S. C. 1 Yeates, 177.

How far and when a bill of lading, which acknowledges the freight of goods received on board to be paid, can be contradicted by the parties concerned, see *Portland Bank* v. *Stubbs*, 6 Mass. Rep. 422. If a master of a vessel sign a bill of lading, acknowledging that the goods are in good order, it seems that in an action against him for not delivering them in good order, no evidence is admissible to prove that they were not in good order when he received them—if they were open to inspection when shipped, and no fraud or imposition were practised on him. *Barrett & al.* v. *Rogers*, 7 Mass. Rep. 297. But if the goods were delivered in packages, and not open to inspection, such bill of lading would not be conclusive evidence of the good condition of the goods, but *prima facie* evidence of the highest order. *Ibid.*

In a prize court, a bill of lading consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of further proof. *The Friendschaft*, 3 Wheat. 14.]

Upon the plea of *non est factum* the plaintiff must prove the execution of the bond in the usual way (*d*) (A).

Illegality or fraud cannot be proved under this plea (*e*).

Breaches. Where the bond contains a condition for the performance of covenants and agreements, breaches must be assigned (*f*) under the stat. 8 & 9 Will. 3, c. 11, s. 8, in the declaration, or suggested on the roll, in all cases, except of money-bonds and bail-bonds (*g*), and, as it seems, bonds entered into by
*269 a *petitioning creditor to the Ld. Chancellor in case of bankruptcy (*h*); and in general where nothing but computation is necessary to ascertain the precise sum due (*i*). After proof of the bond the plaintiff proceeds to prove the breaches assigned, where, from the nature of the case, the burthen of proof is not thrown on the defendant to prove the affirmative; as where the condition is to pay money by instalments, or the payment of rent (*j*) (B).

(*d*) *Infra*, tit. DEED. It is no defence on this plea that the defendant was misled as to the legal effect of the bond. *Edwards* v. *Brown*, 1 Cr. & J. 307. The obligatory part of a bond purported that the obligor was to become bound for ——, omitting to insert the word *pounds*, but from the recitals in the condition it appeared to be the intent that he should enter into a bond for securing various sums of money composed of pounds sterling; the court read the bond as if the word *pounds* were inserted in it. *Coles* v. *Hume*,[1] 8 B. & C. 568. Debt on bond described in the declaration as conditioned for payment by three persons; the bond produced was a bond for payment by two of those named, and by a third person not named; held to be a fatal variance, although the bond was joint and several. *Adams* v. *Bateson*,[2] 6 Bing. 110, and 3 M. & P. 339.

(*e*) A party cannot, even after notice, give in evidence that it had been executed in consideration of foregoing a prosecution against *R.* for embezzling monies of his employers which had been concealed from the defendant when he executed the bond; the fact must be pleaded specially. *Harmer* v. *Rowe*, 6 M. & S. 146. In debt on bond given by the defendant on his being appointed deputy to the plaintiff as a colonial secretary, the condition reciting an agreement to appoint him such deputy, to execute the office and receive the fees, and pay a yearly sum of —— *l.* to the plaintiff *thereout*, but the condition was for payment of that sum *absolutely;* held that it was competent to the defendant to plead, and the jury to find, the fact that the sum was to be paid out of the fees, and that they exceeded the amount, in order to show the illegality of the bond; the fact not being so inconsistent with the bond that it must be rejected. *Greville* v. *Atkins*,[3] 9 B. & C. 462. And see *Collins* v. *Blantern*, 2 Wils. 347, and *Paxton* v. *Popham*, 9 East, 408. The condition of a bond given by the collector of taxes, contained also a distinct clause for accounting and paying over to the commissioners, which was not authorized by the 43 Geo. 3, c. 99; held, that it might be rejected as surplusage, and did not vitiate the bond, being neither contrary to the statute, nor *malum in se*. *Collins* v. *Gwynne*,[4] 7 Bing. 423. Fraud also must be pleaded. *Edwards* v. *Brown*, 1 Cr. & J. 307; 1 Tyrw. 182. *Turk* v. *Tooke*, 4 Mann. & Ry. 393;[5] 12 Moore, 435. *Greville* v. *Atkins*,[3] 9 B. & C. 462.

(*f*) Where a party indemnified by bond is sued in respect of the matter of the indemnity, and damages recovered against him, the defendant in his suit on the bond is bound to assign not only the damages and costs so recovered against him, but also the costs incurred by him in consequence, although he may not have actually paid them; and he cannot upon a *scire facias* suggest them as a further breach, being precluded by 8 & 9 W. 3, c. 11. *Harrap* v. *Armitage*, 11 Pri. 441.

(*g*) 2 B. & P. 446. Tidd's Prac. 507, 4th edit. In debt on bond, where the breaches are assigned in the replication under the statute, the jury may assess the damages without any special *venire*. *Scott* v. *Staley*,[6] 4 Bing. N. C. 724; 6 Sc. 598; and 6 Dowl. (P. C.) 714. And see *Quin* v. *King*, 1 M. & W. 42.

(*h*) *Smithey* v. *Edmondson*, 3 East, 22.

(*i*) And therefore unnecessary in an action on a *post obit* bond for a precise sum. *Murray* v. *Earl of Stair*,[7] 2 B. & C. 82.

(*j*) Debt on bond, the defendant pleaded, *inter alia*, by way of set off, a bond given to him by the plaintiff, conditioned for payment of an annuity granted by the defendant to a third party, and for indemnifying the defendants therefrom; held that the onus of proving performance of that condition was on the plaintiff, and not on the defendant, to show the breach. *Penny* v. *Foy*,[8] 8 B. & C. 11, and 2 Mann. & R. 181.

(A) (That a bond was delivered as an escrow cannot be given in evidence under a general plea of *non est factum*. It must be specially pleaded. *Smallwood* v. *Clarke*, Tay. 281, S. C. 2 Hay. 146. S. P. per Hall, Anon. 2 Hay. 327. *Contra*, *Moore* v. *Parker*, Conference Reps. 553. Delivery is a question of fact for the decision of a jury, and the circumstances from which it is to be inferred must be left to them. It is error in the court to say what circumstances constitute a delivery. *Vanhook* v. *Barnett*, 4 Dev. 268. A bond is not valid that is written over a signature and seal made upon a blank sheet of paper. *Ayres* v. *Harness*, 1 Ohio Rep. 372. Where, in a suit on a bond in Indiana, attesting witnesses reside in another state, the bond will be received in evidence upon proof of their hand-writing. *Jones* v. *Cooprider*, 1 Blackf. 47.)

(B) (In an action on a bond conditioned to perform the decree in a suit in which *A.* & *B.* were defendants,

[1]Eng. Com. Law Reps, xv. 299. [2]*Id.* xix. 21. [3]*Id.* xvii. 421. [4]*Id.* xx. 187. [5]*Id.* xiii. 407. [6]*Id.* xxxiii. 509. [7]*Id.* ix. 33. [8]*Id.* xv. 146.

Where a sum by the condition is payable by instalments, with a stipulation that on default of payment of interest the whole shall become payable, on such default the whole may be recovered (*k*).

In an action on an annuity-bond, the plaintiff must prove that the party during whose life the annuity is granted is still living. If the bond be conditioned for the performance of covenants in some other deed, the plaintiff must prove the execution of the latter deed, as well as of the bond, and also that the covenant has been broken (*l*). Annuity-bond.

The plaintiff, in cases where breaches are assigned under the statute, must give evidence of the amount of his damages (*m*).

Upon an engagement to replace stock, the plaintiff may estimate his damages, either according to the price of stock at the day appointed for replacing it, or on the day of the trial (*n*).

A bond conditioned for the payment of a smaller sum bears interest from the day of payment, although it be given voluntarily (*o*); and where no day of payment is expressed, interest is payable from the time of execution.

Damages may, it seems, be recovered for more than the amount of the penalty (*p*); a jury, in assessing damages on a registration bond, are not confined to the diminution of the value of the advowson to the plaintiff by the defendant's life interest, nor in estimating the annual value are they bound to deduct the curate's stipend (*q*). Where in debt on a bond with a condition, the condition is not set out in the pleadings, the plaintiff must prove that the bond mentioned in the suggestion and produced to the jury is that on which the action is brought (*r*).

*Upon a plea of *non est factum* to a bond with conditions, breaches of which are assigned in the declaration, the jury who try the issue may also assess the damages under the common *venire*. (*s*). *270

For the proofs by the defendant under the plea of *non est factum*, see tit. DEED.

Where the defence is that the consideration of the bond was illegal, and the illegality does not appear on the face of the bond, it should be shown by means of a special plea, and is not evidence under the plea of *non est*

(*k*) *James* v. *Thomas*,[1] 5 B. & Ad. 40.

(*l*) If the defendant let judgment go by default in an action on a bond, and the plaintiff makes a suggestion in which he sets out the condition of the bond, and that appears to be for the performance of an award, or of articles of agreement, or the like, the plaintiff must prove the condition of the bond, the award, indenture or articles, as well as the breaches suggested. *Edwards* v. *Stone*, Cor. Lawrence, J. 1 Will. Saund. 58, *e*. (n.)

(*m*) See 2 Will. Saund. 187, a. 2 N. R. 362.

(*n*) *Downes* v. *Back*,[2] 1 Starkie's C. 318. *Macarthur* v. *Ld. Seaforth*, 2 Taunt. 257. In a late case it was held to be proper to take the price at the day of trial. *Harrison* v. *Harrison*,[3] 1 C. & P. 413.

(*o*) *Hellier* v. *Franklin*,[4] 1 Starkie's C. 291. *Farquhar* v. *Morris*, 7 T. R. 124. *Aliter*, in case of a single bond. *Hogan* v. *Page*, 1 B. & P. 337.

(*p*) *Lonsdale* v. *Church*, 2 T. R. 388. *M'Clure* v. *Dunkin*, 1 East, 436. *Francis* v. *Wilson*,[5] 1 R. & M. 105.

(*q*) *Sondes* v. *Fletcher*,[6] 5 B. & A. 835.

(*r*) *Hodgkinson* v. *Marsden*, 2 Camp. 121. It will be sufficient if the attorney for the plaintiff swear that the bond produced is the instrument delivered to him for the purpose of bringing the action, and that he knows no other of the same date, without calling the attesting witnesses. *Ib.* In an action on a bond for performance of covenants in a lease, the defendant's plea to the bond being overruled on demurrer, he is estopped from saying he did not execute the lease. *Collins* v. *Rybot*, 1 Esp. C. 157.

(*s*) *Parkins* v. *Hawkshaw*,[7] 2 Starkie's C. 381. *Scott* v. *Staley*,[8] 4 Bing. N. C. 724. *Quin* v. *King*, 1 M. & W. 42, 189. As to the plea of the Statute of Limitations, see tit. LIMITATIONS.

held that the record of a suit in which *B.* & *C.* were defendants, did not support the breach assigned. *Coleman* v. *Crumpler & al.* 2 Dev. 508.)

[1]Eng. Com. Law Reps. xxvii. 26. [2]*Id.* ii. 407. [3]*Id.* xi. 436. [4]*Id.* ii. 394. [5]*Id.* xxi. 391. [6]*Id.* vii. 276. [7]*Id.* iii. 392. [8]*Id.* xxxiii. 509.

factum, whether the bond be avoided by the common or only by the statute law (*t*) (A).

Plea of payment.

Proof of the payment of the principal only, will, it is said, support a plea of *solvit post diem* (*u*).

After a lapse of twenty years without demand of payment, or of acknowledgement by the obligor, a presumption arises that the bond has been satisfied (*x*); and such presumption is not rebutted by proof of the obligor's poverty (*y*). But it is otherwise where the obligor has resided abroad during the whole of the time (*z*). So, on the other hand, satisfaction may be presumed from the lapse of a space less than twenty years, if other circumstances render it probable that the bond has been satisfied; as, if there has in the meantime been a settlement of accounts between the parties (*a*) (1).

(*t*) *Harmer* v. *Wright*,[1] 2 Starkie's C. 35.
(*u*) *Dixon* v. *Parkes*, 1 Esp. C. 110. *dub. Hellier* v. *Franklin*,[2] 1 Starkie's C. 292. See tit. PAYMENT.
(*x*) *Oswald* v. *Leigh*, 1 T. R. 270. *Colsell* v. *Budd*, 1 Camp. 27.
(*y*) *Willaume* v. *Gorges*, 1 Camp. 217. (*z*) *Newman* v. *Newman*,[3] 1 Starkie's C. 101.
(*a*) 1 T. R. 270. *Colsell* v. *Budd*, 1 Camp. 27.

(A) (The consideration of a bond can be impeached at law only upon the ground that it is against an express enactment or against the policy of the law. Where a bond is fairly executed, proof of fraud or misrepresentation as to the subject matter of the consideration is inadmissible at law. *Guy* v. *McLean*, 1 Dev. 46. See, also, *Lester* v. *Zachary*, 1 Car. L. R. 380. A bond is not invalidated by being made without consideration or upon an inadequate consideration. *Lester* v. *Zachary*, 1 Car. L. R. 380. Nor can a party to a bond object that it is irregular; the principle of law is that in whatever manner a party thinks proper to bind himself he shall be bound. *Lartigue* v. *Baldwin*, 5 Mart. R. 194. *Duchamp* v. *Nicholson*, 2 Mart. N. S. 672. *Villere* v. *Armstrong*, 4 Mart. N. S. 21. *Morgan* v. *Furst*, 4 Mart. N. S. 116. *Reynolds* v. *Ex'rs of Rogers*, 5 Ohio Rep. 177. To an action of debt upon a bond, it may be pleaded, that the bond was given upon the consideration of the plaintiff's using his influence to procure a certain marriage for the defendant; and if the issue upon such plea be found for the defendant, it will avoid the bond. *Overman* v. *Clemmons*, 2 Dev. & Bat. 185.)

(1) [In the case of *Executors of Clark* v. *Hopkins*, 7 Johns. 556, it is said that after *eighteen or twenty* years, a bond will be presumed to have been paid, and that to rebut the presumption, the obligee ought to show a demand of payment and acknowledgement of the debt, within that time. See also *Shepherd's Executors* v. *Cook's Executors*, 2 Hayw. 238. In *Boltz & al.* v *Ballman*, 1 Yeates, 584, a lapse of eighteen years and a half was ruled not to be sufficient to found a presumption of payment of a bond, under circumstances that tended to repel the presumption: and in *Goldhawk* v. *Duane*, Circuit Court, April, 1809, Wharton's Digest, 91, {reported, 2 Wash. C. C. Rep. 323,} it was held that if the period be shorter than twenty years, the presumption of payment must be supported by circumstances. S. P. *Palmer* v. *Dubois*, 1 Rep. Con. Ct. 180. *Cottle* v. *Payne*, 3 Day, 289. (*Henderson* v. *Lewis*, 9 Serg. & Rawle, 379. See also 14 Serg. & Rawle, 21.) Where no interest had been paid for 23 years, proof of a suit having been commenced and abandoned during that period, was held not to weaken the presumption of payment. *Palmer* v. *Dubois*, ubi. sup. A confession by one co-obligor that he had never paid, and that he believed the other had not, is not sufficient after a lapse of twenty years, to rebut the presumption. *Haskell* v. *Keen*, 2 Nott & McCord, 160. The existence of a civil war, &c. is sufficient to repel the presumption of payment of a bond, though twenty years have elapsed, and no interest has been paid. *Brewton* v. *Cannon*, 1 Bay, 482. And in Pennsylvania, in an action tried in 1794, on a bond conditioned for the payment of money in 1769, on which no receipts had been indorsed, it was ruled that the period of time between 1776 and 1784, during which the limitation acts had been suspended, ought to be taken out of the calculation. *Penrose & al.* v. *King*, 1 Yeates, 344. See also *Conn. & al.* v. *Penn & al.* 1 Peters' Rep. 524. *Jackson* v. *Pierce*, 10 Johns. 414. *Bailey* v. *Jackson*, 16 ib. 210. *Dunlop & Co.* v. *Ball*, 2 Cranch, 180. *Higginson* v. *Mein*, 4 Cranch, 415. *Quince's Administrotors* v. *Ross's Administrators*, 1 Taylor, 155. S. C. 2 Hayw. 180. *Rearden* v. *Searcy's Heirs*, 3 Marsh. 544. S. C. 1 Littell's Rep. 53.

Acknowledging a bond and apologizing for not paying it will rebut the presumption of payment arising from not paying interest for twenty-five years. *Smedes* v. *Hooghtuling & al.* 3 Cames' Rep. 48. An entry made nineteen years before, in the books of the defendant's testator, that a promissory note of twenty-three years' standing was paid, was allowed to be read to support the presumption of payment. *Rodman* v. *Hoop's Executor*, 1 Dallas, 85. See also *Cohen* v. *Thompson*, 2 Rep Con. Ct. 146. *Levy* v. *Hampton*, 1 M'Cord, 145.

A statute of Connecticut limits the payment of bonds of a certain description to seventeen years: and neither an indorsement nor payment on such bonds will save them from the operation of the statute. *Gates* v. *Brattle*, 1 Root, 187. *Fuller* v. *Hancock*, ibid. 238. Whether the rule of not presuming payment within twenty years applies in that state to bonds not within the statute—*Quære*—*Gottle* v. *Payne*, ubi sup. In Maryland, a statute limits suits on bonds to twelve years. See *Hammond* v. *Denton*, 1 Har. & M'Hen. 200.

The presumption, from lapse of time, that a bond has been paid, unless the delay is accounted for, is allowed to prevail in a court of chancery, in the same manner as in a court of law. *Giles* v. *Baremore*, 5 Johns. Ch. Rep.]

[1]Eng. Com. Law Reps. iii. 233. [2]*Id.* ii. 394. [3]*Id.* ii. 314.

Indorsements on the bond, although in the hand-writing of the obligee, acknowledging the receipt of interest within the space of twenty years, have been admitted for the purpose of rebutting the presumption of satisfaction, arising from the lapse of twenty years, although no evidence was given to prove that the indorsements existed before the twenty years had elapsed (*b*); but the admissibility of such evidence appears to be very doubtful in principle, and the contrary has been ruled at Nisi Prius (*c*). Parishioners at a vestry agreed that the overseers should give their bond for a debt due from the parish, and by a minute resolved that they should be indemnified out of the rates; the obligee, a parishioner, signed the agreement and resolution of the vestry; he subsequently received for many years the interest out of the rates, without calling on the obligors for the principal; held, that the parishioners having no power to bind the parish, and the obligee having acceded to the resolutions only so far as they would bind the parish, the liability of the obligors, who undertook personally to pay, was not affected thereby (*d*).

*BOUNDARY ACT, 6 & 7 Will. 4, c. 103. *See* CORPORATION. *271

BREACH OF PROMISE OF MARRIAGE. *See* tit. MARRIAGE.

BRIBERY.

Proof in action for.

UPON a trial for bribery under the stat. 2 Geo. 2, c. 24 (*e*), although the defendant took the note of the voter to whom the money was paid, and insists that it was a mere loan, it is a question for the jury whether it was not a gift (*f*).

To prove the allegation that *A. B.* was a candidate, where the bribery was previous to the election, it is sufficient to show that a poll was demanded for him, for till then every one is a candidate for whom a poll is asked; and that fact makes the person on whose behalf the bribe was given a candidate (*g*); but after the time of election the poll-books are the proper evidence to prove that a particular person was a candidate (*h*) (1). The time of delivering the precept to the returning officer need not be proved (*i*).

Where the declaration alleged that the party was bribed to vote for *L.* and *E.*, and it was proved that he was bribed to vote for *L.* and *his friend*, it was held that the variance was not fatal, since the material fact is that

(*b*) *Searle* v. *Ld. Barrington*, 2 Str. 826. *Glynn* v. *Bank of England*, 2 Ves. 42. *Saunders* v. *Meredith*, 3 M. & R. 120.

(*c*) *Rose* v. *Bryant*, 2 Camp. 321; see tit. LIMITATIONS, and Append. Vol. II. 270.

(*d*) *Jaquet* v. *Lewis*, 8 Sim. 480.

(*e*) This act is to be construed prospectively. *Lord Huntingtower* v. *Ireland*,[1] 1 B. & C. 297; 2 D. & R. 450. An offender discovering another, so that he be convicted, and not being himself convicted, is indemnified. See *Sutton* v. *Bishop*, 4 Burr. 2283. Making an affidavit is a sufficient discovery, *Sutton* v. *Bishop*, 1 Bl. 665, and a *verdict* without judgment a sufficient *conviction;* and it is sufficient though the witness be convicted *after* discovery, *Ib.* As to delay in going to trial, see *Talmash* v. *Gardiner*,[2] 1 D. & R. 512. *Petrie* v. *White*, 3 T. R. 5.

(*f*) 1 Bl. R. 317, 318. A wager with a voter that he does not vote for a particular candidate is within the statute. *Anon.* Lofft. 552.

(*g*) Ibid. 523. (*h*) Ibid.

(*i*) *Grey* v. *Smithyes*, 4 Burr. 2273. Where the declaration set forth the precept from the sheriff to the portreeve of a borough, it was held that the improper insertion of the *if* in the declaration, which was not in the precept, was immaterial. *King* v. *Pippit*, 1 T. R. 235. See *Dickson* v. *Fisher*, 4 Burr. 2267.

(1) [In an information for bribery in an election, it ought to appear certainly that an election was held, and that the vote was given at that election. *Newell* v. *Commonwealth*, 2 Wash. 88.]

[1]Eng. Com. Law Reps. viii. 83. [2]*Id.* xvi. 54.

the party was bribed to vote (*k*). The plaintiff must prove some bribe, or promise, or agreement, previous to the election (*l*).

On a declaration for corrupting one *Moor*, and bribing him to vote for the defendant, it is no defence to show that *Moor* did not vote for the defendant (*m*) (1). The person who took the bribe is a competent witness (*n*).

If an offender who makes a discovery be sued, he may give his defence in *272 *evidence under the plea of *nil debet* (*o*). No damages are recoverable for the detention of the debt (*p*).

BRIDGE.

Indictment against a county.

On an indictment against a county (*q*) for not repairing a bridge, the prosecutor must prove, 1st, that it is a public bridge; 2dly, that it is situate within the county; 3dly, that it is out of repair.

That it is a public bridge.

1st. That it is a public bridge.—The principal evidence to prove this is that of the actual use of the bridge by the public, and that it is of *public convenience* and has been repaired at the public expense. It is not necessary to prove that it is an ancient bridge, or that it was originally built with the concurrence of the public. Where a bridge had been originally erected by a private person forty years ago, but had been since used by the public, it was held that it was a public bridge (*r*).

About forty-five years ago there was a ford through the river where the bridge was built, which was part of a highway from London to Maidstone. The river was deep; at flood-times up to the middle, at ordinary times up to the knee. A miller erected a dam across the river, which raised the water about three inches, and five years afterwards built the bridge in question. In this case much reliance was placed on the *dictum* in Rolle's Ab. 368; viz.

(*k*) *Coombe* v. *Pitt*, 3 Burr. 1586.

(*l*) *Lord Huntingtower* v. *Gardiner*,[1] 1 B. & C. 297; 2 D. & R. 450. Note, that the declaration alleged that the defendant received a large sum *for* giving his vote for, &c., a second class of counts charged a previous agreement; it appeared that the defendant received money *after* the election for giving his vote for, &c. but no evidence was given of any pre-existing agreement. The learned judge reserved the point, and left the case to the jury, who found for the defendant on all the counts which charged a previous agreement. On motion for a nonsuit, this court held that the words of the statute were to be construed *prospectively;* that the terms of the first class of counts were ambiguous, and might after verdict be construed either prospectively or retrospectively, so as to support the verdict, and therefore that the question arose, not upon the record, but on the evidence, and a nonsuit was accordingly directed. See *Avery* v. *Hoole*, 2 Cowp. 825.

(*m*) *Sulston* v. *Norton*, 1 Bl. 317; 3 Burr. 1235. *Bush* v. *Rawlins*, Say. 280. *Phillips* v. *Fowler*, Pasch. 7 Geo. 2, C. B. It is immaterial whether he had in fact a right to vote if he claimed the right, and the defendant thought he had such right. *Lilley* v. *Corrie*, 1 Sel. N. P. 650, n. And such right of voting need not be proved. *Coombe*, q. t. v. *Pitt*, 1 Bl. 523; 3 Burr. 1586.

(*n*) 4 Burr. 2285, 2469. *Edwards* v. *Evans*, 3 East, 451. *Heward* v. *Shipley*, 4 East, 180.

(*o*) *Davy* v. *Baker*, 4 Burr. 2471. The court, after a verdict given against him, will not interpose on motion that judgment may be staid for the discovery and conviction of another person. *Pugh* v. *Curgenvan*, 3 Will. 35.

(*p*) *Cuming* v. *Sibley*, 4 Burr. 2489.

(*q*) The county is liable for such bridges only as are over "water flowing in a channel between banks more or less defined;" they are not liable for the repair of arches forming a causeway and easier access to the main bridge and passage of flood water, the channel of which was occasionally dry. *R.* v. *Oxfordshire*,[2] 1 B. & Ad. 289. And see S. P. ib. in notis, and *Bridges & Nichols' Case*, Godb. 346, pl. 441.

(*r*) *R.* v. *Inhab. of Kent*, 2 M. & S. 513; 1 Roll. Ab. 368. *R.* v. *Inhab. of Wilts*, 6 Mod. 307; 3 Salk. 359. *Case of Glusburne Bridge*, 5 Burr. 2594; 2 Bl. R. 386, n. 685. *R.* v. *Inhab. of the W. R. of York*, 2 East, 353. *R.* v. *Inhab. of Glamorgan*, 2 East, 356. *Lord Portman's Case*, 13 East, 225. *Case of the Medway Canal*, 13 East, 220. *A.* licenses *B.* to build a bridge on his land; *B.* covenants to repair; the property in the materials, subject to the public right of passage after dedication to the public, continues in *B.*, who may maintain trespass against a wrongdoer who severs them. *Harrison* v. *Parker*, 6 East, 154; and see *Spooner* v. *Brewster*,[3] 3 Bing. 139.

(1) [An offer to bribe is indictable, though the bribe is not accepted. *United States* v. *Worrall*, 2 Dallas, 384.]

[1]Eng. Com. Law Reps. viii. 83. [2]*Id.* xx. 389. [3]*Id.* xi. 69.

"that if a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects used to go over this as a common bridge, the bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit," for which he cites 8 Edw. 2, the case of the Prior of Stratford. But on referring to that case, it appeared that the liability there was *ratione tenuræ* (*s*), and the court laid down the rule broadly, in conformity with all the authorities, except that in Rolle, that if a private person build a private bridge, which afterwards becomes of *public convenience*, the *county* is bound to repair it (*t*). The circumstance that the bridge is of private convenience and utility to the party who built it, makes no difference (*u*). The test is not, as it seems, any *adoption* of the bridge by the public, but its *becomiag *useful* to the county in general (*x*): if the bridge be of public utility, the county who derives advantage from it must support it (1). *273

A bridge may be a public carriage-bridge, although used but occasionally by carriages, except in times of flood and frosts, when it is dangerous to pass the river (*y*).

Where the Medway Navigation Company, under an Act, which enabled them to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them, or others as convenient, in their room, forty years ago destroyed a ford across the river in a public highway, by deepening its bed, and built a bridge over the same place, it was held that they were bound to keep it in repair under the conditions of the Act (*z*). So, where a canal-company cut and deepened a ford across a highway, and thereby rendered a bridge necessary for the use of the public, which they built, it was held that they were bound to repair it; the bridge being necessary for the purposes of the company, and not for the purposes of the public (*a*). Public bridge.

Where a parish wooden bridge, used occasionally by light carriages, had been replaced by a spacious stone bridge, built by the trustees of a road, it was held that the county was bound to repair it, and that the inhabitants of the county could not plead that it had been repaired immemorially by the parish (*b*).

(*s*) See a copy of the curious record in this case, 2 M. & S. 520.

(*t*) *R.* v. *Inhab. of Kent*, 2 M. & S. 513. And see *R.* v. *Inhab. of Wilts*, 1 Salk. 359. And see the rule laid down by Aston, J. in the *Glusburne Bridge Case*, Burr. 2594. *R.* v. *Inhab. of Lancashire*, cited by Lawrence, J., 2 East, 352.

(*u*) *R.* v. *Inhab. of Glamorganshire*, 2 East, 356, in note.

(*x*) Per Lord Ellenborough, *R.* v. *W. R. of Yorkshire*, 2 East, 349: and per Aston, J. in the *Glusburne Bridge Case*, Burr. 2594; and Lord Coke's Comment. on the Stat. of Bridges, 2 Inst. 700. Where a bridge is in a highway, the forbearing to prosecute it as a nuisance is evidence of acquiescence by the county. Per Bayley, J. *Rex* v. *Inhabitants of St. Benedict*,[1] 4 B. & A. 450. *R.* v. *Devon*,[2] 1 R. & M. 144.

(*y*) *R.* v. *Inhab. of Co. of Northampton*, 2 M. & S. 262.

(*z*) *R.* v. *Inhab. of the Co. of Kent*, 13 East, 219. [See *Inhab. of Waterbury* v. *Clark*, 4 Day, 198.]

(*a*) *R.* v. *Inhab. of the parts of Lindsey, in the Co. of Lincoln*, 14 East, 317. See also *R.* v. *Inhab. of Somerset*, 16 East, 305.

(*b*) *R.* v. *Inhab. of Surrey*, 2 Camp. 455. *R.* v. *Inhab. of Cumberland*, 6 T. R. 194; S. C. in error, 3 B. & P. 354. Where townships have so enlarged a bridge which they were before liable to repair as a foot-bridge, they are still liable *pro rata*. *R.* v. *W. R. of Yorkshire*, 2 East, 353.

(1) [In the case of *The State* v. *The Town of Campton*, 2 N. Hamp. Rep. 513, it was decided that a bridge, although erected by individuals, yet if dedicated to the public and used freely by them so long as to evince its public usefulness, must be repaired by them. {In *Massachusetts* it has been held, that a public Townway can be established only in the mode prescribed by *Stat.* 1786, c. 67; and a record of the establishment of such a way cannot, it seems, be presumed from an user for any length of time. *Comm.* v. *Low*, 4 Pick. Rep. 408.}

[1]Eng. Com. Law Reps. vi. 482. [2]*Id.* xxi. 401.

By the stat. 43 Geo. 3, c. 59, s. 5 (*c*), no bridge shall be deemed and taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected (*d*) in a substantial or commodious manner, under the direction or to the satisfaction of the county-surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster at their general annual sessions.

The inhabitants of a county are also bound to repair to the extent of 300 feet of the highway at each end of the bridge (*e*).

The inhabitants of a county are not bound to widen a public bridge, though it be too small for the measured breadth of modern carriages (*f*).

*274 *But those who are bound to repair must make it of such height and strength as is answerable to the course of the water (*g*).

Proof in defence by a county.

The inhabitants (*h*) of a county, upon the plea not guilty, cannot throw the *onus* of repairing the bridge upon any other parties; to do this, a special plea is necessary, setting forth the obligation of such other parties specially (*i*). Under the general plea the defendants cannot adduce evidence, except in denial of one or more of the points which must be established on the part of the prosecution; viz. 1st, that the bridge is a public one; 2ndly, situate within the county; and 3dly, out of repair.

But a county on the plea of not guilty, may prove the repair of the bridge by individuals (*k*), as a medium of proof that the bridge is not a public bridge. As that the feoffees of certain estates had repaired it (*l*); for repairs done by an individual are *primâ facie* to be ascribed rather to motives of private interest in his own property, than presumed to have been done for the public benefit (*m*). But it seems that such evidence is of little weight (*n*) when placed in competition with evidence of *user* by the public. Evidence that a bar across a public bridge is kept locked except in times of flood, is conclusive to show that the public have no more than a limited right to use it on those occasions; and in such a case, if the indictment should aver that the bridge was a public bridge, used by the King's subjects at their free will and pleasure, the variance would be fatal (*o*).

Where an indictment alleged that a bridge was a public carriage-bridge, and also for the King's subjects passing and repassing on foot; and upon the evidence it appeared that it had been used by passengers on horseback and on foot, and not with carriages, it was held that the defendants could not be convicted of any part of the charge (*p*).

(*c*) By this stat. s. 4, the surveyor may sue or be sued.

(*d*) This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the statute. Trustees under a Turnpike Act having built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such a bridge on the ground that it was not absolutely necessary. *R.* v. *Inhab. of Lancashire*,[1] 2 B. & Ad. 813.

(*e*) *R.* v. *Inhab. of W. R. of Yorkshire*, 7 East, 588; and in Dom. Proc. 5 Taunt. 284.

(*f*) *R.* v. *Inhab. of Devon*,[2] 4 B. & C. 670; 7 D. & R. 147. *R.* v. *Inhab. of Cumberland*, 3 B. & P. 354.

(*g*) 1 Haw. C. 77, s. 1.

(*h*) A particular inhabitant or tenant of land charged to the repairs, may be made defendant to an indictment, and be liable to the whole fine, and must sue at law for contribution. 1 Haw. C. 77, s. 2. And now see the stat.

(*i*) See the stat. 22 Hen. 8, c. 5. *R.* v. *Inhab. of W. R. of Yorkshire*,[3] 7 East's R. 558. 5 Taunt. 284. *R.* v. *Inhab. of Bucks*, 12 East, 192.

(*k*) 2 M. & S. 262. *R.* v. *Inhab. of Co. of Northampton.*

(*l*) Ibid.

(*m*) Per Ld. Ellenborough, 2 M. & S. 264.

(*n*) Ibid.

(*o*) *R.* v. *The Marquis of Buckingham*, 4 Camp. 189.

(*p*) Per Bayley, J., *R.* v. *Inhab. of Lancashire*, Lancaster Summer Assizes, 1820.

(1) [The inhabitants of a town where a bridge has recently been built without any authority are not obliged to repair it. *Commonwealth* v. *Inhabitants of Charlestown*, 1 Pick. 180.]

[1]Eng. Com. Law Reps. xxii. 189. [2]*Id.* x. 411. [3]*Id.* i. 111.

Upon a special plea by a county that some smaller district, or some individual, is liable to the repairs of the bridge, the evidence on the part of the county to prove the obligation, seems to be the same as upon an indictment against the smaller district or individual. Special plea.

Upon an indictment against a less district than a county, or against an individual, the prosecutor must also prove the liability of the defendants to repair, either from the prescription (*q*) generally, or *ratione tenuræ* (*r*), as alleged in the indictment. Against individuals, &c. Prescription.

A plea by the inhabitants of a county, that certain townships had *immemorially* used to repair a bridge, is disproved by evidence that the townships had enlarged the bridge to a carriage-bridge which they had before been bound to repair as a foot-bridge (*s*). Where, upon a similar plea, it *appeared that a parish was bound by prescription to repair a wooden foot- *275
bridge, used by carriages only in time of flood, and that forty years ago the trustees of a turnpike-road had built upon the same site a wider bridge of brick, which had since been constantly used by all carriages passing that way, it was held that the plea was not sustained by the evidence (*t*).

Upon an indictment against a county, the defendants pleaded that *J. S.* was liable *ratione tenuræ*. It appeared that *J. S.* had purchased part of an estate, the owner of which, both before and after the purchase, had repaired the bridge, and it was held that this was not sufficient evidence to support the plea (*u*). But where an entire estate or manor is liable to the repair of a bridge, and the estate or manor is afterwards divided amongst several, they are each severally liable to the whole charge (*x*). Ratione tenuræ.

Where the indictment charged a corporation with a prescriptive obligation to repair a bridge, and a charter of incorporation granted by Edw. 6, was given in evidence, from the terms of which it appeared to be doubtful whether the corporation had before existed immemorially, and whether lands had not been given for the repair of the bridge (*y*), but parol evidence was given that the corporation had in fact repaired the bridge as far back as living memory could go, it was held that the parol evidence and the charter might be taken in aid of each other, and that the preponderance of evidence was, that this was a corporation by prescription, although words of incorporation were used in the incorporating part of the charter only; and that the corporation were still bound to repair by prescription, and not by tenure (*z*). Corporation.

On an indictment for not repairing a bridge, *ratione tenuræ*, it was held, that in order to negative any such immemorial liability, a record of a pre-

(*q*) See *R.* v. *Hendon*,[1] 4 B. & Ad. 628.

(*r*) See tit. Prescription and Highways.

(*s*) *R.* v. *Inhab. of W. R. of Yorkshire*, 2 East, 353. See also *R.* v. *Inhab. of the County of Surrey*, 2 Camp. 455. Where an Act made a town part and parcel of a hundred, and directed that the inhabitants of the town should do everything with the inhabitants of the hundred which the latter did or were bound to do, held that a presentment against the inhabitants of the hundred for the non-repair of a bridge within the town was good, although charging them as liable by prescription. *R.* v. *Oswestry*, 6 M. & S. 361.

(*t*) *R.* v. *Inhab. of the County of Surrey*, 2 Camp. 455.

(*u*) *R.* v. *Inhab. of Oxfordshire*, 16 East, 223. There was no evidence to show in respect of what lands the former owner of the whole (Ld. Cadogan) repaired the bridge; and as he still retained part of the estate, and continued to repair the bridge, there was no evidence to charge *J. S.*, except that Ld. Cadogan had sold him some lands, which the Court held to be insufficient to charge him with the obligation to repair. Where an individual *ratione tenuræ* is bound to repair a carriage bridge, he is not bound to repair a foot-bridge, though it be annexed to and connected with the carriage bridge. *R.* v. *Inhab. of Middlesex*,[2] 3 B. & Ad. 201.

(*x*) *R.* v. *Duchess of Buccleugh*, 1 Salk. 357; 3 Salk. 77; 6 Mod. 150; Holt, 128.

(*y*) *R.* v. *The Mayor, &c. of Stratford-upon-Avon*, 14 East, 348. The terms of the charter itself are too long to be introduced here, and the case is cited merely for the purpose of showing how far parol evidence of the cause may be given as explanatory of the doubtful terms of a charter.

(*z*) 14 East, 348.

[1]Eng. Com. Law Reps. xxiv. 128. [2]*Id.* xxiii. 57.

sentment in the 18th of Edw. 3, by the men of *K.* against the bishop of *L.*, for the non-repairs of the bridge, on which the jury negatived the liability of the bishop, and went on to find that the bridge had been built about sixty years, and that they were wholly ignorant who of right was bound to repair it, the verdict being followed soon after by a grant of pontage to the men of *K.* for the same repairs, were admissible documents, as material to the issue (*a*) (A).

Defence. An individual, or the inhabitants of any district inferior to a county, may give any matter in evidence in their own discharge under the general issue (*b*).

Competency. *276 The stat. 1 Anne, c. 18, s. 13, reciting that many private persons, and *bodies politic or corporate, are of right liable to the repair of decayed bridges, and the highways thereto adjoining, but that because the inhabitants of the county, riding or division in which such decayed bridge or highways lie, have not been admitted as legal witnesses against such persons, enacts that the evidence of the inhabitants shall be taken and admitted in all such cases. Previous to this statute such witnesses were in some instances held to be competent on the ground of necessity (*c*).

BURGLARY (*d*).

Breaking. On an indictment for burglary it is essential to prove, 1st, a felonious breaking and entering; 2dly, of the dwelling-house; 3dly, in the night-time; 4thly, with intent to commit a felony.

In the first place, it is a question of fact for the jury, whether the prisoner has been guilty of any act of breaking; but whether that act amounts to a *burglarious* breaking, is a pure question of law. There must be evidence of an actual or constructive *breaking*, for if the entry was obtained

Proof of breaking. through an open door or window, it is no burglary (*e*). But the lifting of a latch (*f*) (1); taking out a pane of glass; lifting up of folding-doors (*g*);

(*a*) *R.* v. *Lady Sutton*, 3 Nev. & P. 569. (*b*) See tit. Highway and Prescription.

(*c*) See *R.* v. *Carpenter*, 2 Show. 47. It has been said that inhabitants are competent witnesses on indictments against the county, because they stand indifferent, every man being for his own convenience concerned to uphold the bridge, and, on the other hand, being interested not to subject himself to an useless charge. Gilb. L. E. 240, Lofft's ed. It is, however, obvious that this reason is applicable only in cases where the mere fact of repairs is disputed. Ibid.

(*d*) See the form of the indictment, and the necessary averments, Crim. Pleadings.

(*e*) Fost. 107; 1 And. 114; Saville, 59; 1 Hale's P. C. 551, 553, 556; Summ. 81; 3 Ins. 64; 1 Haw. c. 38. The breaking, which is sufficient in an action of *clausum fregit*, will not always be sufficient to constitute a burglary. 1 Haw. c. 38; 1 Hale, 508, 527, 551.

(*f*) East's P. C. 487.

(*g*) *Brown's Case*, East's P. C. 487. In this case the doors, which were horizontal, were closed by their own natural weight, without any interior fastening; but in *Callam's Case*, (Russel, 903, *cor.* Ld. Ellenborough, O. B. 1809,) which was similar, except that the trap-door had an internal bolt, which was not in; it seems that the Judges were of opinion that the lifting up of the door was not a sufficient breaking. Lifting up the flap of a trap-door which had no fastening, but was kept in its place by its own weight merely, was held not to be a breaking; but the unlocking and opening a door, was held a sufficient breaking out.

(A) (The responsibilities of the proprietors of a toll-bridge, are not the same as those of common carriers. The latter having the custody, care, and control of the goods they carry, have peculiar opportunities for combinations and collusions with robbers, thieves, &c., and are therefore held to a responsibility so high that nothing but an act of God, or the enemies of the country will excuse them from liability for the loss of, or injury to the goods. The persons and property passing a bridge are not subject to the control, nor under the care of the proprietors of the bridge, and are not exposed to all the dangers to which goods in the hands of common carriers are liable. The proprietors therefore are not liable to the same extent. But they are bound to use at least ordinary care and diligence in the construction of the bridge, and in keeping it in proper order, and for any injury which may result from their negligence in this respect, they are liable in damages. And, *query*, whether they are not bound to the utmost care and vigilance, and liable for even slight negligence. *Bridge Company* v. *Williams*, 9 Dana, 404.) [Every city, county and district in South Carolina is bound to lay off and keep in repair its own roads, bridges and causeways, and to defray the expense thereof. *Shoolbred* v. *Corporation*, &c. 2 Bay. 63.]

(1) [See *The State* v. *Wilson*, 1 Coxe's Rep. 429, acc.]

breaking of a wall or gates which protect the house (*h*); the descent down a chimney (*i*); the turning of a key where the door is locked on the inside (*k*), constitutes a sufficient breaking.

Where the glass of the window was broken, but the shutter within was not broken, it was doubted whether the breaking was sufficient, and no judgment was given (*l*).

Where an entry has been gained without any breaking, a subsequent breaking will constitute the offence; as where the party lifts the latch of a chamber-door (*m*), or a servant raises the latch of his master's door with intent to murder or rob his master (*n*).

*It has been doubted, whether a guest at an inn can be guilty of burglary, in respect of breaking his own chamber door, since he has a special property in the chamber (*o*). Most of these observations apply also to an indictment for *breaking out*, under the stat. 12 Ann. c. 7, s. 3, which was a declaratory Act, and for which the stat. 7 & 8 G. 4, c. 29, s. 13, is now substituted. *277

Some part of the *house* must be broken; it is not sufficient to show that a box was broken (*p*); and it seems, that in favour of life, cupboards, presses, lockers, and other fixtures, which merely supply the place of chests, and other ordinary utensils of household, are to be considered as mere moveables, although in questions between the heir or devisee and the executor, they may with propriety be considered as parts of the freehold (*q*) (A).

A constructive *breaking* may be proved; as where entrance was gained by means of fraud, stratagem, or threats, with a felonious design, for the law regards such means in as heinous a point of view as actual violence (*r*). Hence, the gaining admission by raising a hue and cry, and bringing a constable, to whom the owner opens the door (*s*), under pretence of business (*t*); under pretence of taking lodgings (*u*); under a judgment against the casual ejector obtained by false affidavits and without any colour of title (*x*); by fraudulently persuading an inmate to give admission (*y*); by Breaking, constructive.

R. v. *Lawrence*,[1] 4 C. & P. 231. Raising a sash partly before open, was held not to amount to a breaking, to sustain a conviction for house-breaking. *Smith's Case*, 1 Ry. & M. C. C. L. 178. Where the sash-window was closed down, not fastened, and was thrown up by the prisoner, and a crow-bar introduced to force the shutters, but there was no proof that any part of the hand was within the window; held not to amount to an entering sufficient to constitute burglary. *Rust's Case*, 1 Ry. & M. C. C. L. 183.

(*h*) 1 Hale's P. C. 559.
(*i*) East's P. C. 485; Cromp. 32; Dalt. 253.
(*k*) Ibid. 487; 1 Hale, 552.
(*l*) *Chambers's Case*, East's P. C. 487.
(*m*) *R.* v. *Johnson*, East's P. C. 484; 1 Hale's P. C. 553.
(*n*) Kel. 67; Pop. 14; Hutt. 20. *R.* v. *Binglose*, East's P. C. 488. *R.* v. *Gray*, Str. 481; Dy. 99.
(*o*) Haw. c. 38. But if the chamber of the guest be broken by another, the dwelling-house must be alleged to be the innkeeper's, and a guest may be guilty of larceny in respect of goods entrusted to him as a guest.
(*p*) Foster, 108. [*The State* v. *Wilson*, 1 Coxe's Rep. 439.]
(*q*) Ibid. 109, in *Gibbon's Case*.
(*r*) 1 Haw. c. 38; 1 Hale's P. C. 508, 527, 551.
(*s*) East's P. C. 405; 1 Haw. c. 38, s. 5; 3 Inst. 64; Summ. 81.
(*t*) *Le Mott's Case*, Kel. 40; 1 Haw. c. 38, s. 8.
(*u*) *R.* v. *Cassey & Cotter*, Kel. 63. And see *Semple's Case*, 1 Leach, 484.
(*x*) *R.* v. *Farre*, Kel. 43.
(*y*) *R.* v. *Ann Hawkins*, East's P. C. 485, MS. Tracy 80, & MS. Sum. The prisoner, in the absence of the family, persuaded the boy, who kept the key of the house, to let her in, by a promise of a pot of ale; and after admission, and whilst the boy was gone for the ale, she robbed the house. See *R.* v. *Le Mott*, Kel. 42; East's P. C. 486, 494.

(A) (The window of a dwelling-house being covered with a netting of double twine nailed to the sides, top, and bottom, it was held, that cutting and tearing down the netting, and entering the house through the window were a sufficient entry and breaking to constitute burglary. *Commonwealth* v. *Stephenson*, 8 Pick. 354.)

[1] Eng. Com. Law Reps. xix. 360.

conspiracy with a servant (*z*); or lastly, by threats of violence to the owner who opens the door of his house (*a*), is sufficient to constitute the offence.

Entry. Some *entry* must be proved. If thieves by threats of violence induce the owner of a house to throw out his money to them in the night time, which they take up in the owner's presence, the offence would be a robbery, but not a burglary (*b*). But any the least entry is sufficient, by means of the hand (*c*) or foot, or even by an instrument, such as a pistol or hook (*d*). So, it seems, that the discharging a loaded gun through the window of a dwelling-house is a sufficient entry (*e*).

But the entry must appear to have been made with the immediate intent
*278 *to *commit a felony*, as distinguished from the previous intent to *procure admission* to the dwelling-house. Where it appeared that a centre-bit had penetrated through the door, chips being found in the inside of the house, yet, as the instrument had been introduced for the purpose of breaking, and not for the purpose of taking the property, or committing any other felony, it was held that the entry was incomplete (*f*).

If *A.* send in a child of seven or eight years old at the window, who takes goods out and delivers them to *A.*, who carries them away, it is a burglary by *A.*, though the child, for want of discretion, be not guilty (*g*).

It is not essential to prove that the entry was on the same night with the breaking (*h*), provided both were in the night.

Dwelling-house, what is. *Secondly*, of the *dwelling-house* of another (*i*). It is to be considered, 1st, what constitutes a dwelling-house; 2dly, its extent; 3dly, proof of ownership.

Inhabitancy. 1st. A dwelling-house is constituted by a *permanent inhabitancy* of the house. Mere inclosed ground, or a booth, or tent, is not a dwelling-house (*k*); but a hay-loft above a stable is, if inhabited, although it be rated as appurtenant to the stable (*l*). Chambers in the inns of court, and in colleges within the Universities, are dwelling-houses (*m*).

An actual inhabitancy previous to the offence is essential; and therefore, although goods have been brought into a house, and possession taken with a view to inhabitancy, yet no burglary can be committed by breaking into the house previous to actual residence by the owner or some of his family (*n*).

(*z*) Where a servant lets another in to commit a burglary, it is burglary in both. *Cornwall's Case*, East's P. C. 486; 2 Str. 881; 4 Bl. Comm. 227; 10 Str. 433; 1 Hale, 553.

(*a*) East's P. C. 486; 2 MS. Sum. 298; 1 Hale, 553; 1 Haw. c. 38, s. 4; East's P. C. 491. Where, however, the servant, by the assent of the master, lets in robbers, under an agreement with them to rob the house, it seems to be doubtful whether the act be burglarious. See East's P. C. 486; and *Eggington's Case*, Ibid. 494.

(*b*) 1 Hale, 505; East's P. C. 486; 1 Haw. c. 38, s. 3; Sav. 59; Cromp. 31, *contra*. Dalt c. 151, s. 3.

(*c*) *R.* v. *Gibbons*, Fost. 107. East's P. C. 490; where the prisoner cut a hole in the shutters of a dwelling-house, through which he put his hand and took out watches.

(*d*) 3 Inst. 64; East's P. C. 490.

(*e*) See East's P. C. 490; 1 Haw. c. 38, s. 7; 1 And. 115; Ld. Hale, (1 P. C. 555,) says that it does not make a burglary; but adds a *quære*.

(*f*) *R.* v. *Hughes and others*, 1 Leach, 452; East's P. C. 491.

(*g*) 1 Hale, 565, 6.

(*h*) Ibid. 551, 557; East's P. C. 491. An entry sufficient to constitute a burglary is also sufficient under the statutes against housebreaking in the day-time, under the stat. 1 Edw. 6, c. 12, s. 6; 39 Eliz. c. 15. Fost. 108. See the late stat. 7 & 8 G. 4, c. 29, s. 12 & 14.

(*i*) A mansion, the breaking which may constitute a burglary, includes the walls or gates of a town and churches.

(*k*) Haw. c. 39, s. 17.

(*l*) *Turner's Case*, East's P. C. 492.

(*m*) Hale, 556; Haw. c. 38, s. 1.

(*n*) *R.* v. *Lyon and Miller*, Leach, 221. East's P. C. 497; Haw. c. 38, s. 11. *Hallard's Case*, East's P. C. 498, where the former tenant had quitted the house, and the in-coming tenant had put all his goods into the house, and had frequently been there in the day-time, but neither he nor any part of his family had ever

(1) [In an indictment for burglary, the words "mansion house" sufficiently describe a dwelling-house. *Commonwealth* v. *Pennock*, 3 Serg. & Rawle, 199.]

Nor where the inhabitancy is casual, and for a particular purpose, as, where a workman sleeps in an unfinished house (*o*), or an agent is placed in the house to watch thieves or goods (*p*).

But where there has been an actual inhabitancy, by the owner or his servants sleeping in the house, a burglary may be committed in the absence of the owner and all his family, provided the house has not been abandoned, and there be an *intention to return* to the house (*q*). But in all such cases *the inquiry as to the intention to return is material, and should be distinctly proved. Animus revertendi. *279

Where the owner of the house, at the latter end of the summer quitted the house, which he had generally used for a summer residence, and took away great part of the furniture, and had not then come to any settled resolution whether he would return or not, but said that he was rather inclined totally to quit the house, and let it for the remainder of the term, and the house was broken and robbed the January following, the Court held, that under the circumstances the house could not be considered as his dwelling-house (*r*).

2dly. *Extent of the dwelling-house.*—The term dwelling-house comprehends all buildings within the curtilage or enclosure (*s*), all under the same range of building and roof, such as the buttery of a college (*t*); and it was formerly sufficient if the building adjoined the dwelling-house, and it appeared to the jury that it was occupied as parcel of the dwelling-house, although there were no common curtilage and enclosure, or internal communication (*u*), such as a barn, stable, cow-house, dairy-house or the like, or a back house eight or nine yards distant from the dwelling-house, and connected only by a pale extending between them (*x*). But now by the stat. 7 & 8 G. 4, c. 29, s. 13, no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other (A). Extent.

slept there; it was held by Buller, J. that no burglary could be committed there. The same point was decided by Grose, J. in another case. See East's P. C. 498.

(*o*) Where an executor puts servants into the house which belonged to him, as executor, it seems that burglary may be committed there. *R.* v. *Jones and Longman*, East's P. C. 499. If a servant live in a house of the master at a yearly rent, it is the house of the servant, though he has it by reason of the service. *R.* v. *Jervis*, 1 R. & M. 7.

(*p*) *Brown's Case*, East's P. C. 501. *Smith's Case*, East's P. C. 497; 1 Hale, 557. *Harris's Case*, Leach, 808; East's P. C. 498. *R.* v. *Davis*, East's P. C. 499. Where a servant with his family inhabited part of the house of business of a company, the whole being open to him, and he and his family were the only persons dwelling there, held that it might properly be described as his dwelling-house; and *semble*, it might also have been laid as the house of the company. *Witt's Case*, 1 R. & M. C. C. L. 248.

(*q*) 1 Hale, 550; 1 Haw. c. 38; East's P. C. 496; Summ. 82. *R.* v. *Murray and Harris*, East's P. C. 496; Fost. 77; J. Nicholls, the owner of the house at Westminster, took a journey into Cornwall, with intent to return, and sent his wife and family out of town, and left the key with a friend to look after the house; after he had been gone a month, the house was broken and robbed in the night-time; in a month afterwards he returned with his family and inhabited the house; and adjudged to be burglary, O. B. 10 Will. 3. In the case of *R.* v. *Kirkham and Ellison* (Lanc. Sp. Ass. 1817), Wood, B. held that the offence of stealing in a dwelling-house, under the stat. 12 Anne, had been committed, although the owner and his family had left the house six months before, having left the furniture, and intending to return.

(*r*) *Nutbrown's Cases*, Fost. 176; East's P. C. 496.

(*s*) 1 Hale, 558, 559; Haw. c. 38, s. 12; East's P. C. 492.

(*t*) *R.* v. *Maynard*, East's P. C. 501. (*u*) *Brown's Case*, East's P. C. 493.

(*x*) So held by all the Judges in 1665. See 1 Hale, 558, 559; 1 Haw. c. 38, s. 12; 3 Inst. 64, 65; 4 Bl. Comm. 225; Dalt. c. 151, s. 4; East's P. C. 492.

(A) (Burglary can only be committed in a dwelling-house, or such out buildings as are necessary to it as a dwelling. Therefore it is not burglary to break the door of a store situate within three feet of the dwelling, and inclosed in the same yard. *State* v. *Langford*, 1 Dev. 253. But burglary may be committed

In *Garland's Case* (*y*) the jury found specially that the prisoner in the night-time broke into an out-house in the possession of *G. S.*, and occupied by him with his dwelling-house, and separated therefrom by an open passage eight feet wide, and that the said out-house was not connected with the said dwelling-house by any fence inclosing both. And the Judges were of opinion that there should be judgment for the prisoner, for the jury should have found it parcel of the dwelling-house if it were so (*z*).

In *Eggington's Case* (*a*) it appeared that a manufactory was carried on
*280 *in the centre of a large pile of building, in the wings of which several persons lived, but they had no internal communication; that the roofs were connected, and the entrances to all were from the same common enclosure. And all the Judges held that the centre building could not be considered as parcel of any of the dwelling-houses, and could not be considered as under the same roof, although the roofs were connected.

Ownership. The *ownership* and situation of the dwelling-house must be proved as it is laid in the indictment, and in the proper county. Since the consideration of ownership is sometimes rendered complicated by the circumstances of the number of owners, and the nature of their interests, it will be desirable to class the cases as follow:

The first, including those cases where one person alone, by himself or his agents, occupies the whole dwelling-house or curtilage:

2dly. Where several persons severally occupy distinct parts of the same dwelling-house:

3dly. Where several persons jointly occupy the same dwelling-house.

1st. Where a person in his own right, by himself or his agents, occupies the dwelling-house.—In such case, the ownership must be laid in the *suo jure* occupant, and the inhabitancy by his family, his servants, or even his guests in his own absence, will support the allegation that the dwelling-house is his (*b*). And even where a feme covert lives apart from her husband, the dwelling-house must be laid as his (*c*). And this rule holds in the case of all persons who occupy as mere agents or servants of another. Apartments in the King's palaces, or in the houses of noblemen for their stewards or chief servants, must be laid as the mansion-houses of the King or noblemen, as has been long ago adjudged in the instances of Somerset-house and White-hall, and more recently in that of Chelsea Hospital; for in all such cases the occupation is in a representative capacity, and in point

(*y*) East's P. C. 493, Som. Lent. Ass. 1776.

(*z*) Ld. Hale seems to intimate, that if the prosecutor were to hold the out-house as tenant to one, and the dwelling-house as tenant to another, burglary could not be committed in the out-house, however proximate to the dwelling-house its situation might be (1 Hale, 559); but this doctrine is justly questioned by Mr. East in his P. C. 493. It is difficult to conceive how the title under which the legal occupant of an out-house holds it can affect the question whether it be or be not a parcel of the dwelling-house. It is very possible that a man may hold different parts of the same entire dwelling-house under different owners; and the principle, if well founded, would equally apply to such a case.

(*a*) Staff. Spring. Ass. 1801, East's P. C. 494.

(*b*) East's P. C. 500; Haw. c. 38, s. 13, 14; 1 Hale, 522, 557; Kel. 27.

(*c*) *Farr's Case*, Kel. 43.

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in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which on going into the country he had removed his furniture from his former residence in town, though neither the prosecutor nor his family had ever lodged in the house in which the crime was charged to have been committed, but merely visited it occasionally. *Com'th* v. *Brown*, 3 Rawle, 207. See also *State* v. *Mabney*, Charlton's Rep. 84. [In North Carolina, burglary may be committed in a house standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be open or enclosed. *The State* v. *Twitty*, 1 Hayw. 102. *The State* v. *Wilson*, ibid. 242.

In South Carolina, to break and enter by night into a store-house in which no one sleeps, which has no internal communication with the dwelling-house, and is not connected with it, except by a fence, is not burglary. *The State* v. *Ginns*, 1 Nott & M'Cord, 583.])

of law, is not the inhabitancy of the servant or agent, but of the lord or proprietor of the mansion (*d*).

2dly. Where several are severally possessed of distinct parts of the same dwelling-house:

Where a house once entire is actually converted into two by partitions, without internal communication, and the parts are inhabited by different persons, they are distinct dwelling-houses.

In *Jones's case*, a house was so divided for the purpose of accommodating two partners, each of whom paid his own separate household expenses, but the rent and taxes were paid jointly out of the partnership fund. A burglary having been committed in one part, it was laid in the indictment to be the dwelling-house of the partners jointly; and the Court held that it ought to have been laid in the separate occupant, and the jury were directed to acquit the prisoner of the capital part of the charge (*e*).

If the owner of an entire house inhabit part, and let part to a lodger, and there be a common entrance for both, the whole remains the dwelling-house of the owner, and must be so laid, although the part occupied by the lodger or lessee be broken (*f*). But if the owner inhabit part, and let another part *to a tenant, and the part so let be entirely separted from the rest of *281
the dwelling-house, then if the tenant inhabit the part so separated, and it be broken into, it must be laid to be his dwelling-house (*g*). And if in such case the tenant did not inhabit his part so separated, either by himself or by his servant or family, the breaking that part would not amount to a burglary (*h*).

Where *A.* let off a cellar from the house, to which there was no entrance but from the street, to *B.*, and also let a chamber to *B.*, which was part of the remainder of the house inhabited by *A.*, and the cellar was broken in the night-time, it was held that the ownership was to be laid in *A.* (*i*). And this seems to be the necessary consequence of two former rules considered in connection; for, in the first place, *B.*'s occupation of the cellar, together with the chamber which he inhabited, rendered the breaking burglarious as far as regarded the inhabitancy, or in other words, it was parcel of a dwelling-house; and according to another rule, the ownership of that dwelling-house was not in *B.* but in *A.*, who continued to occupy part.

A guest at an inn has no possession as distinct from that of the landlord, and therefore if his chamber be broken it must be laid to the dwelling-house of the landlord (*k*).

If a lodger at an inn open the latch of his own chamber-door with a felonious intent in the night-time, it is said that he does not commit a burglary (*l*); but that if he break the chamber-door of another lodger or guest, he is guilty of burglary (*m*).

Where a house is let to several lodgers or inmates, and the owner inhabits elsewhere, each separate apartment is the dwelling-house of the lodger by reason of his separate inhabitancy. So burglary may be committed by breaking into chambers in the inns of court, or in colleges, and

(*d*) East's P. C. 500. *Ann Hawkins's Case*, Fost. 38. *Pickett's Case*, East's P. C. 501.

(*e*) *R.* v. *Jones*, Leach, 607; East's P. C. 504. As to the rating houses separated or united as distinct houses, see *Tracy* v. *Talbot*, Salk. 532.

(*f*) Kel. 84; 4 Bl. Comm. 225. *Lee* v. *Gansel*, Cowp. 1; East's P. C. 505, 6. *Dictum* of Holt, C. J. *R.* v. *Carroll*, East's P. C. 586; Leach, 273.

(*g*) East's P. C. 507.

(*h*) Ibid.

(*i*) *Gibson's Case*, East's P. C. 508.

(*k*) 1 Hale, 554, 557. *R.* v. *Prosser*, East's P. C. 502; where it seems that a landlord cannot be guilty of burglary in breaking open the chamber of his guest. East's P. C. 502; Kel. 84. But see Dalton.

(*l*) 1 Hale, 554. *Qu.* Kel. 69.

(*m*) Ibid.

each must be laid to be the dwelling-house of him who inhabits it *suo jure* (*n*).

3dly. Where several are in joint occupation of the dwelling-house *suo jure*, the dwelling-house is that of all, and must be so laid.

Where the buttery of a college is burglariously broken, it must be laid to be the dwelling-house of the master, fellows and scholars (*o*).

In the night-time.

Thirdly, in the night-time.—That is where there is not sufficient *day-light* for discerning the face of a man (*p*). The light of the moon is immaterial (*q*). Both the breaking and entering must, it is said, be in the night (*r*), but it is not essential that both should be done on the same night.

Intent.

Fourthly, with a felonious intent.—This may be to commit a felony at common law, as a murder, larceny or rape (*s*), or a felony by statute; for such a felony possesses all the incidents of a felony at common law (*t*).

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*Evidence that larceny was committed is *primâ facie* evidence of an entry with a felonious intent (*u*). The felony, or the intent, must be proved as laid.

If an intent to steal be alleged, it is not sufficient to prove an intent to rescue goods seized by an excise officer (*x*). If the intent be alleged to kill, it is insufficient to prove an intent to maim (*y*). If an intent be laid to steal the goods of *A.* it is not sufficient to prove an intention to steal the goods of *B.* (*z*). If an actual larceny be alleged, it is not sufficient to prove a mere intention to steal (*a*).

Principal and accessory.

If a servant in conspiracy with another let him into the house, it is burglary in both (*b*). Where several are concerned, the entry of one is the entry of all; and although some stand on the outside to keep watch, all are equally guilty of burglary (*c*).

Evidence in case of larceny.

If a burglar in one county convey the goods into another county, where he is convicted of larceny, he may be ousted of his clergy by proof of the burglary in the former county (*d*).

BYE-LAW.

Debt for penalty on. See *Butchers' Company* v. *Money*, 1 H. B. 370. Willis, 384. Wentw. Ind., 501. Com. Dig. tit. Bye-Law.

CANCELLATION. *See* DEED.

CAPTION. *See* REPLEVIN.

CARRIERS.

Proof in action against.

In an action against carriers for negligence or other improper conduct, in respect of the carriage of goods or persons, whether the declaration be founded in *assumpsit* for breach of the defendant's undertaking, or in *tort* for breach of duty, it is necessary to prove, 1st, a *contract* express or

(*n*) *Trapshaw's Case*, Leach, 478; East's P. C. 506. (*o*) *R.* v. *Maynard*, East's P. C. 501.

(*p*) Haw. c. 38; 3 Inst. 63; Sav. 47; 1 Hale, 550; 9 Co. 66; Cro. Eliz. 583. Formerly it was held to be burglary if committed between sunset and sunrise. East's P. C. 509; Haw. c. 38.

(*q*) East's P. C. 509. (*r*) Cromp. 33; 8 Edw. 2. East's P. C. 509.

(*s*) East's P. C. 509; 1 Hale, 559, 561; Kel. 67; 1 Show. 53. As to a rape, see *R.* v. *Locost and Villers*, Kel. 30; 1 Hale, 560, 562. *Gray's Case*, Str. 481.

(*t*) *R.* v. *Dobbs*, East's P. C. 513; 1 Hale, 561. (*u*) Kel. 30; 1 Hale, 560.

(*x*) *R.* v. *Knight and Roffey*, East's P. C. 510. (*y*) East's P. C. 513.

(*z*) *R.* v. *Jenks*, Leach, 896; East's P. C. 514. (*a*) *R.* v. *Vandercomb and Abbott*, East's P. C. 514.

(*b*) *Cornwall's Case*, East's P. C. 486; 1 Str. 881; 1 Hale, 555; 1 Haw. C. 38; 10 St. Tr. 433. It has been said that the servant in such case is guilty of larceny only (Dalt. c. 151); but since they both act in the commission of the same crime, it seems that it must be burglary in both or neither, and the breaking and entry by one is the act of both.

(*c*) 1 Hale, 439, 555; 1 Haw. c. 38; Kel. 111, 161; Fost. 350, 353.

(*d*) See tit. Certificate.

implied; 2dly, the *delivery* of the goods; and 3dly, the defendant's *breach* of promise or duty.

1st. The action is founded either upon an express and special contract, or an implied one. Where an express contract exists, it must be relied upon and proved; for where there is an express contract, none can be implied (*e*). Proof of contract.

*The plaintiff usually relies upon an implied contract, proving that the defendant is a common carrier as alleged in the declaration, and that the goods in question were delivered to one acting as his agent at the office, warehouse, or other place of business, or to an agent conducting his coach or waggon in its usual course (*f*) (A) (1). *283 Implied contract.

Where there is but one contract for the carriage, and the carrier receives the whole consideration, he is liable for the loss of goods arising before the delivery, although it takes place whilst the goods are in the possession of another for the purpose of custody or of cartage, although the profits in respect of such custody or cartage are allowed to the latter by the carrier, and although that fact be known to the owner; for as between the owner and the carrier, such third person is merely the agent of the carrier (*g*).

(*e*) See tit. Assumpsit. [*Whiting* v. *Sullivan*, 7 Mass. Rep. 107.] Where the plaintiffs declared in the general form, and it appeared that the course of dealing was, that the plaintiffs paid an annual sum for the carriage of parcels between London and Dover, and that on the delivery of each parcel the defendants gave a written acknowledgement, stating their undertaking to carry and deliver the same safely, fire and robbery excepted, it was held to be a fatal variance. *Latham* v. *Ruttey*,[1] 2 B. & C. 20; 3 D. & R. 211; 3 Starkie's C. 143. As to the right of a vendor or vendee to maintain the action, see tit. Vendor. In the case of *Swain* v. *Shepherd*, cor. Parke, J., York Summ. Assizes, 1832, there was an order in writing for goods to be sent by a particular carrier; the goods being lost the vendor brought the action, and his agent swore that the course of dealing was that the vendee had a right to return all goods which did not suit him, and that the vendor paid for the carriage; Parke, J., held that it was a question for the jury whether the property passed by the delivery to the carrier.

(*f*) Where the only proof of the defendant's being a carrier from London was that he kept a booking-office, and that on a board at the door were painted the words "conveyances to all parts of the world," Lord Tenterden was of opinion that this was not sufficient, there being in London booking-offices not belonging to carriers. *Upstone* v. *Stark*,[2] 2 C. & P. 598. *Qu.* whether this was not sufficient evidence to go to a jury. See further, *Gilbert* v. *Dale*,[3] 5 Ad. & Ell. 543. Where a railroad Act enabled the company to carry passengers and goods, and contained also a clause requiring notice of action to be given in respect of anything done in pursuance of such Act, a loss having arisen by the carriages getting off the railroad, in consequence of cattle having strayed thereon, through the insufficiency of the fences made by the company, it was held, that having availed themselves of the permission given by the Act to carry goods, they thereby became common carriers, and liable as such, and that the action being brought against them as such, no notice of action was necessary. *Palmer* v. *Grand Junction Railway Company*, 4 Mee. & W. 747; 7 Dowl. 232.

(*g*) *Hyde and another* v. *The Mersey and Trent Navigation Company*, 5 T. R. 389. The defendants, carriers from *A.* to *B.*, charged and received for the amount of cartage from a warehouse at *B.*, where they usually unloaded, but which did not belong to them, to the consignee's house; and it was held, that they were responsible for the loss of the goods destroyed in that warehouse by an accidental fire, although they allowed (with the knowledge of the consignee) all the profits of the cartage to another person. But where the contract was to carry goods from *S.* to *M.*, to be forwarded from *M.* to *N.*; and according to the course of business such goods were, on their arrival at *M.*, immediately delivered to a carrier to be carried to *N.* on payment of the carriage to *M.*, and if no carrier were ready, were deposited in the carrier's warehouse at *M.*, for which no charge was made, till they could be delivered to a carrier to *N.*; and no carrier to *N.* being ready on the particular occasion, the goods were deposited in the warehouse, and destroyed by an accidental fire; it was held, that the defendants were not liable. *Garside* v. *Proprietor of Trent and Mersey Navigation*, 4 T. R. 582. So where *A. B. C. & D.* agreed to carry goods from London to France, and there to

(A) (The owners of a steamboat undertaking to tow a freight boat for hire, are not *quoad hoc*, common carriers. *Caton* v. *Bunney*, 13 Wend. 387. A person once a common carrier, ceases to be liable in that character if it be shown that he has abandoned the business. *Satterlee* v. *Groat*, 1 Wend. 272. The proprietors of steamboats are common carriers—but may exclude all persons of bad character or habits, or who refuse to obey the regulations for the government of the steamboat, and they may rightfully inquire into the habits or motives of passengers who offer themselves. *Jencks* v. *Coleman*, 2 Sumner, C. C. R. 221.)

(1) [Where *A.* agreed with *B.* a common carrier, for the carriage of goods, and *B.* without *A.'s* direction agreed for the carriage with *C.*, who without *A.'s* knowledge agreed with *D.* a third carrier; it was held that *A.* might maintain an action against *D.* for not delivering the goods, and that by bringing the action he affirmed the contract made with *D.* by *C.* and could not afterwards recover from *B.* *Sanderson* v. *Lamberton*, 6 Binney, 129.]

[1]Eng. Com. Law Reps. ix. 10. [2]*Id.* xii. 280. [3]*Id.* xxxi. 393.

Where *A.*, a part-owner in several coaches, made a contract with *B.* for the carriage of parcels which he was in the habit of sending to various places, it was held that this was binding on all the co-part-owners, as well those who became partners after the contract, as those who were partners before (*h*).

Express contract.

Where the defendant is not a common carrier, it is necessary to prove what the terms of the defendant's undertaking were. If, although he was not a carrier, he expressly undertook to carry the goods safely and securely, he will be liable for any damage which they sustain (*i*) (1).

If any receipt was given on the delivery of the goods, it should be produced (*k*); and if an entry was made in the defendant's book, notice should

*284 *be given to produce it, and also the way-bill, if the goods were sent by a coach. It should also be proved what orders were given at the time, as to the carriage of the goods, and place of destination, and what was the written direction upon them.

Where there is no privity of contract other than arises from ownership, it should appear from the evidence that the plaintiff was the owner of the goods, for if the vendor of goods deliver them to the carrier by order of the vendee, at whose risk they are sent, the vendor is the mere agent of the vendee, and the action should be brought by the latter (*l*); and if the action were brought by the vendor, he would be nonsuited. Where goods were shipped and described in the bill of lading to have been shipped by order and on account of the consignee, it was held that no property could be recognized but that specified in the bill of lading, and as that showed the property to be in the consignee, the consignor, who brought the action, was nonsuited (*m*). Where, on the other hand, the bill of lading stated that the

deposit them in the warehouse of *A.*; held that their liability as carriers ceased on the arrival of the goods in France, and that *A.* having paid the amount of a loss of the goods, after they had been deposited in the warehouse, could not recover contribution from *B. C. & D. In re Webb*,[1] 8 Taunt. 443.

(*h*) *Helsby* v. *Mears*,[2] 5 B. & C. 504.

(*i*) *Robinson* v. *Dunmore*, 2 B. & P. 416.

(*k*) *Latham* v. *Rutley*,[3] R. & M. 13. It does not require a stamp if the carriage does not exceed 20*l.*, although the goods be of greater value.

(*l*) *Dawes* v. *Peck*, 8 T. R. 330. *Dutton* v. *Solomonson*, 3 B. & P. 582. *Jacobs* v. *Nelson*, 3 Taunt. 423. *Davis* v. *James*, 5 Burr. 2680. *Moore* v. *Wilson*, 1 T. R. 659. Although the carrier is to be paid by the vendor. *King* v. *Meredith*, 2 Camp. 639. And see tit. GOODS SOLD AND DELIVERED. But where the consignor makes the contract with the carrier, and is to pay him, he ought to bring the action. *Davis* v. *James*, 5 Burr. 2680. Where the plaintiffs consigned goods according to an order received, and the party who ordered them turned out to be a swindler, who got possession of them by the carrier's negligence; it was held that they might maintain the action, as no property had passed to the consignee. *Duff* v. *Budd*,[4] 3 B. & B. 177. And see *Brooke* v. *Pickwick*,[5] 4 Bing. 218. *Middleton* v. *Fowler*, 1 Salk, 282. It is otherwise where the owner has undertaken to watch his property. *Brind* v. *Dale*, 2 M. & W. 775. Or where it appears that a consignor does not intend to trust a shipowner with the custody, as where he is in the habit of sending his own servant in charge of the goods, who has the exclusive management of them. *East India Company* v. *Pullen*, 2 Str. 690. Where goods are forwarded on approval, the consignor should sue. *Swain* v. *Shephard*, 1 Mo. & R. 223.

(*m*) *Brown* v. *Hodgson*, 2 Camp. 36. A special property is sufficient, as in the case of a laundress returning clothes. *Freeman* v. *Birch*,[6] 1 N. & M. 420. [See *Moore* v. *Sheredine*, 2 Har. & M'Hen. 453.]

(1) [In North Carolina, to render a man liable as a common carrier, he must make the carriage of goods his *constant* employment,—that by which he obtains his livelihood: One employed *pro hac vice*, though for a reward, is not liable as a common carrier. *Anon.* v. *Jackson*, 1 Hayw. 14. In South Carolina, whoever carries goods for hire makes himself a common carrier under the custom, and is chargeable with all faults arising from want of skill, care, or diligence. *M'Clures* v. *Hammond*, 1 Bay, 99. The practice of conveying for hire, in a stage-coach, parcels not belonging to passengers, constitutes the proprietors of the coach common carriers. *Dwight & al.* v. *Brewster & al.* 1 Pick. 50. One who receives and forwards goods, taking upon himself all the expenses of transportation, for which he receives a compensation from the owners of the goods, but who has no concern in the vessels by which they are forwarded, or interest in the freight, is not a common carrier. *Roberts* v. *Turner*, 12 Johns. 232.] {As to the liability in *Pennsylvania* of persons engaged in the transportation of goods upon the *Ohio* and *Mississippi* rivers. *Gordon et al.* v. *Little*, 8 Serg. & Rawle, 533.}

[1]Eng. Com. Law Reps. iv. 159. [2]*Id.* xi. 288. [3]*Id.* xxi. 371. [4]*Id.* vii. 399. [5]*Id.* xiii. 404. [6]*Id.* xxviii. 326.

goods were shipped by the plaintiffs (in England), to be delivered to *L. D.* in Surinam, and freight was to be paid in London, and the plaintiffs were in fact the agents of *L. D.*, who resided abroad, it was held that a sufficient privity of contract had been established (*n*).

An action for negligence of this nature must be brought against the principal, and not against an agent employed in the conduct of the master's business, although the loss has resulted from the negligence of the latter.

Where it appeared, in an action against the defendant as a common carrier, that he was the mere driver of the coach, and not the owner, and that he had before carried parcels for the plaintiff, and it did not appear that in this or any other instance any contract had been made for any reward to be paid for conveyance, it was held that the action should have been brought against the principal. The loss in this case resulted from the negligence of the master through the medium of the servant (*o*). It would have been otherwise if the servant had undertaken to carry for hire on his own account, although in fraud of his master (*p*). So where a parcel carried from Bristol to Bath was delivered by the mail-guard to a porter, who received a proportion of the porterage, the rest being paid to the proprietors *of the inn where the coach stopped, for booking, it was held that the porter being a mere servant was not liable for the loss (*q*) *285

Where two are jointly interested in a waggon, each is liable for the negligence of an agent in conducting it, although by a subordinate arrangement between themselves, each undertakes the conduct and management of the waggon by his own driver and his own horses, for specified distances (*r*). Parties.

Where the declaration is in *assumpsit*, the plaintiff must, as in other cases, prove a joint promise, as by proof that *all* the defendants were proprietors, or otherwise; and it is no ground of nonsuit that there are other partners or proprietors who have not been made defendants.

Where the action is laid in *tort*, there has been some difference of opinion whether, inasmuch as the action is virtually founded upon a contract either express or implied, a verdict may be given against one defendant, and in favour of another (*s*). But it is now settled, that where the action is founded on a misfeasance, a breach of common law duty, it is several in its nature, and maintainable against some only of those against whom the action is brought (*t*).

In a late case where the action was against eleven, as coach-owners, for negligence, in consequence of which the coach was overturned and the plaintiff injured, and there were two counts, both of which specified a contract to carry the plaintiff; and upon the trial the plaintiff proved the partnership of all but two, and had a verdict against them, the Court of King's Bench afterwards refused a motion for a new trial, or a nonsuit, observing, that the application was contrary to the justice of the case, and

(*n*) *Joseph* v. *Knox*, 3 Camp. 320.

(*o*) Per Ld. Ellenborough, *Williams* v. *Cranston*,[1] 2 Starkie's C. 82. But a stage-coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part. *Beauchamp* v. *Powley*, 1 Mo. & R. 38. [*Dwight et al.* v. *Brewster et al.* 1 Pick. 54.]

(*p*) *Beauchamp* v. *Powley*, 1 Mo. & R. 38.

(*q*) *Cavenagh* v. *Such*, 1 Price, 328. The coach proprietors in this case had protected themselves by a notice.

(*r*) *Waland* v. *Elkins*,[2] 1 Starkie's C. 272. As to their liability for goods supplied in such a case, see *Barton* v. *Hanson*, 2 Taunt. 49.

(*s*) On the one hand, see *Boson* v. *Sanford*, Salk. 440; 3 Lev. 258; Carth. 58; 3 Mod. 321. *Powell* v. *Layton*, 2 N. R. 365. *Max* v. *Roberts*, 2 N. R. 454. *Buddle* v. *Wilson*, 6 T. R. 369. On the other, *Govett* v. *Radnidge*, 3 East, 62. *Dickon* v. *Clifton*, 2 Wils. 319. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. *Weall* v. *King*, 12 East, 452. See tit. VARIANCE.

(*t*) *Bretherton* v. *Wood*,[3] 3 B. & B. 54; 9 Price, 408; see *Ansell* v. *Waterhouse*, 2 Ch. 1.

[1] Eng. Com. Law Reps. iii. 256. [2] *Id.* ii. 387. [3] *Id.* vii. 345.

that as the objection was on the record, the defendants might take it by means of a writ of error (*u*). The judgment was afterwards affirmed.

Variance. Where the declaration (in *assumpsit*) alleged that the defendant undertook to carry goods in consideration of certain hire and reward to be paid by the plaintiff, the consignor, and it appeared in evidence that the consignee of the goods had agreed with the plaintiffs to pay for the carriage, it was held to be no variance; for as between the carrier and the plaintiff the latter was liable (*x*).

Where the plaintiff declares in *assumpsit* in the common form, proof of notice to him of special terms of contract contained in a notice by the defendant, by which he has limited his responsibility, does not occasion a variance (*y*).

A mis-description of the *termini* in the contract of carriage is fatal (*z*).

*286 *2dly. Delivery.—It is sufficient to prove a delivery either to an agent

Proof of delivery. of the defendant's at the usual place of receipt or to an agent who has authority to receive them, driving the coach or waggon on the course of conveyance (*a*) (A).

If the master of a vessel receive goods at the quay or beach, or send his boat for them, the owners' liability commences with such receipt (*b*).

Of loss. 3dly. Proof of loss.—The plaintiff having proved the defendant's receipt of goods on a contract to deliver them safely at some other place, it seems to be incumbent on the defendant to prove the performance of his promise. To support an averment of loss, it is enough for the plaintiff to show that the goods in fact have not arrived (*c*).

A promise by a book-keeper to make compensation for the loss of a parcel is not binding upon the master, unless he be proved to be a general agent of the master for such purposes (*d*).

(*u*) *Wood* v. *Bretherton*, *cor.* Park, J., Lancaster Sum. Ass. 1820, 3 B. & B. 54.

(*x*) *Moore* v. *Wilson*, 1 T. R. 659. (*y*) *Clarke* v. *Gray*, 6 East, 564.

(*z*) *Tucker* v. *Cracklin*,[1] 2 Starkie's C. 385, *cor.* Abbott, J. But in *Woodward* v. *Booth*,[2] 7 B. & C. 301, where it was averred that the plaintiff delivered to the defendant a trunk to be put into a coach at Chester, in the county of Chester, to wit, at, &c., and safely carried to Shrewsbury, and the proof was, that the trunk was delivered to the defendant at the *city* of Chester (being a county of itself, but within the ambit of the county of Chester), it was held that the variance was not material. And see *Beckford* v. *Crutwell*, 1 Mo. & R. 187, where the *terminus a quo* being stated to be London, Ld. Tenterden held, that it was sufficient to prove that the coach went from a part of the town usually called London, as Piccadilly.

(*a*) *Gouger* v. *Jolly*,[3] Holt's C. 317; *Williams* v. *Cranston*,[4] 2 Starkie's C. 82. *Secus*, if such delivery were not in the ordinary course of business, but for the driver's own gain. *Butler* v. *Baring*,[5] 2 C. & P. 613. The merely leaving goods in the yard of an inn where the defendant and other carriers put up, is insufficient. *Sclway* v. *Holloway*, 1 Ld. Ray. 46. So, if goods be left at a wharf piled up among other goods without communication to any one there. *Buckmore* v. *Levi*, 3 Camp. 414. The delivery on board ship should be to the mate, or other accredited officer. *Cobham* v. *Downe*, 5 Esp. C. 43.

(*b*) *Fragano* v. *Long*,[6] 4 B. & C. 219; *Boys* v. *Pink*,[7] 8 C. & P. 361.

(*c*) *Tucker* v. *Cracklin*,[8] 2 Starkie's C. 385. The delivery must be according to the contract, if there be a special contract, or according to the course of trade, where such a known course exists; see *Golden* v. *Manning*, 2 Bl. 916; 3 Wils. 429; *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129. He is bound to deliver a parcel at the place to which it is directed. *Bodenham* v. *Bennett*, 4 Price, 31. Where a parcel was directed to '*J. Worthy*, *Exeter*,' and the carrier delivered it to one who told him he had been sent for it by a person whom he did not know, but who was in the street, it was held that he was guilty of gross negligence and liable, notwithstanding the notice of non-liability which had been given. *Birkett* v. *Willan*, 2 B. & A. 356. So where a parcel was delivered to the carrier, directed '*Mr. Parker*, *High-street*, *Oxford*,' and after the parcel had been refused by Mr. Parker, was delivered to a stranger calling himself Parker, whose residence was unknown to the carrier. *Duff* v. *Budd*,[9] 3 B. & B. 177. In general, carriers are bound to carry the goods to the residence of the consignee, wherever they are directed. *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129, *infra* note (*l*).

(*d*) *Olive* v. *Eames*,[10] 2 Starkie's C. 281.

(A) (When a common carrier on a canal is prevented by the ice from completing the voyage, he is bound on the opening of the navigation to fulfil his contract, but is discharged from further liability by the owner accepting them at the place of interruption, and is entitled to freight *pro rata*. *Parsons* v. *Hardy*, 14 Wend. 215.)

[1]Eng. Com. Law Reps. iii. 394. [2]*Id.* xiv. 48. [3]*Id.* iii. 119. [4]*Id.* iii. 256. [5]*Id.* xii. 287. [6]*Id.* x. 313. [7]*Id.* xxxiv. 429. [8]*Id.* iii. 394. [9]*Id.* vii. 399. [10]*Id.* iii. 304.

Where the plaintiff's shopman stated that he did not know of the delivery of the goods, and that they could not have been delivered without his knowledge, it was held to be sufficient (*e*).

The declarations of a coachman relating to the loss have been held to be admissible against the carrier (*f*).

Proof of the loss of goods by a carrier will not be sufficient to maintain a count in trover (*g*); but trover lies against a carrier who delivers the goods to a wrong person, although by mistake (*h*). And if a carrier refuse to deliver goods in his possession to the owner after demand, it will be evidence of a conversion (*i*) (1).

If the plaintiff declare on a loss in negligently carrying, &c., he cannot insist on a loss of the goods in the defendant's warehouse previous to the commencement of the carriage (*k*).

*By the rules of Hilary term, 4 Will. 4, the plea of not guilty operates as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received. *287 Proof in defence.

The delivery must be according to the contract, if there be a special contract, or according to the course of trade where a known course exists (*l*).

According to the well known rule of law, a carrier is liable for all losses and injuries to the goods, except such as arise from the act of God, or the king's enemies (*m*) (A); as by lightning, or by a hostile invading force.

(*e*) *Griffiths* v. *Lee*,[1] 1 C. & P. 110. (*f*) *Mayhew* v. *Nelson*,[2] 6 C. & P. 58.

(*g*) *Ross* v. *Johnson*, 5 Burr. 2825. [1 Vent. 223. *Owen* v. *Lewyn*.] *Kirkman* v. *Hargreaves*, Lanc. Sum. Ass. 1800, *cor.* Graham, B. cited in Selwyn's Ni. Pri. tit. CARRIERS.

(*h*) *Youle* v. *Harbottle*, Peake's C. 49. *Syeds* v. *Hay*, 4 T. R. 260. *Ross* v. *Johnson*, 5 Burr. 2825; *Stephenson* v. *Hart*, 4 Bing. 583. [*Devereux* v. *Barclay*, 2 B. & A. 702, S. P.]

(*i*) Salk. 655.

(*k*) *Roskell* v. *Waterhouse*,[3] 2 Starkie's C. 461. See also *In re Webb*,[4] 2 Moore, 500; 8 Taunt. 443.

(*l*) *Golden* v. *Manning*, 2 Bl. 916. 3 Wils. 429; *Stoer* v. *Crowley*, 1 M'Clel. & Y. 129. In the absence of any express contract or usage, a carrier is bound to deliver the goods at the house of the consignee. *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 389; *Duff* v. *Budd*,[5] 3 B. & B. 182. If it be according to the carrier's course of trade that he should deliver the goods at the consignee's residence, he is bound to do so. *Golden* v. *Manning*, 2 W. B. 916. Where goods are carried by sea, it seems to be sufficient that the captain should deposit them in a place of safety, and give notice to the consignee. *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 398. And see *Gatliffe* v. *Bourne*,[6] 4 Bing. N. C. 314.

(*m*) 1 T. R. 27; 5 T. R. 389; 2 B. & P. 416; 1 East, 604; 3 Esp. C. 127.

(1) [Where goods were put on board the defendant's vessel to be carried to A., and on arriving there, were by the defendant's direction, put on the wharf, it was held that this was not a delivery to the consignee, and that evidence of a usage to deliver goods in this manner was immaterial, but that the defendant was liable in trover for such part of the goods as was not actually delivered to the consignee. *Ostrander* v. *Brown & ul.* 15 Johns. 39.]

(A) (The ancient rule of the law of carriers, that a carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves. It seems that his responsibility should be measured by the law as applicable to the carrying of passengers. *Boyce* v. *Anderson*, 2 Peters, 155. The words "dangers of the river only excepted," used in a bill of lading, embrace such dangers as could not be guarded against by human skill or foresight. *Johnson* v. *Fryer*, 4 Yerger's R. 48; *Hunt* v. *Norris*, 6 Mart. 680. Nor will proof of a custom or usage of trade existing among the freighters and owners of boats on a navigable river, excuse them from the operation of the law governing common carriers. *Adam* v. *Hay*, 3 Mur. 149; *Rapp* v. *Palmer*, 3 Watts, 178. See also *Hart* v. *Allen*, 2 Watts, 114. The master of a vessel is liable upon the bill of lading signed by him, though the goods are damaged by the unskilfulness of the pilot. *Harvey* v. *Pike*, N. Car. Term R. 82. The owners of a vessel lying in the river T., undertook for hire to carry certain goods from U. to N. L. and deliver them there in safety. In the passage the river was obstructed by the ice, which formed during the night previous to sailing; the vessel became injured and leaky, by which the goods were spoiled—held, that the owners of the vessel were liable as common carriers for the damage sustained. *Richards* v. *Gilbert*, 5 Day. 415. See also,

[*Coit* v. *M'Mechen*, 6 Johns. 160. *Elliott* v. *Rossell*, 10 Johns. 1. *Murphy & al.* v. *Staton*, 3 Munf. 239, *acc.* Where the master of a vessel plying between New York and Albany received flour on board to be carried to New York and there sold in the usual course of business, for the ordinary freight, and having sold the flour at New York for cash, was robbed of the money; the owners of the vessel were held answer-

[1]Eng. Com. Law Reps. xi. 333. [2]*Id.* xxv. 281. [3]*Id.* iii. 432. [4]*Id.* iv. 159. [5]*Id.* vii. 399. [6]*Id.* xxxiii. 364.

He is liable, therefore, although it appear that the goods were destroyed in consequence of a casual fire which broke out in a booth at the distance of a hundred yards from the place where the defendant had deposited the goods to be ready for carriage, although the jury negative any negligence on the part of the defendant (*n*); so where the goods had been carried from *A.* to *B.*, where the plaintiff lived, and were accidentally burnt in a warehouse there before they had been carted to the plaintiff's house, the carriers were held to be liable, although the warehouse did not belong to them, and although they allowed the profits of cartage which they received to another person (*o*).

A carrier is liable, although the plaintiff sends a servant of his own with the defendant's cart to guard the goods, and although he is not a common carrier if he undertakes for the safety of the goods (*p*). So it is no defence that the damage was occasioned by the wrongful act or negligence of a third person (*q*). This is a rule of policy and convenience in order to make carriers more careful; for if a carrier were to be excused where the damage was occasioned by the misconduct or negligence of strangers, when he found that to be the case he would give himself no more trouble about the goods. He is liable, although the goods were taken by robbers, using force which he could not resist (*r*).

*288 Loss by the act of God.

*But it is a good defence to show that the goods were sunk in the vessel in which they were sent, in consequence of a sudden squall of wind, or that they were thrown overboard to lighten the vessel in order to save the passengers in a storm (*s*) (A).

(*n*) *Forward* v. *Pittard*, 1 T. R. 27. See also *Hyde* v. *The Trent Navigation Company*, 5 T. R. 389. So of a hoyman. *Dale* v. *Hall*, 1 Wils. 281. He continues liable until delivery to the party, and is not discharged by delivery at a wharf which he uses. *Wardell* v. *Mourillyan*, 2 Esp. C. 693. An exception of losses, by the perils of the sea, includes a loss from the vessels running foul of another. *Bullen* v. *Fisher*, 3 Esp. C. 67.

(*o*) *Hyde* v. *The Trent Navigation Company*, 5 T. R. 389. Declaration on a contract by the owners of a steam vessel to carry goods from Dublin to London, and to deliver the same at the port of London to the plaintiff or his assigns. A plea, that after the arrival of the vessel at London the defendant caused the goods to be deposited on a wharf, to remain there until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery had elapsed they were destroyed there by fire, was held to be bad. *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314.

(*p*) *Robinson* v. *Dunmore*, 2 B. & P. 416. So, though a man travel in a stage-coach, and take his portmanteau with him, although he has his eye upon the portmanteau, the carrier will be responsible if the portmanteau be lost. Per Chambre, J. 2 B. & P. 419.

(*q*) Per Ashurst, J. 3 Esp. C. 131. (*r*) Per Ld. Mansfield, C. J., and Buller, J. 3 Esp. C. 131.

(*s*) 1 Roll. Abr. 79. [*Smith* v. *Wright*, 1 Caine's Rep. 43.]

able for the money to the shippers of the flour. *Kemp* v. *Coughtry*, 11 Johns. 107. The master and owner of a ship are responsible for the goods they have undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to them. *Schieffelin* v. *Harvey*, 6 Johns. 170. *Watkinson* v. *Laughton*, 8 Johns. 213. *Foster & al.* v. *Essex Bank*, 17 Mass. Rep. 510, per Parker, C. J. See *Walter* v. *Brewer*, 11 Mass. Rep. 99. *Dean* v. *Swoop*, 2 Binney, 72. In *Richards* v. *Gilbert*, 5 Day, 415, it was held that where the owners of a vessel undertook to carry goods for hire from one port to another, and during the passage, the river became obstructed with ice, they were liable as common carriers for the damages sustained.

Where a vessel was beating up the *Hudson*, against a light and variable wind, and being near shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk; it was held that the carrier was excused, the accident not being imputable to his negligence. *Colt* v. *M'Mechen*, *ubi. sup.* If the vessel of a common carrier strike on a rock not generally known, and not known to the master, and if he conduct himself properly and no fault be imputable to him, he is not liable. *Williams* v. *Grant*, 1 Conn. Rep. 487. *Secus*, if he be ignorant of the navigation of the river, and have no pilot on board. *Ibid.*]

But if a carrier know of an obstruction before an injury is sustained by it, not known before, he must use increased caution and vigilance to avoid it, and if by any means he could remove it, he must do so or he will be in default. *Gardon & Waker* v. *Buchanan & Porterfield*, 5 Yerger's R. 71.]

(A) (In an action against a common carrier for a loss, it is not sufficient to entitle the plaintiff to recover, that there was a defect about the vessel, or want of skill in the carrier; but it must also appear that such

In order to prove a destruction or loss by the king's enemies, the goods having been taken by an armed force, it must be proved that they were taken by robbers or pirates (*t*).

There is no distinction between a land and water carrier (*u*) (A); and the rule extends to a wharfinger who conveys goods from a wharf to vessels in his own lighters (*x*).

Proof of notice.

The most common defence in actions of this nature is by proof that the defendant has limited his common-law responsibility, by notice to that effect to the plaintiff; for since, in point of law, it is competent to a carrier so to limit his liability, if he can show that the plaintiff had previous notice of the terms on which the defendant undertook to deal, there is an end of his common-law liability, and the notice of those terms constitutes a special and particular contract between the parties (*y*).

To establish a defence of this nature, the defendant must prove, in the first place, that the plaintiff had notice of the defendant's terms. The burthen of proof lies upon the defendant; it is not sufficient to show that he has used means to give notice, he must prove that such means have been effectual. The most usual evidence to show this is by proof that a notice was put up in the office, where goods are received and entered for the purpose of carriage, in so conspicuous a situation that it must (unless he were guilty of *wilful negligence*) have attracted the attention of the plaintiff or his agent, for a notice to the agent under such circumstances is notice to the plaintiff himself (*z*). This proof fails where the party who delivers the goods at the office cannot read (*a*); and where the goods were delivered by a porter who admitted that he had frequently been at the defendant's office, and that he had seen a painted board, but did not suppose that it contained anything material, and in fact had never read it, it was held,

(*t*) 1 T. R. 33. 2 Vent. 109.

(*u*) 3 Esp. C. 127. A water-carrier impliedly undertakes that the vessel shall be tight and fit for the purpose, and is answerable for damage arising from leakage, *Lyon* v. *Mills*, 5 East, 428. Even although notice be given that he will not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel. For a loss by the *personal* default of the carrier is not within the scope of such a notice. *Ib.*

(*x*) *Maving* v. *Todd*,[1] 1 Starkie's C. 72. *Rich* v. *Howland*, Cor. J. 330. So also are the proprietors of stage-coaches carrying goods, and owners and masters of vessels and hoymen. *Wordell* v. *Mourillyan*, 2 Esp. C. 693. *Morse* v. *Slue*, 2 Lev. 69. Goods made to order are delivered by the tradesman at a *booking-office* to be forwarded to the customer, without specifying any particular conveyance; *qu.* whether the consignor can maintain an action against the *office-keeper*, for the loss of the goods whilst under his charge. *Gilbert* v. *Dale*,[2] 5 Ad. & Ell. 543.

(*y*) Where one of several partners in a stage had agreed to carry the parcels of the plaintiff gratis, but the co-partners had no knowledge of the agreement, and the ordinary notice of non-responsibility was given, it was held that the defendants were not liable for the loss of a parcel, where the value exceeded 5*l.*, no notice of value having been given. *Bignold* v. *Waterhouse*, 1 M. & S. 255.

(*z*) Notice to the principal in London is sufficient, though the goods were delivered by his agent to the carrier in the country. *Mayhew* v. *Eames*,[3] 3 B. & C. 601.

(*a*) *Davis* v. *Willan*,[4] 2 Starkie's C. 279.

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defect or want of skill contributed, or may have contributed in some measure to occasion the loss. It is the consequence of negligence, not the abstract existence of it, for which a carrier is answerable. *Hart* v. *Allen et al.* 2 Watts, 114.)

(A) (A carrier is bound to have a vessel or carriage suitably provided for the undertaking, and failing to do so, shall not set up a providential calamity to protect himself from what has been occasioned by his own folly. *Hart* v. *Allen*, 2 Watts, 114.)

[*Bell* v. *Read & al.* 4 Binney, 127. If there be a want of seaworthiness, it renders the carrier liable, though the loss does not proceed from that cause; but if it appear that the loss may fairly be attributed to inevitable accident, the *onus probandi* of unseaworthiness lies on the owner of the goods. *Ibid.* Where, however, a vessel founders, the carrier must prove that she was seaworthy, before he can bring himself within the excuse of its being an inevitable accident. *Ibid.* S. P. *Murphy & al.* v. *Staton*, 3 Munf. 239. See *Putnam* v. *Wood*, 3 Mass. Rep. 481. *Wallis & al.* v. *Cook*, 10 Mass. Rep. 510.]

[1]Eng. Com. Law Reps. ii. 301. [2]*Id.* xxxi. 393. [3]*Id.* x. 195. [4]*Id.* iii. 346.

that although the board in fact contained a notice of limitation, the evidence of notice was insufficient, and that it was incumbent on a party who wished to rid himself of his common-law responsibility, to give effectual
*289 *notice (*b*). So, the proof failed where the notice at the office at Cheltenham stated the advantages of carriage by the particular waggon in large letters, and the notice of non-responsibility in small characters (*c*), although at the *termini* of the carrier's route, notice was given at the offices by means of a board inscribed with large letters. So also where the goods are not delivered at the office where the notice is exhibited, but are delivered into a cart sent round to receive goods (*d*), or at an intermediate stage between the two places, from each of which the carrier conveys goods to the other, if there be no notice at the place of delivery, although notices are suspended at the two *termini* (*e*).

By advertisement. Another usual mode of proof is by evidence that notice was given by means of printed cards, or by advertisements in the public newspapers; but this is insufficient, unless it be proved that the plaintiff has seen such cards, or read the newspapers (*f*). And even then it is a question of fact for the jury (*g*).

Where it appeared on cross-examination of one of the plaintiff's witnesses, that the plaintiff had been in the habit of sending parcels by that conveyance, and that two parcels had at different times been lost, and that the plaintiff had acquiesced in those losses, desiring the witness for the future to insure the parcels sent, it was held to be evidence of the plaintiff's knowledge that the defendants limited their responsibility (*h*).

In the next place, if the notice be brought home to the plaintiff, it must appear, that in point of law it is sufficient to protect the defendant in the particular instance, either *in toto*, or *pro tanto*. This of course is a matter of pure legal consideration for the decision of the Court (*i*) (A).

(*b*) *Kerr* v. *Willan*,[1] 2 Starkie's C. 53, *cor.* Ld. Ellenborough, C. J., and afterwards by the Court of K. B.
(*c*) *Butler* v. *Heane*, 2 Camp. 415. (*d*) *Clayton* v. *Hunt*, 3 Camp. 27.
(*e*) *Gouger* v. *Jolly*,[2] 1 Holt's C. 317.
(*f*) *Clayton* v. *Hunt*, 3 Camp. 27. As to proof of notice in an advertisement, see *Jenkins* v. *Blizard*,[3] 1 Starkie's C. 418. *Leeson* v. *Holt*,[4] 1 Starkie's C. 186. Evidence is requisite to identify *E. F.*, who gives the notice, with the defendant, and in the absence of such evidence, the allegation of negligence need not be proved. *Macklin* v. *Waterhouse*,[5] 5 Bing. 212 and 224, and 2 M. & P. 319. It is not sufficient to show that the notice was inserted in a paper which circulates in the place in which a party lives, without some proof that he took in the newspaper. *Proprietors of the Norwich Navigation* v. *Theobald*,[6] M. & M. 153. See *Boydell* v. *Drummond*, 11 East, 144, n. An advertisement in the *Gazette* is not *per se* receivable for this purpose, for although a party might be expected to look into the *Gazette* for notices of dissolution of partnership, he could not be expected to do so for notice by carriers. *Munn* v. *Baker*,[7] 2 Starkie's C. 255.
(*g*) *Rowley* v. *Horne*,[8] 3 Bingh. 2. It was proved that the plaintiff had taken in for three years, a weekly newspaper, in which the defendant's restrictive notice had been always advertised, and the jury, notwithstanding, found a verdict for the plaintiff, the Court of Common Pleas thought the verdict perfectly right, and that it could not be intended that a party read all the contents of any newspaper he might chance to take in. They said that carriers who wished, by means of notice, to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person, who brought a parcel for conveyance, a printed paper containing the notice; and a new trial was refused.
(*h*) *Roskell* v. *Waterhouse*, *cor.* Abbott, L. C. J.[9] 2 Starkie's C. 461. The defendant may show that when other parcels were delivered to him by the plaintiff, a ticket was delivered containing the notice. *Mayhew* v. *Eames*,[10] 3 B. & C. 603.
(*i*) Where the notice was, "that cash, plate, jewels, &c. will not be accounted for, if lost, of more than 5*l.* value, unless entered as such, and a penny insurance paid for each pound value:" the court held that the defendants were not liable to any extent, the parcel (containing light guineas) not having been entered and paid for as valuable (*Clay* v. *Willan*, 1 H. B. 298). Where the notice was, "that the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, &c. or

(A) (The term "baggage" used in the advertisement of a common carrier limiting his responsibility, is

[1]Eng. Com. Law Reps. iii. 241. [2]*Id.* iii. 119. [3]*Id.* ii. 451. [4]*Id.* ii. 349. [5]*Id.* xv. 421. [6]*Id.* xxii. 272. [7]*Id.* iii. 339. [8]*Id.* xi. 3. [9]*Id.* iii. 432. [10]*Id.* x. 195.

*Where a carrier affixes one notice to his counting-house, and delivers another to the party, he is bound by that which is the least beneficial to himself (*k*). So if he circulate hand-bills, limiting his liability, he cannot further restrain it by evidence of a notice upon a board in his office (*l*).

Where the plaintiff declared in *assumpsit* for not safely carrying, and the defendant proved a notice to the plaintiff, couched in the usual form, it was held that the plaintiff could not (as the declaration was framed, at all events,) insist that the loss was not protected by the notice; the goods having been stolen from the defendant's warehouse before the carriage of the goods commenced, the plaintiff ought for that purpose to have charged the defendants as warehousemen, and not as carriers (*m*).

any package whatsoever, if lost or damaged, above the value of 5*l*., unless insured and paid for at the time of delivery; it was held that the plaintiff having delivered goods of a greater value than 5*l*. without insuring or paying for them when delivered, could not recover even to the amount of 5*l*. *Nicholson* v. *Willan*, 5 East, 507. See also *Izett* v. *Mountain*, 4 East, 371; where the notice was nearly in the same terms.

In *Beck* v. *Evans*, 16 East, 244, where the proprietors of a public waggon gave notice that they would not be answerable for cash, bank-notes, writings, jewels, plate, watches, lace, silk hose, wool, muslins, china, glass, paintings, or any other goods of what nature or kind soever, above the value of 5*l*., if lost, stolen, or damaged; it was held that the notice did not extend to goods of large bulk and known quality, where the value must be obvious, such as a large cask of brandy. There was, however, in the above case, proof of gross negligence. Bayley, J. doubted whether the words of the contract extended to a case of gross negligence.

Where a carrier by water had given notice that he would not be answerable for *any damage*, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. on the damage, so as the whole did not exceed the value of the vessel and freight, it was held that he was answerable for a damage arising from a leakage, on the ground that it was a personal default in the carrier himself in not providing a sufficient vessel, and that the loss was not within the scope of the notice. *Lyon* v. *Mells*, 5 East, 428.

C., one of several coach-proprietors, in consideration of a favour conferred upon himself, undertook that he and his partners would carry the plaintiff's own family and private parcels free of expense, and they were so carried for two years, and the word "banking," which was usually written upon the parcels, was omitted on the suggestion of *C.*, and the word "carrier" written in its place, to which *C.* or his son usually added the word "*free;*" there was no evidence that the other proprietors (partners with *C.*) had notice of this agreement. The defendants had given notice that they would not be liable for any parcels of above the value of 5*l*., unless entered and paid for, &c. A parcel of the plaintiff's delivered under these circumstances, of considerable value, having been lost, it was held that the plaintiff was not entitled to recover against the partners. For even where the carrier under such circumstances undertakes to carry without reward, notice of value ought to be given, in order to point his attention to the particular goods; he does not dispense with notice in *toto*, but only with payment; also, because there was no notice to the other partners; and notice to one partner is not notice to all, unless the transaction be *bona fide*. There was no consideration between the plaintiff and the other partners, and therefore no contract. *Bignold* v. *Waterhouse*, 1 M. & S. 255. A notice from the proprietors of a coach going from *A.* to *B.* extends to the return-journey; but it must be proved that the party sending on the return-journey knew that the coach was one that started from it. *Rowley* v. *Horne*,[1] 5 Bing. 227, and 2 M. & P. 333.

(*k*) *Munn* v. *Baker*,[2] 2 Starkie's C. 255. (*l*) *Cobden* v. *Bolton*, 2 Camp. 108.

(*m*) *Roskell* v. *Waterhouse*,[3] 2 Starkie's C. 461.

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to be strictly applied to the "baggage of passengers;" parcels not belonging to passengers are not included under the meaning of that term. *Beckman et al.* v. *Shouse et al.*, 5 Rawle, 179. [*Dwight et al.* v. *Brewster et al.*, 1 Pick. 50.] And though a stage owner posted notices that he would not be accountable for baggage, unless the fare was paid, and the same entered on the way-bill, he was held liable for the loss of a trunk through negligence, though the fare was not paid; notice not having been brought home to the owner, nor to his servant who carried it to the stage office. *Bean* v. *Green*, 3 Fairf. 422. *Walker* v. *Skipwith*, Meigs Rep. 502. The advertisements of common carriers, in order to relieve them from liability, must be plain and explicit, and are to be strictly interpreted. *Barney* v. *Prentiss*, 4 Har. & I. 317. *Atwood* v. *The Reliance Trans. Co.*, 9 Watts, 87. See also *Camden & Amboy R. R.* v. *Burke*, 13 Wend. 611. *Halstead* v. *Nowlen*, 19 Wend. 234. *Cole* v. *Godwin*, *id.* 251. *Camden Transp. Co.* v. *Belknap*, 12 Wend. 354. *Clark* v. *Faxton*, *id.* 153. Large sums of money in the trunk of a passenger are not to be regarded as within the term baggage, in order to render the carrier liable for the loss. *Orange County Bank* v. *Brown*, 9 Wend. 85. See also *Malpica* v. *McKown*, 1 Louis. Rep. 254. If the baggage of a passenger is lost, through any defect in the vehicles or machinery used, although no negligence, or want of care, or skill can be charged, a notice in the usual form, "all baggage at the risk of the owners," though brought home to the knowledge of the passengers, will not in such case excuse the company. *Camden & Amboy R. R. Co.* v. *Burke*, 13 Wend. 611.)

[1]Eng. Com. Law Reps. xi. 3. [2]*Id.* iii. 339. [3]*Id.* iii. 432.

Proof in reply to notice.

A party, after notice that the carrier will not be responsible for goods of above a specified value, unless they be entered and paid for according to their value, cannot recover in respect of goods of greater value which have not been so entered and paid for; for the notice throws upon him the duty of communicating the value, and the concealment is a fraud on the carrier, both because it deprives him of the compensation for which he has a right to stipulate, and also because it precludes him from exercising a degree of vigilance and caution proportioned to the increased risk (*n*) (A). The *291 proof of *misfeasance in such case would of course be incumbent on the plaintiff (*o*). Notwithstanding this the carrier will still be liable for any actual misfeasance, or even for gross negligence, through which the goods are destroyed or lost (*p*) (B); for this is a substantive wrong, independently of the contract, in respect of which the plaintiff would be entitled to recover on a declaration stating, that having delivered the goods to the plaintiff for one purpose he had converted them to another. And where the concealment is not the cause of non-performance, the contract is not so wholly avoided but that the plaintiff in such a case may still sue on the contract, notwithstanding the fraud; and thus, proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice. The question of gross negligence is usually a question for the jury (*q*). The defendant was held to be liable, notwithstanding such notice, where his agent knew that a cask of brandy was leaking fast in the course of the carriage, and yet took no pains to stop it (*r*) (C).

(*n*) And in such a case the owner cannot recover even the amount of the value specified, as the minimum for which no extra price is payable. *Harris* v. *Packwood*, 3 Taunt. 264.

(*o*) *Marsh* v. *Horne*,[1] 4 B. & C. 322.

(*p*) Conditions of this nature were introduced for the purpose of protecting carriers against extraordinary events, and not to exempt them from due and ordinary care. Per Wood, B. 4 Price, 34; and see the cases cited, note (*r*).

(*q*) *Beck* v. *Evans*, 16 East, 244. *Duff* v. *Budd*,[2] 3 B. & B. 177; 6 Moore, 469. *Batson* v. *Donovan*,[3] 4 B. & A. 21.

(*r*) *Beck* v. *Evans*, 16 East, 244; *supra*, 295. In the case of *Batson* v. *Donovan*,[3] 4 B. & A. 21, the plaintiffs, after notice by the carrier, delivered a parcel of bank-notes to a large amount to the carrier, without informing him of its contents; the coach in which the parcel was conveyed, was left at midnight in the middle of a very large street with a porter, who was ordered to watch it; during this time the parcel was stolen. The court held that it had been properly left to the jury to say, first, whether the plaintiffs had been guilty of any unfair concealment of the value of the property; secondly, whether the carrier had been guilty of gross negligence. The jury found for the defendants, and the court of King's Bench on a special case refused a new trial. Best, J. dissentiente. So in *Duff* v. *Budd*,[2] 3 B. & B. 177, where a parcel directed to a particular place had been mis-delivered, it was left to the jury to say whether the defendants had been guilty of gross negligence; and it was held, that the usual carrier's notice, and a subsequent correspondence with the carrier, with a view to detect and punish the fraud by which he had been misled, did not amount to a bar or waver of the action. So also, where goods sent to *A.* and *B.* to be carried by a mail-coach, were taken out and left to be forwarded by a coach, of which *B.* alone was the proprietor, and were lost. *Garnett* v. *Willan*,[4] 5 B. & A. 53; for this was not a loss within the terms of the notice, but a consequence of a wrongful act, by which the defendants divested themselves of the charge which they had undertaken. So in *Sleat* v. *Fagg*,[5] 5 B. & A. 342, where a parcel of notes packed in brown paper was sent without any communication as to value, to be conveyed by the mail, but was forwarded by a light coach, from which it was stolen; where the jury found that the risk had been increased by altering the mode of conveyance contracted for. Note, that this case was distinguished from that of *Batson* v. *Donovan*,[3] 4 B. & A. 21; for it was not merely the case of a negligent performance of a contract, but a refusal to perform it altogether. It is to be observed, that the effect of giving notice to throw the obligation of giving information as to the value of the subject-matter upon the owner, whereas where no notice is given, the duty of making inquiry with a view to claim a remuneration adequate to the risk is incumbent on the carrier; and where the owner having such notice, conceals the value, he is not, in the absence of misfeasance or of gross negligence,

(A) A bailor is not bound to state the value of a package delivered to a carrier, unless inquiry is made —if on inquiry being made he answers falsely, or attempts fraudulently to conceal the value, the carrier it seems will not be liable for the value in case of loss without his default. *Phillips* v. *Earl*, 8 Pick. 182.

(B) (*Hastings* v. *Pepper*, 11 Pick. 41.)

(C) (*Warden* v. *Greer*, 6 Watts, 424.)

[1]Eng. Com. Law Reps. xi. 243. [2]*Id.* vii. 399. [3]*Id.* vi. 333. [4]*Id.* vii. 19. [5]*Id.* vii. 123.

*A parcel of bank-notes had been sent by a coach from Hereford to Brecon, and their value was known to the agent of the defendants; on the arrival of the coach at Brecon, the book-keeper, who usually unloaded the coach, received the way-bill in which the parcel was entered, but supposing that the coachman had the parcel about his person, did not ask him about it, or look for it in the coach, in the back seat of which the parcel had been deposited; it was left to the jury to say whether the defendants had not been guilty of gross negligence, the jury found for the plaintiffs, and the Court of Exchequer afterwards held, that in such a case a notice of non-liability, which the defendants had given, did not protect them (*s*). Proof in reply to notice, &c.

Where the defendant's agent, in the course of delivering out parcels in London, carried in a cart, left the cart in the street, and the plaintiff's parcel was stolen out in his absence, the jury found it be gross negligence in the defendant (*t*).

Where the owner of vessels navigating from *A.* to *C.* gave notice that he would not be answerable for losses, received goods at *A.* to be carried to *B.*, an intermediate place, and instead of delivering them at *B.*, took them on towards *C.*, and before their arrival at *C.* the goods were sunk, without any want of care in the master, it was held that the defendant, who ought to have delivered the goods at *B.*, was liable to the full amount (*u*).

Where a box was sent from London directed to '*J. W.*' Exeter, and was delivered at the coach-office in Exeter on a Sunday evening to a stranger, who said that he had been employed by a man in the street to call for *W.*'s box, it was held that there was sufficient evidence of gross negligence to go to a jury (*x*).

Evidence may also be given, in answer to proof of notice, to show that in the particular case the defendant waived or dispensed with the entry or payment according to value.

Where the defendant's agent was informed of the nature and value of the article, and told to charge what he pleased for it, it was held that the defendant was answerable for the loss, notwithstanding the notice in the usual form, on the ground that the payment on delivery had been dispensed with (*y*). But the usual notice will exempt the carrier from liability, notwithstanding the bulk of the package, unless the nature of the goods be *known* to the carrier, and is such that the value of the goods must necessa-

entitled to recover. See the observations of the Court in *Batson* v. *Donovan*,[1] 4 B. & A. 21. For the concealment of the real value in such a case is as much a fraud on the carrier as if the owner had used an active artifice for the purpose of deceit, as in *Gibbon* v. *Paynton*, 4 Burr. 2298; where a person knowing that the carrier had given notice that he would not be responsible for money, sent money hid in hay, in an old nail bag, without disclosing the contents. The general principle applies "*ex dolo malo non oritur actio.*" A carrier is in the situation of an insurer, and concealment of that which will enhance the risk discharges the insurer. See also *Harris* v. *Packwood*, 3 Taunt. 266. Where, Lawrence, J. observed, "that there was nothing unreasonable in a carrier requiring a greater sum when he carried goods of greater value, for he was to be paid not only for his labour in carrying, but for the risk he runs." See also *Clark* v. *Gray*, 6 East, 595; *Izett* v. *Mountain*, 4 East, 371. As the owners in such cases, by their misconduct, deprive the carriers of the compensation which they ought to receive, and withhold that information which would reasonably render a greater degree of caution necessary, they are not entitled to recover. But though in such cases a plaintiff is not entitled to recover for a mere breach of contract, still the defendant is liable for a misfeasance, where he acts in direct contravention of the contract; as in *Ellis* v. *Turner*, 8 T. R. 531; *Beck* v. *Evans*, 16 East, 244; *Birkett* v. *Willan*, 2 B. & A. 356; *Bodenham* v. *Bennett*, 4 Price, 31. It seems that in some cases the plaintiff may still declare in *assumpsit*, although he may declare on the misfeasance. See the observations of Holroyd, J. in *Sleat* v. *Fagg*,[2] 3 B. & A. 349.

(*s*) *Bodenham* v. *Bennett*, 4 Price, 31. See also *Tyly* v. *Morris*, Carth. 485. *Gibbon* v. *Paynton*, 4 Burr. 2298; 3 Taunt. 264.

(*t*) *Smith* v. *Horne*,[3] Holt's C. 643; 2 Moore, 18; 8 Taunt. 144.

(*u*) *Ellis* v. *Turner*, 8 T. R. 531.

(*x*) *Birkett* v. *Willan*, 2 B. & A. 356. The defendants had proved the usual notice.

(*y*) *Wilson* v. *Freeman*, 3 Camp. 527; and see Vent. 238.

[1]Eng. Com. Law Reps. vi. 333. [2]*Id.* vii. 19. [3]*Id.* iii. 210.

rily exceed the value specified in the notice (*z*) (1). And even where it was proved that the defendant's book-keeper knew the value of the parcel
*293 (containing *200 guineas), but nothing was said to him as to the contents or value, and the parcel was lost, it was held that *mere knowledge* of the value did not defeat the notice of non-liability (*a*).

Proof of fraud.

The defendant may also in this, as in other cases, set up fraud on the part of the plaintiff, as an answer to the action. Thus, where the plaintiff at *W.* apprehending, from the disturbed state of the country, that his corn was in danger of being seized by a mob, after having written to the defendant, a carrier by water, to send a private boat, stopped a boat by the defendant, passing from *R.* to *B.*, which was not one of the boats employed in carrying goods from *W.* to *B.*, and, without communicating the circumstances to the boatmen, prevailed upon them to take the goods on board, and the corn was seized by the rioters, and lost; it was held, principally on the ground of fraud apparent in the transaction, the circumstances and urgency of the case not having been communicated to the boatmen, that the plaintiff was not entitled to recover (*b*).

Where a plaintiff, a passenger by the defendant's coach, having received a parcel of value from a friend, to be booked and conveyed by the same coach, and instead of doing so, places it in his own bag, which is subsequently lost; being a wrong doer towards the defendants, the loss is imputable to his own misfeasance, and he cannot sue them for the value (*c*).

Where, on the delivery of a box to the carrier, he asked what was in it, and the owner answered "a book and tobacco," as in fact so there was, but there was also 100*l.* besides, and the carrier was robbed, Rolle, C. J., is reported to have held at *Nisi Prius*, that the defendant was answerable, for the other was not bound to tell him all the particulars in the box, and it was the business of the carrier to have made a special acceptance (*d*). But where a carrier received two bags of money sealed up, and was told that they contained 200*l.*, and a receipt was given, charging 10*s.* per cent. for carriage and risk, and the bags, of which the carrier was robbed, contained 400*l.*, it was held that the plaintiff could not recover more than 200*l.* (*e*); and it may be doubted whether the defendant would now be considered as liable even to that extent, and whether the whole contract would not be considered as avoided by the fraud (*f*) (A).

(*z*) *Down* v. *Fromont*, 4 Camp. 40; and see *Thorogood* v. *Marsh*,[1] 1 Gow. 105.

(*a*) *Levi* v. *Waterhouse*, 1 Price, 280. *Marsh* v. *Horne*,[2] 5 B. & C. 322. Neither will the fact, that the defendants have made allowance for damage on former occasions, without inquiring into the cause of such damage. *Evans* v. *Soule*, 2 M. & S. 1.

(*b*) *Edwards* v. *Sherratt*, 1 East, 604. It was left by Rooke, J. to the jury to say whether the goods were put on board according to the usual course of dealing with a common carrier; the Court held that the direction was proper, and that it was in effect a question whether the boatman acted under the proper authority of his employer when he took the corn on board.

(*c*) *Miles* v. *Cattle*,[3] 6 Bing. 743.

(*d*) 1 Bac. Ab. 556; and see *Mayhew* v. *Eames*, 1 C. & P. 550.

(*e*) B. N. P. 71; 1 Bac. Ab. 346.

(*f*) Where the plaintiff adopts a disguise for his parcel, calculated to prevent the carrier from taking any particular care of it, and so as not to give due information or protection to him, he cannot recover. *Bradley* v. *Waterhouse*,[4] 1 M. & M. 154.

(1) [The responsibility is the same, whether they are informed that a package contains money, or papers as valuable as money. *Dwight & al.* v. *Brewster & al.* 1 Pick. 50.]

(A) (Where a carrier is told that a packet containing money, which is delivered to him, is very valuable, though he is not informed that it contains money, there is no ground for imputation of fraud or concealment. *Allen* v. *Sewall*, 2 Wend. 327. And in an action against a common carrier by a consignee, for not delivering goods in good order, the defendant will not be permitted to contradict the bill of lading signed by him, unless it be to prove fraud or imposition practised on him. *Warden* v. *Greer*, 6 Watts, 424.)

[1]Eng. Com. Law Reps. v. 476. [2]*Id.* xi. 243. [3]*Id.* xix. 219. [4]*Id.* xiv. 326.

The defendant may also show in defence that the loss has resulted from the improper and negligent manner in which the goods have been packed or delivered by the plaintiff. Where a carrier gave a receipt for a dog, which was afterwards lost, it was held to be no defence that the dog had not been delivered in a state of security, there being no collar about his neck, but only a cord. Lord Ellenborough ruled, that after a complete delivery to the defendant, the property remained at his risk, and he was bound to use *proper means for securing it (*g*) (A). If the defendant insist that the contract was void for illegality, it lies on him to prove it; for illegality will not be presumed (*h*). Negligence. *294

The responsibility of carriers of goods is further limited by the provisions of the statute 11 G. 4, and 1 W. 4, c. 68, s. 1 (*i*).

(*g*) *Stuart* v. *Crawley*,[1] 2 Starkie's C. 323.

(*h*) *Sissons* v. *Dixon*,[2] 5 B. & C. 758; where the illegality insisted on was, that the goods had not been entered at the custom-house. But a carrier may show, in defence to an action of trover, that he delivered the goods to one who had a legal right to the custody of them; as that he delivered the clothes of a female minor, who had eloped, to her guardian. *Barker* v. *Taylor*,[3] 1 C. & P. 101. Where the parcel contained bank-notes, stamps, and a *letter*, it was held that the fact that the letter accompanied the stamps, was *prima facie* evidence that it related to them, so as to bring the case within the stat. 42 G. 3, c. 81, s. 6. *Bennett* v. *Clough*, 1 B. & A. 461.

(*i*) By that stat. no mail-contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of, or injury to, any article or articles, or property, of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description; trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, or Ireland respectively, or of any other bank in Great Britain or Ireland; orders, notes, or securities for payment of money, English or foreign; stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles; glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials; furs or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles, or property aforesaid, contained in such parcel or package, shall exceed the sum of 10*l.*, unless, at the time of the delivery thereof at the office, warehouse, or *receiving-house* of such mail-contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property, shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Section 2. When any parcel or package, containing any of the articles above specified, shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such common carrier, &c. to demand an increased rate of charge, to be notified by some notice affixed in legible characters in some public part of the office, &c. stating the increased rates of charges required to be paid as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons shall be bound by such notice, without further proof of knowledge.

Section 3. When the value shall have been so declared, and the increased rate of charge paid, or an engagement accepted for the same, the person receiving such increased rate of charge or accepting such agreement shall, if required, sign a receipt for such package or parcel, acknowledging the same to have been insured, such receipt not to be liable to any stamp-duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, such common carrier, &c. shall not be entitled to any benefit under this Act, but shall be liable as at common law, and to refund the increased rate of charge.

Section 4. From and after the 1st day of September then next, no public notice heretofore or hereafter made shall be deemed to limit or affect the liability at common law of any such common carriers as aforesaid, in respect of any goods to be carried by them, but that all such common carriers shall, after the said 1st day of September, be liable, as at common law, to answer for the loss of, or any injury to, any goods in respect whereof they may not be entitled to the benefit of this Act, any notice by them made contrary thereto or limiting such liability notwithstanding.

Section 5. For the purposes of this Act, every office, warehouse, or receiving-house appointed by such

(A) (A carrier is not justified by the inability or refusal of the consignee to receive the goods, to leave them exposed on the wharf, but it is his duty to secure them for the owner. *Ostrander* v. *Brown*, 15 Johns. R. 39. See also *Eagle* v. *White*, 6 Whart. 505. But if an injury happen to property in the hands of a bailee, the interference of the bailor to remedy the evil, will not release the bailee from liability for the consequence of his negligence. *Tod* v. *Figley*, 7 Watts, 542.

[1]Eng. Com. Law Reps. iii. 364. [2]*Id.* xii. 371. [3]*Id.* xi. 330.

Carriers of persons.

*In an action against a coach-owner for an injury sustained by a passenger, the plaintiff must prove, not only the usual engagement to carry him, by proof that he has taken his place, &c. (*k*), but must prove *negligence;* for coach-owners do not insure the persons of passengers against accidental injuries (*l*) (A). But upon general principles, the owners of mail and other

common carrier as aforesaid for receiving parcels shall be deemed the receiving-house, &c. of such common carrier; any one of such common carriers may be sued, and no action shall abate for want of joining any co-partner.

Section 6. No special contract between any such common carriers and other parties shall be affected by this Act.

Section 7. Where any parcel shall be delivered at any such office, and the value and contents declared as aforesaid, and increased rate of charges paid, and such parcel shall have been lost, the party entitled to recover damages in respect of such loss shall also be entitled to recover back such increased charges so paid as aforesaid.

Section 8. That nothing in this Act shall be deemed to protect such common carriers from liability for loss arising from the felonious acts of any servant, nor to protect any such servant from liability for loss occasioned by their own neglect.

Section 9. Such common carriers shall not be concluded as to the value of any such parcel by the value so declared as aforesaid, but shall be entitled to require from the party suing proof of the value, by ordinary legal evidence, and shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges.

Section 10. That in all actions brought against such common carriers for loss, &c., whether the value of such goods shall have been declared or not, the defendants may pay money into court, as in any other action.

The Act extends to all articles comprised within Section 1, although not within the terms of the preamble, viz. an article of great value in small compass. A looking-glass of above 10*l.* value was packed up and sent to be carried from the carrier's office in London to the house of S. near Lymington. A notice pursuant to the statute was fixed up in the office. The words "plate-glass," "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid. The parcel was conveyed from Lymington to the place of its ultimate destination on a brewer's truck, that being the usual mode in which parcels were conveyed in that part of the country. When the glass was unpacked it was found to be broken. It was held that the carrier was not liable for the damage occasioned by the breaking of the glass. *Owen* v. *Burnett*, 2 C. & M. 353; 4 Tyr. 133, S. C. The plaintiff sent a parcel, directed to one in London, to the postmaster of Bradford, to be forwarded to M. The postmaster received 2*d.* to book the parcel, and sent it by a mail-cart to the King's Arms inn at M. He was accustomed so to take in parcels for the mail-cart. The innkeeper at M. booked the parcel for London, charging 2*d.* as "booking" for his trouble, and also charging on the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail-coach, of which the defendants were proprietors, to London. Several coaches used to stop at the King's Arms; the mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-office was kept at the King's Arms. The parcel was lost, and it was held, first, that for the purpose of taking in the above parcel, the King's Arms was a receiving-house of the defendants, within the stat. 11 G. 4 & 1 W. 4, c. 68; secondly, that the plaintiff might properly sue the defendants on a contract to carry from M. to London. *Syms* v. *Chaplin*,[1] 5 Ad. & Ell. 634.

Value.—The notification as to the value must be express. *Boys* v. *Pinks*,[2] 8 C. & P. 361.

Shall have been declared.—A defence that no notice was affixed at the receiving-house pursuant to the statute, must be specially pleaded. *Syms* v. *Chaplin*,[1] 5 Ad. & Ell. 634.

On a plea that the property was not delivered at a receiving-house, but to the defendant's servant, and that the plaintiff did not at the time of delivery declare the value, &c., replication *de injuria*, and verdict for the plaintiff, it is no ground for a new trial that no notice was affixed. *Ibid.*

(*k*) See the observations, *supra*, as to the *contract.*

(*l*) *Aston* v. *Heaven*, 2 Esp. C. 533. *Christie* v. *Griggs*, 2 Camp. 79.

(A) (A carrier of passengers is bound to use the highest degree of care that a reasonable man would use. *Hall* v. *The Connecticut River Steamboat Co.*, 13 Conn. Rep. 319. The burden of proof is on the defendants to show that there was no negligence in every case where an injury results to passengers from an accident; the fact that the carriage was upset and the plaintiff's wife injured; or that while the carriage was driven at a moderate rate, on a plain good level road, and that in coming in contact with any other object, one of the wheels came off, whereby it was overturned, imply negligence. *Ware* v. *Gay*, 11 Pick. 106. *Stokes* v. *Saltonstall*, 13 Peters Rep. 181. The carriers are discharged from liability if the driver was a person of competent skill, and the accident was occasioned by no fault or want of skill on his part, but by physical disability arising from extreme and unusual cold, which rendered him incapable for the time to do his duty. *Stokes* v. *Saltonstall*, 13 Peters Rep. 181. *Camden and Amboy R. R. Co.* v. *Burke*, 13 Wend. 611. Where the plaintiff, a passenger in a steamboat from Hartford to New York, in an action against the owner for injuries sustained by him through the negligence of the master, having proved that on the arrival of the boat in the dock at New York, the chainbox used to keep the boat in trim was so insufficiently

[1]Eng. Com. Law Reps. xxxi. 403. [2]*Id.* xxxiv. 429.

coaches are liable for injuries occasioned by the negligence of their agents (*m*). The liability continues till the passengers are safely set down, though beyond the place of destination (*n*). The breaking down or overturning of a stage-coach is *primâ facie* evidence of negligence (*o*). Where the road was such as to require an extraordinary degree of caution on the *part of the passengers, a driver was held to have been guilty of negligence in not warning them of the full extent of the danger (*p*). Evidence that the coach at the time of the overturning was carrying a greater number of passengers than are allowed by the Act of Parliament (*q*), has been held to be conclusive to show that the accident arose from the overloading of the coach (*r*); on the other hand, if it appear that a coach is loaded with more passengers than its construction will bear, it is no excuse that the number did not exceed the statutory allowance (*s*). If the driver of a coach may adopt either of two courses, one of which is safe and the other hazardous, and he elects the latter, he is responsible for the mischief which ensues (*t*).

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If through the default of a coach-proprietor in neglecting to provide proper means of conveyance, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, and in consequence his leg be broken, the proprietor will be responsible in damages, although the coach was not actually overturned (*u*). It is no defence that the contract was for travelling on a Sunday (*x*). A party who pays his whole fare is entitled to take his seat at any stage of the journey (*y*); *secus*, if he pay a deposit only (*z*). A postmaster is not compellable to let a chaise,

(*m*) *White* v. *Boulton and others*, Peake's C. 81. *Brucker* v. *Fromont*, 6 T. R. 659; 2 Salk. 441. *Michael* v. *Allestree*, 2 Lev. 172.

(*n*) *Dudley* v. *Smith*, 1 Camp. 167.

(*o*) *Christie* v. *Griggs*, 2 Camp. 79, 345, note (*m*); see also *Dudley* v. *Smith*, 1 Camp. 167.

(*p*) *Christie* v. *Griggs*, 2 Camp. 79. As where the coach, before it reached its usual destination, had to pass under a low gateway, and it was scarcely practicable for a passenger on the roof of the coach to pass without injury, and the coachman merely informed the passenger that the passage was very *awkward*. See also *Dudley* v. *Smith*, 1 Camp. 167.

(*q*) 50 G. 3, c. 48, s. 2.

(*r*) *Israel* v. *Clarke*, 4 Esp. C. 259.

(*s*) *Ibid.*

(*t*) *Mayhew* v. *Boyce*,[1] 1 Starkie's C. 423.

(*u*) *Jones* v. *Boyce*,[2] Ibid. 493. In an action against a coach proprietor for negligence, it appeared that the coach travelled from the county of O. to the county of W., that the plaintiff became an outside passenger for hire, that there was luggage on the roof of the coach, and no iron railing between the luggage and the passengers, and that the plaintiff being seated with her back to the luggage, was by a sudden jolt thrown from the coach, and her leg was thereby broken in the county of O., where she remained some time to be cured, but before she was fully recovered she removed to the county of W., where further medical attendance became necessary, and expense was consequently incurred. The learned Judge directed the jury to find for the plaintiffs, if they were of opinion that the injury was occasioned by the negligence of the defendant. The jury found for the plaintiff, and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat. It was held that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendant; also, that the inconvenience suffered and expense incurred by the plaintiff in the county of W. *was material evidence of a matter in issue* arising there, within the meaning of the undertaking given by the plaintiff, in answer to motion to change the venue. *Curtis and Wife* v. *Drinkwater*,[3] 2 B. & Ad. 169.

(*x*) *Sandiman* v. *Breach*,[4] 7 B. & C. 96. Under the stat. 3 Car. 1, c. 1, and 29 Car. 2, c. 7. But the driver of a stage van is a common carrier, and subject to penalties for travelling on a Sunday. *P.* v. *Middleton*,[5] 3 B. & C. 164; 4 D. & R. 824.

(*y*) *Ker* v. *Mountain*, 1 Esp. C. 27.

(*z*) *Ibid.*

secured, that it rolled across the deck, and striking against the plaintiff threw him overboard, whereby one of his legs was broken, and his body bruised; offered further evidence to prove that after he was taken from the water, and while sitting upon the wharf, he applied to the master for some of his men to assist him into a carriage, who refused, saying that he had enough for his men to do on board; it was held, that such evidence was admissible; because such conduct of the master was part of the transaction in question; and also for the purpose of showing the damage sustained. *Hall* v. *The Connecticut River Steamboat Company*, 13 Conn. R. 319.

[1]Eng. Com. Law Reps. ii. 454. [2]*Id.* ii. 482. [3]*Id.* xxii. 51. [4]*Id.* xiv. 22. [5]*Id.* x. 41.

but if he do so, and the passenger take his seat, the postmaster is bound to proceed if the fare be tendered (*a*).

CASE, ACTION ON.

Effect of the new rules.

Previously to the new rules of pleading, the whole of the material allegations on the record were put in issue by the plea of not guilty. The new rules of H. T. 4 Will. 4, have in ordinary cases, made great alteration in this respect, and the proofs now requisite on the part, as well of the plaintiff as the defendant, are regulated by the form of pleading and the

*297 *issues taken. As the new rules affect only the mode of making the de-

New rules. fence, leaving the proof of material facts put in issue as before, and, indeed, still allow the plea of the general issue as before, where it is given by a particular statute (*b*), the proofs will be stated as before, subject to the observation, that their materiality must depend on the issue taken.

For the prooofs in particular actions of this class, see the different heads Carriers.—Criminal Conversation.—False Representation.—Disturbance.—Libel and Slander.—Lights.—Malicious Arrests and Prosecutions.—Negligence.—Nuisance.—Reversion.—Seduction.—Sheriff.—Trover.—Watercourse.—Way.

The proof of the different averments essential to support an action on the case in *tort*, and the necessity of the correspondence of such proofs with the allegations upon the record, are severally considered under the respective appropriate titles, and under the general head of Variance.

Parties.

Some points will now be considered which are particularly applicable to the present form of action.

Plaintiffs.

The action must in general be brought by the party whose person or property has sustained the injury complained of. Thus the vendor of goods cannot maintain an action for their loss against the carrier where the property has vested in the vendee by the delivery to the carrier on his behalf (*c*). So where *A.* chartered the whole of the defendant's ship, the defendant agreeing to receive a full cargo, and to deliver the same to *A.* or his assigns, and the plaintiff, to whose order the goods were consigned, brought an action against the defendant for negligence in stowing the goods, and it appeared that the plaintiff was the mere agent of *A.*, he was nonsuited (*d*).

If it appear that some of the plaintiffs are not entitled to support the action, it will be a ground of nonsuit; they must recover, if at all, in respect of a general joint damage, for the Courts will not take cognizance of separate and distinct injuries in one and the same action (*e*). The plaintiffs must therefore prove a joint cause of action, such as damage done to joint property (*f*); joint slander of the plaintiffs in their trade or business (*g*); and two persons may join, although their interests be several, if the injury complained of were a joint damage to both (*h*). Where the damage is laid as a joint damage to several plaintiffs, and appear in evidence to be a separate damage to some of them only, they must be nonsuited; as, where the declaration alleged a slander of the plaintiffs in their joint trade, and it

(*a*) *Massiter* v. *Cooper*, 4 Esp. C. 260.

(*b*) The intention to rely on the statute, under the general issue, must be notified by inserting the words "By statute" in the margin of the plea.

(*c*) *Supra*, tit. Carrier.

(*d*) *Moores* v. *Hopper*, 2 N. R. 411.

(*e*) 1 Saund. 291, *g.*; Bac. Ab. Action, [C.]; 2 Saund. 116, n. 2; 2 Wils. 423; 3 Lev. 362.

(*f*) If one tenant in common only be sued in trespass, trover or case, for anything concerning the land held in common, the defendant may plead the tenancy in common in abatement. 2 Saund. 291, *d.*

(*g*) 3 B. & P. 150; 2 East, 426.

(*h*) 2 Saund. 116, *a*; 3 Lev. 362.

appeared in evidence that the words were addressed personally to one only (*i*).

It is a general rule, that in actions of *tort* one defendant may be acquit- Defend-
ted and another found guilty, *torts* being several in their nature (*k*); where, ants.
however, the action is virtually founded upon a breach of contract, doubts
*have been entertained upon this point. In a late case in an action against *298
carriers, the Court of King's Bench refused a new trial, leaving the defend-
ant to take his objection, which was upon the record, by writ of error (*l*),
and the judgment was afterwards affirmed.

The allegation of the particular day on which an injury was committed Time.
is not material, and the plaintiff may prove it to have been committed on
any day before or after the day laid in the declaration, provided it be
before the commencement of the action (*m*) (1), whether the form of action
be trespass or case. But if the injury be continuous in its nature, or has
been repeated, it seems that the plaintiff, if there be but one count alleging
a continuance or repeated acts within a time specified, may either give in
evidence upon that count one act anterior to the first day specified in the
declaration, or any number within the limits assigned (*n*) (2). But if the
declaration contain several counts, he may give in evidence so many acts,
each anterior to the first day specified in each respective count (*o*).

Where in an action on a policy of insurance, the declaration alleged, that
after the making the policy the ship sailed, and it appeared in evidence
that she sailed before, the variance was held to be immaterial (*p*).

Where the injury is of a transitory nature, and the place is merely Place.
alleged by way of *venue*, a variance is immaterial; and, as will be seen in
actions for nuisances to real property, where there is a doubt whether the
place was introduced by way of *venue*, or of local description, it will be
ascribed to *venue* (*q*). Where however a precise local description is given
of such an injury, it must be proved as laid (*r*).

If the injury be the immediate result of force used by the plaintiff and Means and
not the mere remote consequence of his wrongful act, trespass is the proper manner.
form of action. The distinction between such injuries as are to be laid in
trespass, and consequential injuries, for which an action on the case is the
proper remedy, is frequently very nice. The general rule is, that if the
injury result immediately from force applied by the defendant, trespass is
the proper form of action (*s*), and it is immaterial whether the trespass be
wilful or not (*t*) (A).

(*i*) *Solomons and others* v. *Medex*,[1] 1 Starkie's C. 191. And see *Barnes* v. *Holloway*, 8 T. R. 150. *Hawkes* v. *Hawkey*, 8 East, 427. *Helly* v. *Hender*, 3 Bulst. 83.

(*k*) 1 Will. Saund. 291, *d.*, where the cases on the subject are collected.

(*l*) *Wood* v. *Bretherton*, K. B. Mich. 1820; vide tit. Carriers. And see 1 Will. Saund. 291, *d.*; and *supra*, 201, and the cases there referred to.

(*m*) 1 Will. Saund. 24, n. *Brook* v. *Bishop*, 7 Mod. 152; Ld. Raym. 823, 974, 976; 2 Salk. 639. *Hume* v. *Oldacre*,[2] 1 Starkie's C. 351.

(*n*) Ibid. (*o*) Ibid.

(*p*) *Peppin* v. *Solomons*, 5 T. R. 496. *Matthie* v. *Potts*, 1 B. & P. 23.

(*q*) *Supra*, 201. (*r*) See tit. Variance.—Venue.

(*s*) Per De Grey, C. J. in *Scott* v. *Shepherd*, 3 Wils. 403; 2 Bl. R. 892.

(*t*) Per Ld. Ellenborough, *Leame* v. *Bray*, 3 East, 599. For the decisions on this head, see Trespass.

(1) [See Yelv. 71, *note* Amer. ed.]

(2) [See *Pierce* v. *Pickens*, 16 Mass. Rep. 470.]

(A) (See *Gates* v. *Miles*, 3 Conn. R. 64. *Case et al.* v. *Mark*, 2 Ohio R. 170. *Johnson* v. *Castleman*, 2 Dana, 377. Where the defendant, through neglect and for want of due caution, but without a design to injure, discharged a loaded gun in a public place where many people were assembled; the contents of which gun struck the plaintiff's leg and wounded him severely; in consequence of which wound the plaintiff lost his leg, and incurred great expense in effecting his cure, besides being disabled from carrying on his business,

[1]Eng. Com. Law Reps. ii. 351. [2]*Id.* ii. 422.

Negligence of agent.

In actions for the negligence of an agent, it is a general rule that an allegation of negligence by the defendant is supported by proof of negligence in his agent, for the negligence of the latter is the negligence of the principal who employed him (*u*). A declaration alleging that the defendant so negligently drove his cart that the plaintiff's horse was killed, is supported by proof that the defendant's servant drove the cart and occasioned the injury (*x*). And it is a general rule in civil actions, and also in cases of indictments for treason and misdemeanors, and in some cases for felony,

*299 *that the act of the agent may be alleged to be the act of the principal who gave him directions (*y*).

Proof of agency.

Where in an action against *A.* for damage to the plaintiff's window, occasioned by the negligence of the defendant's servant in driving his waggon, it appeared that *A.* and *B.* were in partnership as carriers, and that by a private agreement *inter se* each undertook the conveyance of goods by his own waggons, horses and drivers, for specified distances, and that the damage in question had been effected within *B.*'s division, and by his waggon and driver, it was held that *A.* was liable, for since the waggon was to be drawn for his benefit, for all legal purposes the servant was his, although for inferior purposes, and, as between *A.* and *B.*, he was considered as the servant of *B.* (*z*).

Sums, &c.

A variance from sums and quantities will not be material, unless they constitute part of a contract, or other entire subject-matter. It is unnecessary to prove the precise sum as laid in support of an averment that so much was *due* for rent in an action to recover double the value of goods removed to prevent a distress (*a*).

In an action on the Post-horse Act, for letting and not accounting for divers, to wit, eight post-horses, proof of letting and not accounting for five, was held to support the declaration (*b*).

(*u*) *Supra*, tit. AGENT, 31. *Michael* v. *Allestree*, 2 Lev. 172; *supra*, 55. But the plaintiff may usually waive a trespass and bring case, *infra*, 212, note (*x*).

(*x*) *Brucker* v. *Fromont*, 6 T. R. 659. And see *Turberville* v. *Stamp*, 1 Ld. Raym. 264; Skinn. 681; Carth. 425; Salk. 13.

(*y*) *Supra*, tit. ACCESSORY.—AGENT.

(*z*) *Waland* v. *Elkins*,[1] 1 Starkie's C. 272.

(*a*) *Gwynnet* v. *Phillips*, 3 T. R. 646.

(*b*) *Radford* v. *M'Intosh*, 3 T. R. 632.

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an action on the case for consequential damages was held not to lie, but that the proper form of action was *trespass vi et armis*. *Taylor* v. *Rainbow*, 2 Hen. & Mun. 423. If an injury be inflicted on a child whilst in the service of its father, *trespass vi et armis* is the proper form of action; but if the child be hired to, and in the service of another, an action on the case is the proper remedy. *Wilt* v. *Vickers*, 8 Watts, 227. Where a house under lease is pulled down by a trespasser, case is the proper form of action for the injury done to the freehold. *Olt* v. *Grice*, 4 Devereux's Law Reps. 477. A husband may maintain an action on the case against the parent of his wife for inducing her to live separate from him, and in such action it is not necessary to prove malice. *Park* v. *Hopkins*, 2 Bailey, 408. [Mr. Angell, in his "Treatise on the Common Law, in relation to Water-courses," p. 76, 80—gives the following extract from the manuscript letters of Judge Gould of Connecticut:

"When the original act occasioning the injury was forcible, the remedy is in some cases trespass, in others trespass on the case. If the forcible act is immediately injurious, trespass is the proper action; if, on the contrary, the injury for which redress is sought, is the remote or consequential effect of the forcible act, the remedy is trespass on the case. As if *A.* throws a log across a highway, and *B.* injures himself by falling over it, here the injury to *B.* is consequential, and the remedy is trespass on the case.

"The difficulty is in applying the last rule, and in distinguishing what is the *immediate* and what the *consequential* effect of any forcible act. The injury to be immediate within the rule, need not be the instantaneous effect of the forcible act. When it is instantaneous, there is no difficulty in the application.

"Injuries, which are not the instantaneous effect of some forcible act, are in some cases regarded as immediate, in others consequential.

"1. When the immediate or proximate cause of the injury produced is but a continuation of the original force, the effect is immediate.

"2. On the other hand, when the original force ceases before the injury or damage commences, such injury or damage is consequential, and the author of it is liable in trespass on the case only."] {See also Mr. *Day's* note to *Huggett* v. *Montgomery*, 2 New. Rep. 447.}

[1] Eng. Com. Law Reps. ii. 387.

Under a count for a total loss it is sufficient to prove an average loss (*c*).

In covenant, evidence of part of the breach will enable the plaintiff to recover *pro tanto*. Where the plaintiff alleged, by way of breach, that the defendant had pulled down the whole house, it was held that he was entitled to recover damages for pulling down half the house (*d*). Damages.

It is always essential to prove the allegation that the particular damage alleged was the immediate and natural result of the wrongful act of the defendant stated in the declaration. Thus in an action for slander, by means of which the plaintiff lost his situation as a journeyman to a third person, it is not sufficient to prove, that in consequence of the wrongful act of the defendant, the master dismissed the plaintiff from his employment before the end of the term for which he had contracted with him, for the dismissal was not the legal and natural consequence of the words, but the mere wrongful act of the master (*e*).

No evidence can in general be given of damage which is not specially alleged in the declaration. But where special damage is laid, the plaintiff may frequently recover in respect of that damage in this form of action, where he could not have recovered for it in trover. As, where the plaintiff alleged that the defendant wrongfully had detained the tools used by him in his trade, for the space of two months, whereby he had lost the benefit of his trade, it was held that a special action on the case was the proper form of action, for the damages being special, the action ought to be special (*f*) (A).

It is sufficient, in many instances, to give presumptive evidence of the loss sustained; as, in an action for firing guns so near the plaintiff's decoy-pond, *that it causes the birds to take flight (*g*); or prevents the wild ducks from coming there (*h*); or for hindering horses from being brought to the plaintiff's market, in consequence of which he lost the toll payable upon the sale (*i*). So the law will presume some damage where the defendant has been guilty of a breach of legal duty to the plaintiff (*k*). As where the sheriff has not a prisoner in custody on the return of the writ, although the plaintiff can prove no damage (*l*). The variance from the amount of the damages laid in the declaration is immaterial. *300

As this action is founded on the plaintiff's title in justice and equity to receive a compensation in damages, the defendant may under the general issue, except in some instances depending on peculiar circumstances, give in evidence any facts or circumstances which in equity and conscience are Proof in bar.

(*c*) *Nicholson* v. *Croft*, Burr. 1188. (*d*) Burr. 1907. Bl. 200.

(*e*) *Vicars* v. *Wilcocks*, 8 East, 1. See also *Ashley* v. *Harrison*, Peake's C. 194; 1 Esp. C. 48; *Taylor* v. *Neri*, 1 Esp. C. 386; where it was held that a manager of a theatre could not sustain an action for beating a performer, *per quod* he was prevented from performing.

(*f*) *Kettle* v. *Hunt*, B. N. P. 78.

(*g*) *Carrington* v. *Taylor*, 11 East, 571. The defendant had before fired at a greater distance and brought out some of the birds, and though he did not fire into the decoy pond, it was held to be evidence of a wilful disturbance of, and damage to the decoy. Ibid.

(*h*) *Keble* v. *Hickringill*, 11 Mod. 73, 130. So an action lies for firing a cannon at negroes, and thereby preventing them from trading with the plaintiff; *Tarleton* v. *M'Gawley*, Peake's C. 205; and it is no defence that the plaintiff had not paid duty to the king of the country for a license to trade. Ibid.

(*i*) Per Holt, C. J. Ibid. (*k*) *Barker* v. *Green*,[1] 2 Bingh. 317.

(*l*) It may, perhaps, be more properly stated, that the breach of legal duty is in itself a damage in law sufficient to support the action. See *Pindar* v. *Wadsworth*, 2 East, 154; and *infra*, tit. DISTURBANCE.—DAMAGE.

(A) (In assessing the damages in actions for injuries to personal property, the jury are not restricted to the pecuniary loss of the plaintiff, but may take into view the circumstances of aggravation attending the transaction alleged and proved. And it makes no difference, in this respect, whether the form of the action is trespass or case. *Merrils* v. *The Tariff Manufacturing Company*, 10 Connecticut Reps. 384.)

[1]Eng. Com. Law Reps. ix. 419.

sufficient to bar the plaintiff's claim (*m*). The excepted defences are, that of a justification, in an action for slander or libel, of the truth of the words; this rests on peculiar grounds; a special plea is necessary in order to apprize the plaintiff that evidence will be adduced to prove the truth of the charge of which he complains. So, perhaps, where the defendant had published a true account of a judicial proceeding. So again where the defence is founded upon the statute of limitations. The stat. 8 & 9 Will. 3, c. 27, s. 6, enacts, that in an action of escape against the keeper of any prison, no retaking on fresh pursuit shall be admitted in evidence under the general issue, or without a special plea verified by affidavit.

Evidence in defence.

In an action for beating the plaintiff's horse, *per quod* he was deprived the use of it, the defendant was admitted to prove that the horse and cart of the plaintiff were before the defendant's door, and hindered him from coming to load, wherefore he whipped the horse in order to remove it (*n*). So in an action for obstructing the plaintiff's lights, it was held that the defendant might, under the general issue, prove that he had built upon an ancient foundation according to the custom of the city of London (*o*). So a release is evidence (*p*). So in an action for the seduction of a servant, evidence that the plaintiff had recovered a penalty against the servant, is evidence in bar of the action under the same plea (*q*). The defendant may, under the general issue, give in evidence a verdict and judgment in a former action as to the same subject-matter between the same parties; but if he mean to rely on it as an *estoppel* he should plead it; if he merely give it in evidence it will not be conclusive (*r*) (1).

It is an answer to the action to show that the profits, of which the plaintiff complains he has been deprived, were to be derived through the medium of
*301 *an illegal transaction (*s*), or that the thing destroyed was a nuisance (*t*). It seems to be no objection that trespass might have been sustained, for the plaintiff may waive the trespass, and rely on the consequential injury (*u*).

Rules H.T. 4 W. 4.

By the new rules of Hil. T. 4 W. 4:—1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.:* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plain-

(*m*) Per Ld. Mansfield, Burr. 1353. [Yelv. 174, note (*b*).]
(*n*) *Slater* v. *Swann*, Str. 872. (*o*) *Anon.* Com. 273.
(*p*) Burr. 1353.
(*q*) *Bird* v. *Randall*, Burr. 1345. P. C. Bl. 373, 387. But *qu.* whether this ought not to have been pleaded, *vide supra*, Vol. I. Ind. tit. JUDGMENT, and Stra. 701.
(*r*) *Vooght* v. *Winch*, 2 B. & A. 662, Ind. tit. JUDGMENT.
(*s*) But Ld. Kenyon held that the plaintiff might recover against the defendant for preventing him from carrying on a foreign trade, although he had not conformed to the law of the country. *Tarleton* v. *M'Gawley*, Peake's C. 205.
(*t*) *Hannam* v. *Mockett*,[1] 2 B. & C. 934; where the action was brought for disturbing plaintiff's rookery. See *Du Bost* v. *Beresford*, 1 Camp, 511. *Keeble* v. *Hickeringill*, 11 East, 574.
(*u*) Thus where a distress is made after tender of the rent, the plaintiff may waive the trespass and bring case. *Branscomb* v. *Bridges*,[2] 1 B. & C. 145; 3 Starkie's C. 171; and in general the plaintiff it seems may waive a trespass committed in taking goods, and bring trover. See *Moreton* v. *Harden*,[3] 4 B. & C. 223.

(1) [*Stafford et al.* v. *Clark*, 2 Bingh. Rep. 377. See particularly the opinion of Gaselee, J. page 382.]

[1]Eng. Com. Law Reps. ix. 280. [2]*Id.* viii. 43. [3]*Id.* x. 316.

tiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession or avoidance shall be pleaded specially, as in actions of assumpsit.

CERTIFICATE.

For PARISH CERTIFICATE, *vide* INDEX.

Conviction of felony.

OF a *Conviction of Felony.* By the stat. 3 & 4 W. & M. c. 9, s. 7, a transcript certified by the clerk of the crown, peace, or assizes, of the conviction of a man who has the benefit of clergy, or of a woman who has the benefit of the statute, containing the effect and tenor of the indictment and conviction, to the Judges and justices in any other county where such man or woman shall be indicted, on being produced in court, shall be evidence of the fact of admission to the benefit of clergy or of the statute. Provisions nearly similar are made by the stat. 15 G. 2, c. 28, s. 9, in case of a conviction for uttering counterfeit coin (*x*).

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Certificate of conviction in case of felony.

*By the stat. 6 G. 1, c. 23, s. 6, a transcript of the indictment, conviction, and order for transportation of a felon, certified by a clerk of assize or of the peace, is evidence, under an indictment against a felon ordered to be transported, for being at large before the expiration of his term.

By the stat. 7 & 8 G. 4, c. 28, s. 11, in an indictment for any felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of 6*s.* 8*d.*, and no more, shall be demanded or taken,) shall, upon proof of the identity (*y*) of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same.

So in some other cases, which will be noticed in their proper places, certificates by authorized officers are admissible in evidence; so also are certi-

(*x*) See tit. COIN.

(*y*) In order to prove a former conviction it is sufficient to prove that the prisoner was the party who underwent the sentence, in the certificate of the clerk of the peace; it is not necessary to call a witness who was present at the trial. *R.* v. *Crofts*, 9 C. & P. 220.

ficates, in some instances, by public notaries (*z*) (1). In other instances, where the certificate is not made by an accredited agent of the law, to whom authority is delegated for the purpose, such as a chirographer (*a*), the general rule is, that his statement or certificate of a fact is inadmissible (*b*) (2). The certificate of a British vice-consul abroad is not evidence to prove any fact, even such as the amount of a sale, although he is by the law of the country where he resides, constituted the general agent for absent owners of goods, and was obliged to make the sale in question (*c*) (3). The certificate of the Secretary at War, relating to the office of a sergeant in the army, has, it seems, been admitted in evidence (*d*); but this decision does not appear to be founded in principle (4).

Certificate in the nature of an adjudication.

In general, where the certificate is in the nature of an adjudication by a Court of competent jurisdiction, it is receivable in evidence, when properly authenticated, of the fact itself. As for instance, a certificate by commissioners appointed by a statute to inquire into and state the debts of the army (*e*); or a record by a magistrate of a forcible entry, and detainer (*f*).

The certificate of a Bishop in a case of bastardy or marriage, when entered of record, is in general conclusive upon the fact (*g*); but this is a regular legal adjudication upon the fact by a competent tribunal. It has in one instance, it seems, been held, that a certificate under the seal of a minister resident abroad, that a particular marriage was solemnized by him (*h*), was admissible; but this was when the rules of evidence were in
*303 a *crude and unsettled state (*i*). Even the King himself, it has been held,

(*z*) See Vol. I. Index, tit. CERTIFICATE. (*a*) See BILLS OF EXCHANGE.
(*b*) Vide Index, tit. CERTIFICATE.
(*c*) *Waldron* v. *Coombe*, 3 Taunt. 162. *Roberts* v. *Eddington*, 4 Esp. C. 88. *R.* v. *Vyse*, Forrest, 35. See further on the subject of certificates, *Omichund* v. *Barker*, Willes, 550; I Blacks. 29.
(*d*) *Lloyd* v. *Woodall*, 1 Bl. R. 29. (*e*) Str. 481; *supra*, Vol. 1. Index, tit. JUDGMENT.
(*f*) See the stat. 15 Rich. 2, c. 2; 8 Hen. 6, c. 9, s. 2; Burn's J. tit. *Forcible Entry and Detainer*. 2 Rol. R. 39. Dalt. c. 44.
(*g*) See tit. BASTARDY, *supra;* and tit. MARRIAGE, *infra.*
(*h*) *Alsop* v. *Bowtrell*, Cro. J. 541.
(*i*) See Willes's R. 549, where the decision is questioned.

(1) [The mere certificate of a notary, that a release was acknowledged by the party to be his act and deed, is not evidence in Virginia. *Kidd* v. *Alexander*, 1 Randolph, 456. In Massachusetts, such a certificate of a justice of the peace, made on a deed, is constantly received in evidence, without further proof. {But in *Pennsylvania* a certificate of a notary in a foreign country of the proof before him, by two witnesses, of a power of attorney for the sale of lands in that state, is not sufficient under the Act of Assembly of 1705. *Griffith* v. *Black*, 10 Serg. & Rawle, 160.}

A notarial certificate is not evidence that a person was preparing to leave the country. *Foster* v. *Davis*, 1 Littell's Rep. 71.]

{In *Pennsylvania*, by the act of 2d Jan. 1815, (Purd. Dig. 603,) the "official acts, protests, and attestations of all notaries public, acting under the authority of that commonwealth, certified according to law, under their respective hands and seals of office, may be read and received in evidence of the facts therein certified, in all suits depending; provided that any party may be permitted to contradict, by other evidence, any such certificate." Under this act it has been decided, that in a suit against the indorser of a promissory note, the defendant may call the notary to explain the protest, and even, it seems, to contradict it. *Craig* v. *Shallcross*, 10 Serg. & Rawle, 277.}

(2) [A certificate of a clerk in chancery in Holland, in return of a commission, stating that a list of names was signed by "the late directors of the Spiel house," in his presence, was ruled to be inadmissible, the testimony not having been taken on oath, and the report not being official. *Jones* v. *Ross*, 2 Dallas, 143. A certificate of the Collector-General of the customs at Havanna, under his seal of office, stating that a cargo insured was decreed by the Intendant to be sold, is not good evidence—as it relates to the transactions of another tribunal, which are presumed to be in writing. *Wood* v. *Pleasants*, Circuit Court, April, 1813, Wharton's Digest, 231.]

(3) [See as to admissibility of certificates of land officers, &c. in Pennsylvania, and other states—*Cluggage* v. *Swan*, 4 Binney, 150. *Lessee of Brown* v. *Galloway*, 1 Peters' Rep. 291. *Morris's Lessee* v. *Vanderen*, 1 Dallas, 64. *Garwood* v. *Dennis*, 4 Binney, 314. *Penn's Lessee* v. *Hartman*, 2 Dallas, 230. *Lessee of Todd* v. *Ockerman & al.* 1 Yeates, 295. *Master's Lessee* v. *Shute*, 2 Dallas, 81. *Neilson* v. *Mott*, 2 Binney, 301. *Thornton* v. *Edwards*, 1 Har. & M'Hen. 158. *Seward* v. *Hicks*, ibid. 22. *Ayres* v. *Stewart*, 1 Overton's Rep. 221. *Governor* v. *Jeffreys*, 1 Hawks. 207. *Rochell* v. *Holmes*, 2 Bay, 487.]

(4) [See *Wickliffe* v. *Hill*, 3 Littell's Rep. 330.]

cannot give evidence in a cause by letters under his sign manual (*k*) (1).

Where a parish has pleaded guilty to an indictment for not repairing a highway, a certificate, signed by two magistrates, is received as evidence by the Court, to advise them to discharge the defendants; and the practice is of ancient date (*l*). It does not, however, appear, that such certificates have been used as evidence before a jury. So the Courts, in some instances, receive certificates from other Courts as to the particular laws and customs. The customs of the city of London are ascertained by the Courts at Westminster by means of a certificate by the recorder of London (*m*). So, certificates are received from the Courts in Wales as to their practice (*n*).

It has been held that a certificate of the discharge of an insolvent debtor under the stat. 2 G. 2, c. 20, is admissible to prove the discharge (*o*).

CHARACTER.

HERE may be considered the proof,—

I. Of the moral character and conduct of a person in society:

II. Of an allegation that a party holds an office, or fills a particular situation.

Moral character in society.

There are three classes of cases in which the moral character and conduct of a person in society may be used in proof before a jury, each resting upon peculiar and distinct grounds.

Such evidence is admissible,—1st. To afford a *presumption* that a particular party has or has not been guilty of a criminal act. 2dly. To affect the *damages* in particular cases, where their amount depends upon the character and conduct of any individual; and, 3dly. To impeach or confirm the *veracity* of a witness.

Evidence of the character which a person bears in society is in many instances admissible, as affording a presumption that he did or did not commit a particular act.

Presumptive evidence of innocence.

Where the guilt of an accused party is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general character, since it is not probable that a person of known probity or humanity would commit a dishonest or cruel act in the particular instance. Such presumptions are, however, so remote from the fact, and it is frequently so difficult to estimate a person's real character, that they are entitled to little weight, except in doubtful cases (A). Since the law considers a presump-

(*k*) 2 Roll. Ab. 686; and per Willes, C. J. in *Omichund* v. *Barker*, Willes R. 550; notwithstanding the case of *Aubignye* v. *Clifton*, Hob. 213, *contra; vide* Vol. I. 3 Woodeson, 376. Com. Dig. Testmoigne, [A.] 1; 1 Parl. Hist. 43.

(*l*) Per Ashurst, J. in *R.* v. *Mawbey*, 6 T. R. 619; 2 Roll. R. 412. *Leyton's Case*, Cro. Car. 584. *Randall's Case*, 1 Keb. 256; 2 Keb. 221; T. Raym. 215; Salk. 358; 1 Str. 688. [Salk. 183.]

(*m*) 1 Burr. 251. (*n*) Cro. Eliz. 503.

(*o*) *Guillum* v. *Stirrup*, C. T. Hardw. 144. This statute has expired. *Qu.* as to the provisions of the statute. It seems that such a certificate would not be evidence, unless it was the original entry of the adjudication, or an examined copy of it; or unless it was made evidence by the express provisions of the statute.

(1) [The certificate of the governor of a West India island, stating that the defendant had applied for leave to take away his cargo, to save the penalty of an embargo bond, and which permission he had refused, was allowed to be given in evidence. *U. S.* v. *Mitchell*, Circuit Court, Jan. 1811. Wharton's Digest, 230, 231.] [Reported, 3 Wash. C. C. Rep. 95.]

(A) (When a prisoner introduces evidence for the purpose of proving his general good character, previous to the date of the transaction charged against him, and the attorney for the commonwealth introduces evidence to impeach his general character, the latter shall not be allowed to inquire of the witness what he

tion of this nature to be admissible, such evidence is in principle admissible wherever a reasonable presumption arises from it, as to the facts in question; in practice it is admitted whenever, technically speaking, the character of the party is involved in the issue.

*304 When evidence in criminal cases.

*Formerly, evidence of the defendant's good character, in criminal proceedings, was admitted in capital cases only (*p*), and that in *favorem vitæ;* but such evidence is now admissible in all cases of misdemeanors, where the character of the defendant is in jeopardy (*q*).

Upon indictments for larceny, or fraud of any description, the general character of the defendant for honesty is admissible; and where the indictment charges upon the defendant any violence committed against the person of an individual, or against the public peace, evidence may be adduced by him of his general character for humanity, and peaceable conduct. Such evidence is also admissible upon an indictment for libel (*r*).

Usual questions.

It is a general rule, that evidence must be given of the general character of the party, and not of particular acts (*s*), for the presumption in favour of the prisoner arises from the general uniform tenor of his conduct, and not from particular isolated facts (A). The questions usually put for this purpose are, how long the witness has known the prisoner, and what his general character has been for honesty, humanity, or loyalty (according to the nature of the charge), during that period.

A prosecutor cannot impeach the character of a defendant until the latter has adduced evidence to support it (*t*); and although such evidence is warranted in principle, it is not resorted to in practice; he may cross-examine the witnesses as to the grounds of their belief, and as to particular facts, and may bring evidence in contradiction to impeach the general character of the defendant (*u*).

Civil proceedings.

In civil proceedings, unless the character of a party be put directly in issue by the nature of the proceeding, evidence of his character is not in general admissible (B).

(*p*) *R.* v. *Harris*, 2 St. Tr. 1033. *R.* v. *Carr*, 32 G. 2; 3 St. Tr. 57.

(*q*) *R.* v. *Harris*, 2 St. Tr. 1038. *Attorney-General* v. *Bowman*, 2 B. & P. 532, *a.* [*Commonweath* v. *Hardey*, 2 Mass. Rep. 317.]

(*r*) *R.* v. *Harris*, 2 St. Tr. 1038.

(*s*) 1 T. R. 754. See Vin. Ab. Evidence, M. a. 1, 6.

(*t*) B. N. P. 296. In the case of barratry, the prosecutor may examine as to particular facts, for otherwise the case cannot be proved; but then particular notice is requisite as to the facts to be proved.

(*u*) 2 Atk. 339. *Clarke* v. *Periam.*

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had learned of the character of the prisoner, previous to the date of the transaction, by conversation had since the said date, with persons acquainted with the prisoner. *Carter* v. *Commonwealth*, 2 Virg. Cas. 169.) [*The State* v. *Wells*, 1 Coxe's Rep. 424.]

(A) *Ramsey* v. *Johnson*, 3 Penns. Rep. 293.

(B) (Evidence of good character is not admissible to repel the imputation of fraud in civil proceedings. *Aliter*, where character is directly put in issue, or on a trial of an offence against the state, involving moral turpitude, or on an indictment for a breach of the peace. *Ward et al.* v. *Harndon*, 5 Porter, 382. But where a defendant is improperly permitted to assail the character of the plaintiff, there is no error in permitting the plaintiff to countervail it by evidence of good character. *Findlay* v. *Pruitt*, 9 Porter, 195. In an action for a malicious prosecution, the defendant's character is not in issue, and he cannot call witnesses to support it. *Rogers* v. *Lamb*, 3 Blackf. 155. In an action for criminal conversation with the plaintiff's wife, the plaintiff's general character is not in issue. *Norton* v. *Warner*, 9 Day's R. 172. It is not competent for a plaintiff in an action for seduction to give evidence of the good character of the seduced, unless it be first attacked by the defendant. *Wilson* v. *Sproul*, 3 Penns. R. 49.) See *United States* v. *Freeman*, 4 Mason, 505. *Douglass* v. *Tousey*, 2 Wendell, 352. [In tresspass, assault and battery, the plaintiff ought not to be permitted to give evidence of his general character. *Gevins* v. *Badley*, 3 Bibb, 195. In assumpsit for money had and received, the defendant cannot give evidence of his general character, though he is incidentally charged by the evidence with committing a particular fraud. *Nash* v. *Gilkeson*, 5 Serg. & Rawle, 352. {*Anderson's Ex.* v. *Long et al.* 10 Serg. & Rawle, 55.} The plea of probable cause to an action for malicious prosecution, does not put the plaintiff's general character in issue. *Gregory* v. *Thomas*, 2 Bibb, 286. Where the character of the party is not immediately in issue, yet if he introduce evidence in support of it, the

Upon an ejectment brought by an heir-at-law to set aside the will, for fraud committed by the defendant, evidence of the defendant's good character was rejected as inadmissible (*x*). And even upon an information to recover a penalty from the defendant for keeping false weights, such evidence was rejected, because the prosecution was not directly for the crime, but to recover a penalty (*y*). The principle of this distinction is not very intelligible; the good character of the defendant in a prosecution for keeping false weights can be admitted on no ground, except that it affords a presumption that the fact imputed has not been committed, and this is the very fact which is in issue in the former case. The effect of the distinction is, to make the admissibility of evidence to prove a fact to depend, not upon its tendency to prove it, but upon the consequences which result from the fact when proved.

In an action of slander, imputing dishonesty to the plaintiff, who was the defendant's servant, the plaintiff may, it has been held, adduce evidence of *general good character, even before any evidence to the contrary has been given on the other side (*z*). The words, it is observable in that case, were published in giving a character of the servant upon the application of one who required the character, and consequently where, according to the ordinary rule by which such actions are governed, the plaintiff would be bound to prove the falsity of the words, and malice of the defendant. In other cases, and where no justification is pleaded, it seems that such evidence would not be admissible, for the truth of the charge imputed by the slander could not come in issue. Where, indeed, the defendant justifies the slander which conveys an imputation of dishonesty, the case may admit of a very different consideration, for there the party is charged with a crime, and in such a case, character affords just the same presumption of innocence as if the party had been tried for the offence (*a*). And next, although, as will be seen, a defendant may in some instances impeach the plaintiff's character, or even that of a third person, in order to mitigate the damages, and where he does so, it is clear that the plaintiff may, on the other hand, prove the goodness of his character, yet, in general, a plaintiff is not allowed to adduce such evidence in the first instance (*b*); such evidence is unnecessary till the character has been impeached; for the law presumes a person's character to be good till the contrary be proved. *305

The character of *third persons* is also in some instances admissible, as affording a presumption with respect to the disputed fact.

Upon the question of illegitimacy, it has been held, that after probable evidence of non-access has been adduced, evidence may be given that the mother was a woman of bad character (*c*). So upon an indictment for a rape, or for an attempt to commit a rape, general evidence is admissible to

(*x*) *Goodright* v. *Hicks*, 1 Phill. L. Ev. 174, 5th edit.

(*y*) On an information in the Exchequer by the Attorney-general, to recover a penalty. *Attorney-General* v. *Bowman*, *cor.* Eyre, C. B., 2 B. & P. 532.

(*z*) *King* v. *Waring*, 5 Esp. C. 13.

(*a*) In *Cornwall* v. *Richardson*,[1] 1 Ry. & M. 305, it is said to have been held that though the plea justified a charge of felony, the plaintiff could not give evidence of good character; yet, *qu.* might he not go into any evidence to rebut the justification?

(*b*) *Dodd* v. *Norris*, 3 Camp. 519. *Bamfield* v. *Massey*, 1 Camp. 460.

(*c*) *Pendrell* v. *Pendrell*, Str. 925.

opposite party may rebut the evidence by impeaching his general character. *Grannis* v. *Brandon*, 5 Day, 260.

Evidence of general character, derived from the common report of the neighbourhood, is admissible. *Kimmel* v. *Kimmel*, 3 Serg. & Rawle, 336. See also *Boynton* v. *Kellogg*, 3 Mass. Rep. 192. *Foulkes* v. *Sellway*, 3 Esp. C. 236.]

[1]Eng. Com. Law Reps. xxi. 446.

impeach the character of the woman for chastity and decency (*d*). And in such a case evidence is admissible that the woman has formerly been connected with the prisoner, although it cannot be shown that she has been criminally connected with other persons (*e*).

General evidence to impeach the character of a prosecutrix for chastity, is admissible upon an indictment for a rape (1), or for an assault to commit a rape, although she has been examined as a witness, and has not been asked questions on cross-examination tending to impeach her character for chastity (*f*) (A).

Damages. 2dly. In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad character for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant (*g*) (2). So in actions
*306 for *slander and libel, where the defendant has not justified, evidence of the plaintiff's bad character has also been admitted (*h*) (B).

The grounds of admitting such evidence is, that a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished (*i*). Where, however, the defendant justifies the slander, it seems to be doubtful whether evidence of reports as to the conduct and character of the plaintiff can be received (*k*) (3).

(*d*) *Hodgson's Case;* by a majority of the Judges, on a case reserved, 1812; and *cor.* Wood, B. York Summer Assizes, 1812. And see[1] 2 Starkie's C. 241.

(*e*) Ibid.

(*f*) *R.* v. *Clarke*,[1] 2 Starkie's C. 241. The prosecutrix is not bound to answer the question whether she has had connection with other men. 3 Camp. 515.

(*g*) B. N. P. 27, 296. *Coote* v. *Berty*, 12 Mod. 232. See *Foulkes* v. *Selway*, 3 Esp. 236; *Roberts* v. *Mulston*, Sel. N. P. 25. [See *Ligon* v. *Ford*, 5 Munf. 10.]

(*h*) *Ld. Leicester* v. *Walter*, 2 Camp. 251; 1 M. & S. 284. *Rodriguez* v. *Tadmire*, 2 Esp. C. 720.

(*i*) —— v. *Moor*, 1 M. & S. 284. See *Snowden* v. *Davis*, 1 M. & S. 286; and tit. Libel and Slander. *King* v. *Francis*, 3 Esp. C. 116. And see tit. Damages.—Trespass; and *Watson* v. *Christie*, 2 B. & P. 224.

(*k*) In the case of *Snowden* v. *Smith*, (Devon Lent Ass. 1811), Chambre, J. rejected such evidence; and the case of the *Earl of Leicester* v. *Walter* being cited, said that it did not govern a case like the present, where the defendant justified. See 1 M. & S. 286, *a*. But in the subsequent case of *Kirkman* v. *Oxley*, (cited Phillips on Evidence, 189,) Heath, J., in an action for slander imputing larceny, allowed the defend-

(1) [Such evidence was admitted in *The Commonwealth* v. *Murphy*, though it does not so appear in the case, as reported, 14 Mass. Rep. 387.]

(A) (In an action by a father for debauching his daughter, her general character cannot be proved, and it is not material whether the child was got at her father's or elsewhere. *Wallace* v. *Clark*, 2 Tennessee R. 93. But evidence of the general character of a female witness in respect to chastity is not admissible to affect her character for veracity. *Gilchrist* v. *M'Kee*, 4 Watts, 380. See also *Com'th* v. *Moore*, 3 Pick. 194. *Contra*, *Com'th* v. *Murphy*, 14 Mass. Rep. 387. Where the person injured and the principal witness in a prosecution for an attempt to commit a rape was deaf and dumb, and the public prosecutor offered evidence to prove that her general character for truth was good; it was held that such evidence was admissible, though no impeachment of character had been attempted. *The State* v. *De Wolf*, 8 Con. Rep. 93.)

(2) [In an action by a woman for a breach of promise of marriage, and for seduction, the defendant shall not be permitted to give in evidence, in mitigation of damages, the general bad reputation of the plaintiff, as to chastity, which she acquired after the seduction. *Boynton* v. *Kellogg*, 3 Mass. Rep. 189. But see *Johnson* v. *Caulkins*, 1 Johns. Cas. 116. *Woodward* v. *Bellamy*, 2 Root, 354.]

(B) (In an action of slander evidence of the general bad character of the plaintiff is admissible. *Waters* v. *Jones*, 9 Porter's Reps. 442. *Wolcott* v. *Hull*, 6 Mass. Rep. 514. *Ross* v. *Lapham*, 14 Mass. Rep. 275. *Sawyer* v. *Eifert*, 2 Nott & McCord, 511. *Buford* v. *M'Luny*, 1 Nott & McCord, 268. {*Bodwell* v. *Swan*, 3 Pick. Rep. 376.} But evidence of a particular crime, of a nature different from that with which he is charged, is inadmissible. *Sawyer* v. *Eifert*, ubi sup. *Andrews* v. *Vanduzor*, 11 Johns. 31. *Seymour* v. *Merrills*, 1 Root, 459. Where the defendant pleads in justification the truth of the words alleged to have been spoken, the plaintiff may give in evidence his general good character, before it is impeached by the defendant, otherwise than by his plea of justification. *Harding* v. *Brooks*, 5 Pick. 244. [See *Grunnis* v. *Brandon*, 5 Day, 260].)

(3) [In *Foot* v. *Tracy*, 1 Johns. 46, the court of New York was divided on the question whether in an

[1] Eng. Com. Law Reps. iii. 303.

And in an action for a malicious prosecution on a charge of felony, it was held, that a witness could not be asked on cross-examination whether the plaintiff's house had not been searched on a former occasion, and whether he was not a person of suspicious character, in order to prove that there was probable cause for the charge; for in an action of slander, such proof is given to mitigate the damages, and not to bar the action; and such evidence affords no proof of probable cause (*l*).

But it seems, that in general a *plaintiff* cannot go into evidence of good character to increase the damages, until evidence has been given to impeach it (1). The plaintiff in an action for adultery with his wife, or for the seduction of his daughter, cannot give evidence of the good character of the one or the other, until the defendant has given evidence to impeach it (*m*); for till the contrary appear, their previous characters are presumed to be good, and that presumption is very forcibly confirmed by the consideration that the defendant is at liberty, if there be ground for it, to impeach the character by evidence.

It has even been held, that where the defendant has attempted to impeach the plaintiff's character on cross-examination of his witnesses, and has palpably failed, the plaintiff cannot call witnesses to his own good character (*n*). It may be doubted whether this is not carrying the general rule too far; such evidence is in general inadmissible, because the law presumes that the party's conduct has been correct and proper, a presumption which is strongly confirmed by the silence of the adversary upon the subject; but where he attempts to impeach the character of the party by evidence, the presumption from acquiescence ceases. Besides, although the witnesses deny the facts, it is very possible that the insinuation conveyed *by the questions, and the mode of answering them, may have produced an *307
effect upon the jury which ought to be removed.

It has been held in one instance, that in an action for the seduction of a daughter, evidence on the part of the defendant, in mitigation of damages, that the daughter had previously had a child by another man, did not warrant the admission of general evidence of good conduct (*o*), but that the

ant, who had justified, to go into evidence of the plaintiff's bad character in mitigation of damages. The latter decision appears to be better founded in principle, from this consideration: if the issue on the justification, and the question as to the quantum of damages, were to be tried separately, such evidence would clearly be admissible on behalf of the defendant after the issue on the plea of justification had been decided against him; and if so, it is difficult to say that such evidence can be rejected, although both questions are tried together; for although the defendant gives evidence tending to prove his justification, he is still entitled to give evidence in reduction of damages, in case the jury decide against him on the justification. It would be for the Court, in such a case, to advise the jury to apply such evidence to the reduction of damages only, and not to consider it as subsidiary to the proof of the justification.

(*l*) *Newsam* v. *Carr*, *cor.* Wood, B.[1] 2 Starkie's C. 69.

(*m*) *Bamfield* v. *Massey*, 1 Camp. 460; 3 Camp. 519.

(*n*) *King* v. *Francis*, 3 Esp. C. 116, *cor.* Ld. Kenyon.

(*o*) *Bamfield* v. *Massey*, 1 Camp. 460. [*Wallace* v. *Clark*, 2 Overton's Reps. 93.] See *Dodd* v. *Norris*, 3 Camp. 519. Vide *infra*, tit. SEDUCTION. In an action on the case for the seduction of the plaintiff's sister,

action for libel, the defendant might give in evidence, under the general issue, the general character of the plaintiff, in mitigation of damages. In the case of *Larned* v. *Buffington*, 3 Mass. Rep. 553, Parsons, C. J. says, "when through the fault of the plaintiff, the defendant, as well at the time of speaking the words, as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff, to mitigate damages." But in *Alderman* v. *French*, 1 Pick. 19, Jackson, J. says, "we do not find this doctrine supported by any authority; and think whenever such evidence is admitted, it will be when the defendant, instead of making it a ground of defence under the pretence of mitigating the damages, will admit that he was mistaken, and thus afford all the relief he can against the calumny he has published."]

(1) [*Ketland* v. *Bisset*, Circuit Court, Oct. 1804. Wharton's Digest, 251, *acc.* See *Grunnis* v. *Brandon*, 5 Day, 260.]

[1]Eng. Com. Law Reps. iii. 249.

plaintiff was confined to evidence to disprove the specific breach of chastity. And yet it should seem, upon principle, that as the fact was offered in evidence by the defendant, in order to diminish the value of that which the plaintiff had lost, and to show that the injury to his feelings and his comforts was less than might otherwise have been presumed, evidence was admissible on the other hand to show that the subsequent conduct of the daughter had been correct, and to prove in fact what degree of injury had been sustained.

In the subsequent case of *Dodd* v. *Norris* (*p*), where the daughter was cross-examined in order to show that in her intercourse with the defendant she had been guilty of great indelicacy and levity, evidence of good character was held to be inadmissible, no evidence of bad character having been given by the defendant. This case, it is to be remarked, differs essentially from the former, inasmuch as no evidence was given to impeach the daughter's character, and consequently to diminish the damages, except so far as it arose out of the very transaction itself; and if that were to be a sufficient ground for the admission of such evidence, it would be admissible in every such action, since the very nature of the action involves improper conduct on the part of the wife or daughter.

3dly. Evidence offered to impeach the character of a witness has already been considered (*q*).

Special character or office.

II. In order to prove a *general* allegation that a party holds a particular office or situation, it is usually sufficient to prove his acting in that capacity. (A).

In the case of all peace officers, justices of the peace, and constables, it is sufficient to prove that they acted in those capacities, even upon an indictment for murder (*r*). And prior to the statute 11 G. 2, c. 30, s. 32, which directs, that excise and custom-house officers acting in the execution of their duty, shall be taken to be such till the contrary appears, evidence was admitted, both in criminal and civil proceedings, to show that they were reputed officers (*s*). So upon an indictment for perjury, in taking an oath before a surrogate in the Ecclesiastical Court, evidence that he has acted as a surrogate is *primâ facie* evidence of his authority (*t*). But where a plaintiff, in an action for slander, avers that he is a physician, and has regularly taken his degree as a doctor of physic, he must prove that he is such, by producing the books of the University containing the act which
*308 conferred *the degree, or by proof of an examined copy of such act, or by

the sister was cross-examined by the defendant's counsel as to her having had criminal intercourse with other men; Bayley, J. held that general evidence of good character was admissible. *Murgatroyd* v. *Murgatroyd*, York Sum. Ass. 1828.

(*p*) 3 Camp. 519. (*q*) See Vol. I. 211, and tit. WITNESS.

(*r*) Per Buller, J., *Berryman* v. *Wise*, 4 T. R. 366. *Gordon's Case*, Leach, 581. *R.* v. *Shelley*, Leach, 381, (*n*). Upon an indictment for sacrilege, alleging the property in the custody of *A.* and *B.* churchwardens, it is sufficient to show that *A.* and *B.* have acted in that capacity. *R.* v. *Mitchell*, *cor.* Abbott, J., Salisbury Spring Assizes, 1818. {Per Abbott, C. J. *Snow* v. *Peacock*,[1] 2 Carr. & Payne, 217.} [*Potter* v. *Luther*, 3 Johns. 431.]

(*s*) Per Buller, J. 4 T. R. 366. See also *R.* v. *Bigg*, *supra*, tit. AGENT.

(*t*) *R.* v. *Verelst*, 3 Camp. 432.

(A) (General reputation merely is inadmissible to prove who are the officers of a corporation; though *semble*, it may be received in connection with their acts performed as officers. *Litchfield Iron Company* v. *Bennett*, 7 Cow. 234. On a question involving the fact of a man's being a constable, it is competent to prove that he is generally reputed to be a constable and acts in that capacity. *Johnson* v. *Stedman*, 3 Ohio, 97. And where a tax collector justifies his acts as such collector, proof of his acting in that capacity and general reputation, is *prima facie* evidence of his authority, and unless contradicted is conclusive. *Eldred* v. *Sexton*, 5 Ohio, 216.

[1]Eng. Com. Law Reps. xii. 95.

the production of a diploma, with proof of the seal of the court (*u*). But in such case, to prove a *general* averment that the party is a physician, it seems to be sufficient to show that he has acted as such (*x*) (1).

In an action by an attorney for fees, an allegation that he is an attorney of the Court of King's Bench, is evidenced by proof that he has acted as such (*y*). So it has been seen, that on an indictment for forgery, where it was necessary to prove that *Adams* was the agent of the Governor and Company of the Bank of England, it was held that this was sufficiently proved by evidence that *Adams* had been used to sign bills and notes as such agent, which from time to time had been duly paid and answered by the Bank (*z*).

In cases where, from the precise and special nature of the allegation, the due *appointment* of the party to an office or situation must be proved, then according to the general rule, it must be proved by the best evidence which the case admits of; that is, by the production and due proof of the original appointment, where it is in writing. Appointment, proof of.

Upon an indictment against overseers, alleging that they were duly appointed, their appointment must be proved by the production of that appointment under the hands and seals of two justices, as the statute requires (*a*).

On an indictment against an apprentice for a fraudulent enlistment, the indentures must be produced and proved by the attesting witness in the usual way (*b*).

Where an indictment for stealing a letter alleged that the prisoner was a sorter and charger, proof that he was a sorter only was held to be insufficient (*c*).

It is a general rule, that where a party has assumed to act in a particular character or situation, or has represented himself as such, the assumption or representation is evidence of the fact against himself, since it operates by way of admission (A). Proof by admission.

In an action against an incumbent for non-residence, it is sufficient to

(*u*) *Moises* v. *Thornton*, 8 T. R. 303. So a barrister is proved to be such by the order-book of the society to which he belongs. *Savage's Case*, Doug. 342.

(*x*) *Moises* v. *Thornton*, 8 T. R. 307. *Berryman* v. *Wise*, 4 T. R. 366. But see *Pickford* v. *Gutch*, *cor.* Buller, J., Dorchester Summer Ass. 1787; which was an action for calling the plaintiff a quack. The declaration alleged that the plaintiff had used and exercised the profession, &c. of a physician; and Buller, J., held that proof of the plaintiff's acting as a physician was insufficient, and that it was necessary to produce a diploma; on which the diploma was produced in court, and the plaintiff recovered. In *Smith* v. *Taylor*, (1 N. R. 196,) in a similar action, the allegation was, that the plaintiff at the time of speaking the words was a physician; and the plaintiff having obtained a verdict without any documentary proof of his degree, the Judges of the Common Pleas were, upon a motion to set aside the verdict, equally divided in opinion upon the question whether regular proof of the degree was necessary.

(*y*) *Berryman* v. *Wise*, 4 T. R. 366.

(*z*) *R.* v. *Bigg*, 3 P. Wms. 427; *supra*, 41. But where a declaration for slander alleged that the plaintiff was a physician, and exercised that profession in England, it was held that proof of a diploma from St. Andrew's, and of having acted as a physician in England, was not sufficient; for such a person cannot legally exercise his profession in England. *Collins* v. *Carnegie*,[1] 1 Ad. & Ell. 695.

(*a*) *R.* v. *Arnold*, Str. 101. In this case parol evidence of the appointment was offered.

(*b*) *R.* v. *Jones*, 1 Leach, 208. The indictment alleged that the defendant was an apprentice bound by indenture to *L. W.*

(*c*) *R.* v. *Shaw*, 1 Leach, 79; 2 Bl. 789; 2 East's P. C. 580. See *R.* v. *Ellins*, Russ. & R. 188; *Sellers* v. *Till*, 4 B. & C. 655; and *infra*, tit. VARIANCE.

(1) [*Brown* v. *Minns*, 2 Rep. Con. Ct. 235, *acc.*] {The defendant said of the plaintiff, "the Reverend *Thomas Smith* is a perjured man;" and it was held in an action for slander for so saying, that parol evidence that the plaintiff was a minister was admissible. *Cummin* v. *Smith*, 2 Serg. & Rawle, 440.}

(A) (The declarations and statements of a deceased individual that he was agent, are not admissible testimony to prove the agency. There must be other proof showing the fact of agency, before his statements can be received. *Floyd* v. *Woods & Co.*, 4 Yerger's R. 165.)

[1] Eng. Com. Law Reps. xxviii. 180.

*prove that he is in possession, without proving his presentation, institution and induction (*d*).

Proof that a man had acted in this country as a priest of the see of Rome, was held to be evidence against himself, upon the trial of an indictment, that he had been ordained by the see of Rome (*e*) (1).

Special character.

In an action for penalties under the Post-horse Act, proof that the defendant had previously accounted with the plaintiff as farmer-general, was held to be *primâ facie* evidence of the appointment of the latter to that situation (*f*).

Upon an indictment for bigamy, actual proof of the marriage is requisite, although the prisoner has by cohabitation, and otherwise, acknowledged the first marriage, and although such proof would be sufficient for the purpose of a civil action (*g*), except for adultery.

CHURCHES.

Act for building, 1 & 2 W. 4, c. 38.

CHURCHWARDENS (*h*).

Two churchwardens elected for the township, *B.* may maintain an action against the late churchwardens of that township for money remaining in their hands, without joining the other late or present churchwardens for the rest of the parish, separate rates being made for the several townships (*i*).

COIN.

Proof of currency.

To prove the allegation that the coin specified was the *current* coin of the realm, it is not in general necessary to prove either the indenture

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*between the king and the master of the mint (*k*), or the king's proclamation (*l*), to give it currency. For the fact, that the money is the king's

(*d*) *Bevan* v. *Williams*, 3 T. R. 635, (*n*). (*e*) *R.* v. *Lewis*, 2 St. Tr. 801.

(*f*) *Radford*, qui tam. v. *Mackintosh*, *qu.* 3 T. R. 632, against the opinion of Chambre, J. 1 N. R. 211. See other instances, tit. Admission; and see Phill. 181.

(*g*) Vid. *infra*, tit. Polygamy.—Criminal Conversation.

(*h*) Churchwardens are a *quasi corporatum* to take goods for the use of the poor, Vin. Ab. tit. Churchwardens; or of the parish, 12 H. 7, 29, a. But they are incapable of purchasing lands, except by particular statutes, or by special custom, Co. Litt. 3, a; as by 9 G. 1, c. 7, for workhouses; by 59 G. 3, c. 12, s. 12, the churchwardens and overseers may provide land for the employment of the poor. By the stat. 55 G. 3, c. 137, property in goods provided for the use of the poor is vested in the overseers. As to the actions which they may maintain, see Com. Dig. Eglise, [F.] 3. By the statute 54 G. 3, c. 170, s. 8, overseers may sue on securities to indemnify against bastards. Where land belonging to a parish was occupied by *A.*, who paid rent to the churchwardens, and they executed a lease of the same land to *B.*, and gave notice of the lease to *A.*, it was held that *B.* could not recover against *A.* for use and occupation. For they are not by law a corporation to hold lands, and the stat. 59 G. 3, c. 12, s. 17, which enacts, that the churchwardens *and* overseers, shall accept, take, and hold in the nature of a body corporate, for and on the behalf of the parish, all buildings, lands, and hereditaments belonging to such parish, does not extend to such a case. *Philips* v. *Pearce*,[1] 5 B. & C. 433; and held that *A.* was not estopped from denying *B.*'s title. Ibid. It is contrary to the duty of an overseer to borrow money for parochial purposes. *Massey* v. *Knowles and others*,[2] 3 Starkie's C. 65. They are a corporation at common law, Str. 52. The canons say they shall be chosen by the parson and the parishioners; and if they disagree, then one by the parson and one by the parishioners, Ib. Burn's Eccl. Law, tit. Churchwardens. One alone cannot release, nor give away the goods of the church. Cro. J. 234; Burn's Eccl. Law, tit. Churchwardens. Both together cannot dispose of goods, or do any other act to the disadvantage of the church. Com. Dig. Eglise, [F.] 3; 1 Rol. 893, l, 20; Ib. 426.

(*i*) *Astle* v. *Thomas*,[3] 2 B. & C. 271; and see 4 Sid. 281–2; Com. Dig. tit. Eglise, [F.] 2; *Turner* v. *Baynes*, 2 H. B. 559.

(*k*) The weight, alloy, impression, and denomination of money are regularly settled by indenture between the king and the master of the mint, which has been sometimes followed by a proclamation as a more solemn mode of giving it currency. East's P. C. 149; 1 Hale, 101, *et seq.*; MS. 46.

(*l*) East's P. C. 149; 1 Hale, 101, 6, 7, 8, 204.

(1) [In *Connecticut* a clergyman in the celebration of marriage is a public civil officer; and his acts in that capacity are admissible, as *prima facie* evidence of his official character. *Goshen* v. *Stonington*, 3 Conn. Rep. 209.]

[1]Eng. Com. Law Reps. xi. 264. [2]*Id.* xiv. 164. [3]*Id.* ix. 83.

money, and current within the realm, is one of general notoriety, and may be found, it seems, on evidence of common usage (*m*). Where, however, a new species of coin has lately been issued with a new impression, which is not familiar to the people, it may be desirable to give more precise evidence of the fact, by means of the indentures, or by the testimony of an officer of the mint cognizant of the new coin, and of the stamps used, or by similar evidence (*n*). And where by any statute, such as the stat. 37 Geo. 3, c. 126, s. 1, relative to a new coinage, the king's proclamation is essential, it ought to be proved (*o*).

Any coin once legally made and issued by the king's authority, continues to be the current coin of the country until it be recalled, notwithstanding any change in the authority by which it was so constituted (*p*).

A recall is proved by proclamation, or by an act of parliament enacting it; and it seems that long disuse is presumptive evidence of a recall (*q*). And on the other hand, where a proclamation is essential, long-continued and approved usage of the coin would be evidence of a legal commencement by proclamation (*r*).

Proof of the counterfeiting.

Whether there has been a counterfeiting of real coin is a matter of fact for the consideration of the jury; in consideration of law there should be such a resemblance as may in the ordinary course of circulation impose upon the king's subjects; a variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it, and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin (*s*) (A). It is even unnecessary that there should be *any impression* upon the counterfeit coin, if there be evidence to the jury in fact that the counterfeit is of the likeness and similitude of the lawful current coin (*t*). It must, however, appear that the coin was perfected sufficiently for circulation; and therefore, where a stamp had been impressed on an irregular piece of metal not rounded, and in an unfinished and incomplete state for currency, it was held that the offence had not been consummated (*u*).

Under the stat. 8 & 9 Will. 3, c. 26, it was held, that the colouring blanks with such materials that when rubbed they resembled coin, was a colouring within the statute, before the resemblance had been actually produced by so rubbing the coin (*x*).

In the case of treasons relating to the coin, one witness was sufficient (*y*).

*Upon an indictment for having in possession implements for coining (*a*), *311

(*m*) Ibid. 1 Hale, 192, 197, 213.
(*n*) East's P. C. 149.
(*o*) Ibid.
(*p*) 1 Hale, 122; East's P. C. 148.
(*q*) East's P. C. 149.
(*r*) East's P. C. 150. For the various instances in which a proclamation is necessary, see East's P. C. 149. It is unnecessary to mention any of them here, except the stat. 37 Geo. 3, c. 126, s. 1, relative to new copper coinage, which renders a proclamation essential.
(*s*) East's P. C. 164. See *Ridgeley's Case*, East's P. C. 171; *Lennard's Case*, Leach, 85; East's P. C. 170.
(*t*) *R.* v. *Welsh*, Leach, 293; East's P. C. 164.
(*u*) *Varley's Case*, Leach, 71; 2 Bl. 632; East's P. C. 164. See *R.* v. *Harris*, Leach, 126.
(*x*) *R.* v. *Case*, East's P. C. 165.
(*y*) 1 Hale, 221; Fost. 239; East's P. C. 187. Such offences are no longer treasons. See st. 2 W. 4, c. 34, and 7 W. 4, and 1 Vict. c. 90; and see the Appendix, tit. COIN.
(*a*) See the stat. 8 & 9 Will. 3, c. 26, s. 1, 5, 7; and now the stat. 2 W. 4, c. 34.

(A) (One who brightens base pieces (which are brought to him, ready formed with the impression and appearance of dollars, except that they are of a lead colour, and not then passable) by boiling them in ley, and rubbing them with a woollen cloth, and subjecting them to other processes, thereby rendering them, by their resemblance to real dollars, more fit for circulation, is guilty of forgery. He completes the offence, and thereby subjects to the operation of the law, not only himself, but all those who acted a part, and were present assisting at the transaction from beginning to end, or who did anything thought necessary by themselves, to impose on the public by making the base coin resemble the true. *Raswick* v. *Commonwealth*, 2 Virg. Cas. 356.)

it is not necessary to prove that they have been actually used for making money (*b*).

Where it appeared that the object of the prisoner was to coin foreign money, and not the current coin of the realm, a majority of the Judges held that the fact amounted to a sufficient excuse, but Mr. J. Foster and Lord Hardwicke were of a different opinion (*c*).

Proof of putting off, &c.

Upon an indictment for knowingly uttering counterfeit coin (*d*), it was not sufficient upon an indictment under the stat. 8 & 9 Will. 3, c. 26, to prove a mere tender or attempt to get rid of money, which had not been accomplished, for the words of the statute, *pay* or *put off*, denote an actual passing of the money (*e*). Where the indictment charged the putting off various counterfeit money "for the sum of 5*s*.;" it was held to be well supported by proof that it was paid for by two half-crowns, although the agreement was for a sovereign for 4*s*., and 3*s*. for 1*s*.; it being all one contract and one transaction (*f*). Under the same statute it was unnecessary, in order to satisfy the allegation that the money was milled money, to show that the money was actually milled, that is, that it was passed through a mill or press to be formed into a plate of proper thickness, to be cut into pieces for stamping; it is sufficient if the money resemble genuine milled money, all money being now milled and not hammered (*g*).

Scienter.

In order to show the guilty knowledge of the defendant, evidence is admissible that the defendant uttered base coin (*h*) to other persons on the same day, or perhaps on other days near the time of committing the offence (A). And this, upon the general principle, that the conduct of a prisoner is admissible in evidence to prove a guilty knowledge or intention (*i*). In such cases, indeed, where the intention does not appear from the transaction itself, it must be inferred from other facts and circumstances. Such other utterings are therefore evidence, although they may be in themselves substantive offences. The whole demeanor of the prisoner may afford pregnant evidence of his mind and intention; for it is a general rule, that where crimes intermix, and one is evidence to prove another, the Court must go through the whole detail.

In one instance, where a man committed three burglaries on the same night, which were all connected, the prisoner having left at one place property which he stole at another, evidence was given as to all three (*j*).

*312 *There must, however, in such cases, be such a connection as to warrant

(*b*) By all the Judges, *Ridgeley's Case*, Leach, 172; East's P. C. 171. An instrument for making the edges, although of modern invention, but producing the same result, is an instrument within the meaning of the 8 & 9 W. 3, c. 26. *Moore's Case*, 1 Ry. & M. C. C. L. 122.

(*c*) *R.* v. *Bell*, Fost. 430; East's P. C. 169.

(*d*) See the form of the indictment, CRIM. PLEAD. 531, &c.

(*e*) *Woodbridge's Case*, East's P. C. 179; Leach, 251. The prisoner there had brought the coin to the house of the intended buyer, to be sold at a certain rate, and had laid them down upon the table for the buyer to count them out, and she had counted part, when the officers entered and apprehended them, before the buyer could pay for those selected; and it was held that the offence had not been completed.

(*f*) *R.* v. *Hedges*,[1] 3 C. & P. 411.

(*g*) *R.* v. *Bunning*, Leach, 708; East's P. C. 183. *R.* v. *Dorrington*, and *R.* v. *Lazarus*, Ibid.

(*h*) See *R.* v. *Wylie*, 1 N. R. 92. *R.* v. *Tattersall*, 1 N. R. 93, *u*. See tit. KNOWLEDGE.

(*i*) Upon an indictment for robbery in extorting money by threats, subsequent attempts are evidence to prove the *quo animo*. *Donally's Case*.

(*j*) Cited by Ld. Ellenborough, *R.* v. *Wylie*, 1 N. R. 94.

(A) (Where the public prosecutor on an information for passing a counterfeit coin, purporting to be a half dollar, knowing it to be counterfeit, offered evidence of the prisoner's having in his possession, at the same time an engraved paper, having the appearance of a bank-note, but not purporting to be signed or countersigned, for the purpose of showing the guilty knowledge of the prisoner charged in the information, it was held, that such evidence was inadmissible. *Stalker* v. *The State*, 9 Day's Reps. 341.)

[1] Eng. Com. Law Reps. xiv. 374.

the inference of knowledge in the principal case. This may arise, in the case of uttering, from proximity of time, but the more detached in point of time the previous utterings are, the less relation will they bear to that stated in the indictment. The fact that all the money uttered is from the same die, or, in the case of uttering forged notes, that they are all impressions from the same plate, is important to connect the utterings, and to indicate a guilty knowledge. The circumstance that the prisoner at the time of uttering had other counterfeit coin, (especially if it be of the same description with that uttered,) is also evidence for the same purpose (*k*), although not alleged in the indictment. It is, however, to be observed, that to make such circumstances evidence, there must be a strong connection in the subject-matter.

Upon an indictment for forging and uttering a bill of exchange, it was held that the prosecutor was not at liberty to prove that a bank-note which was found in the pocket of the prisoner was forged (*l*).

Other indications of guilty knowledge and intention, such as the taking precautions to prevent a quantity of base coin from being injured by rubbing, and the possession of powder or pith used to give to the base coin the usual appearance of coin which has been in circulation, are too obvious to require remark.

The information and proceedings before the magistrates were deemed the commencement of the suit under the 9th sect. of the stat. 8 & 9 Will. 3, c. 26, s. 6, and should be produced (*m*), although the indictment were for colouring, and the commitment were for counterfeiting, when the time was material.

In order to oust the prisoner of his clergy under the stat. 15 Geo. 2, c. 28, s. 23, the record of the former conviction must be proved (*n*). And where the second conviction is in a different county or city, it is sufficient under the 9th section of that statute to produce a transcript containing the effect and tenor of the former conviction made by the clerk of the assize, or clerk of the peace in the county or city where the first conviction was had.

And by the stat. 37 Geo. 3, c. 126, s. 5, such a transcript of conviction so certified (in case of uttering coin not current here), shall be evidence of such conviction in any other county, city or place.

The having counterfeit coin in possession, is evidence of procuring it with intent to circulate it, which is a misdemeanor (*o*).

COLLATERAL FACTS.

Collateral facts.

It has been seen that all facts and circumstances are admissible in evidence which are in their nature capable of affording a reasonable presumption or inference as to the disputed fact (*p*); and that, on the other hand, remote and collateral facts, from which no fair and reasonable inference can be drawn, are inadmissible, for they are at best useless, and may be mischievous, because they tend to abstract the attention of the jury, and frequently to prejudice and mislead them (*q*). It seems to be the province of the Judge, *in the exercise of a sound discretion, to discriminate between *313
such facts as are connected with the issue, and such as are merely collateral.

It is, however, frequently difficult to ascertain *à priori*, whether proof of a particular fact offered in evidence will or will not become material, and

(*k*) Per Thompson, B., 1 N. R. 95.
(*l*) By Bayley, J., Lancaster Summ. Ass. 1820.
(*m*) East's P. C. 168. *R.* v. *Willace.* Ib.
(*n*) *R.* v. *Rothwell*, Add. Pen. St. 122.
(*o*) *R.* v. *Fuller*, Russ. & Ry. 308.
(*p*) *Supra*, Vol. I.
(*q*) Nothing is inadmissible which is material to the issue joined, to prove or disprove it (per Blackstone, J., Bl. 1169). No new matter foreign to the issue joined is admissible in evidence. Per De Grey, J. Bl. 1165. And *vide* Vol. I.

in such cases it is usual in practice for the Court to give credit to the assertion of the counsel who tenders such evidence, that the fact will turn out to be material.

The following are instances where the facts have been held to be insufficient to afford any inference as to the fact in dispute.

The time at which one tenant pays his rent is not evidence to show at what time another tenant pays his rent (*r*).

A custom in one parish, archdeaconry, or manor, is no evidence of the same custom in another (*s*). For in these and other such cases there is no such connection between the fact and the issue as to afford a reasonable inference from the one to the other. Where, on the other hand, such facts are by any general link connected with the issue, they become evidence. Thus, where all the manors within a particular district are held under the same tenure, and the issue is upon some incident to that tenure, the custom of one manor is evidence to prove that the same custom exists in another (*t*).

Where the issue is as to a particular right upon a common, evidence is inadmissible of the existence of such right on an adjoining piece of common, unless a connection between them be proved, and the right be claimed on both (*u*).

Where the question is one of skill and judgment, evidence may be given of other facts, which, although in other respects collateral, are, by means of the skill and judgment of the witness, connected with and tend to elucidate the issue (*x*).

A collateral fact is not in general evidence to discredit a witness (*y*). But where a witness swore that a party had acknowledged two intruments to have been made by him, evidence was admitted that one of them was forged (*z*). So evidence of character is in many instances admissible (*a*). So collateral facts are admissible to prove intention, malice, or guilty knowledge (*b*).

In an action for a malicious prosecution, a publication by the defendant, on the subject of the prosecution, is evidence to prove the malice. So, although acts done subsequent to a contract cannot alter the nature of the contract, they may be adduced to show what the contract was, if it be doubtful (*c*); therefore an admission of a debt by the acceptance of bills of exchange by partners, in payment of goods sold, is evidence to show the fact of a sale to the partners (*d*). So where the meaning of the terms of an agreement is doubtful, and depends on custom or usage, collateral evidence is admissible to explain them (*e*). So collateral evidence is admissible to show the probability of a surrender by a tenant for life, where the possession has long accompanied the recovery (*f*) (A).

*314 *In order to prove that the acceptor of a bill of exchange knew the payee to be a fictitious person, evidence is admissible to show that the acceptor

(*r*) *Carter* v. *Pryke*, Peake's C. 95.
(*s*) Cowp. 808. *Ruding* v. *Newell*, Str. 957, 601, 662; Fort. 41; Doug. 425. Unless the custom be general.
(*t*) Str. 652. *Duke of Somerset* v. *France*, 3 Keb. 90; Fost. 41, 44; Doug. 495; Cowp. 808.
(*u*) 4 T. R. 157. *Morewood* v. *Wood*.
(*x*) *The Wells Harbour Case*, M. 23 G. 3.
(*y*) See Vol. I.; and *R.* v. *Watson*,[1] 2 Starkie's C. 116.
(*z*) Ann. 311.
(*a*) See tit. CHARACTER.
(*b*) See tit. COIN.
(*c*) *Saville* v. *Robertson*, 4 T. R. 720.
(*d*) 1 T. R. 720.
(*e*) See tit. CUSTOM.
(*f*) See 2 Saund. 42, 7.

(A) (The character of a creditor for strictness and closeness in the collection of his debts, may be given in evidence as a circumstance to show that a debt has been paid, after eight years have elapsed. *Leiper* v. *Erwin*, 5 Yerger, 37.)

[1]Eng. Com. Law Reps. iii. 273.

had accepted similar bills before they could, according to their date, have arrived from the place of date (*g*). And similar evidence is admissible to prove that the indorsee had a general authority from the acceptor to fill up bills with the name of a fictitious payee (*h*).

COMMENCEMENT OF ACTION. *See* TIME.

COMMON.

Common, or right of common, is an incorporeal hereditament, which consists in a profit which a man has in the lands of another.

Common is chiefly of four sorts: of pasture, piscary, turbary, and estovers (*i*).

Common of pasture, is a right of feeding one's beasts in another's land; and it is either appendant, appurtenant, or in gross (*j*).

Common appendant is of common right (*k*), and it may be claimed in pleading as *appendant*, without laying a prescription. But appendancy *implies* a prescription (*l*). It cannot be claimed, except in the lord's wastes (*m*), for the claimant's *own* commonable cattle, *levant* and *couchant*, upon the land (*n*). Appendant.

Rights of common *appurtenant* to the claimant's land are altogether independent of tenure; they may be claimed in *other lordships;* and for cattle not commonable; may be claimed by *grant* as well as by *prescription*, and either for cattle *levant* and *couchant*, or for a stinted number not *levant* and *couchant* (*o*). And may be claimed as well by *grant* within legal memory as by *prescription* (*p*). Appurtenant.

Common *in gross* may also be claimed by either grant or prescription. In gross.

As all these rights depend either upon a *prescription* or a *grant* (*q*) actually proved or presumed, much of the evidence on this subject is referable to the more general heads of evidence of *grants* and *prescriptions*. It is obvious, that unless a grant can be expressly proved, such rights must in general be *supported by evidence of usage (*r*). No such right of common appendant exists but for such cattle as are *levant* and *couchant* (*s*). So many are *levant* and *couchant* as the *land*, to which the common is appurtenant, will maintain in winter (*t*); and the common cannot be claimed as appendant to a house without any curtilage or land (*u*). And therefore, *315 Levancy and couchancy.

(*g*) 2 H. B. 288. (*h*) Ibid.

(*i*) Finch's L. 157; Co. Litt. 122; 2 Inst. 86; 2 Com. 32.

(*j*) Co. Litt. 122; 2 Com. 33. Common *pur cause* of vicinage is not strictly a right of common. It happens where the inhabitants of contiguous townships have usually intercommuned with each other, the beasts of the one straying mutually into the other's fields, without any molestation from either. It is a permissive right, intended to excuse what is, in strictness, a trespass in both, and to prevent a multiplicity of suits. 2 Com. 33. *Musgrave* v. *Cave*, Willes, 322.

(*k*) See 2 Inst. 86; 2 Com. 33. When the lords of manors originally granted out parcels of lands to tenants, the latter could not plough or manure the land without beasts; the beasts could not be sustained without pasture; and pasture could not be had but in the lands, wastes, and in the fallow lands of other tenants; and therefore the law annexed the right of common as inseparably incident to a grant of the lands for commonable cattle, *i. e.* beasts of the plough, or such as manure the ground. 2 Com. 33.

(*l*) Hargrave's note, 2 Inst. 122, *a*, n. A copyholder who has common in a waste without the manor, has it annexed to the land, and not to his customary estate, and must prescribe in a *que* estate through his lord. *Berwick* v. *Matthews*,[1] 5 Taunt. 365.

(*m*) 2 Inst. 85; 1 Roll. 396; 4 Co. 37. (*n*) Ibid. and Burr. 320. *Benson* v. *Chester*, 8 T. R. 396.

(*o*) 4 Burr. 2431; 1 Rol. 401, l. 15; 2 Cro. 27; 2 Mod. 185. (*p*) *Cowlam* v. *Slack*, 15 East, 108.

(*q*) Cro. Car. 482; F. N. B. 180: Bac. Ab. Common, [A.] 2.

(*r*) See 12 Vin. Ab. [T.] b. 18, pl. 3. Litt. R. 295.

(*s*) Bac. Ab. Common, [A.] 2.

(*t*) Per Coke, J. Noy, 30; Vent. 54; 5 T. R. 46. *Shakespear* v. *Peppin*, 6 T. R. 741.

(*u*) *Scholes* v. *Hargrave*, 5 T. R. 46; and per Buller, J. *Ibid.* The cases, Salk. 169, 2 Brownl. 101, *Emerton* v. *Selby*, 2 Ld. Raym. 1015, Noy, 30, are consistent with this doctrine, for in all of them the Courts say that they will intend that messuage or cottage includes land.

[1] Eng. Com. Law Reps. i. 135.

where a plaintiff in an action for the disturbance of his right of common, claimed the right for all commonable catttle *levant* and *couchant*, and it appeared that the house of which he was the owner had neither land, curtilage, nor stable, belonging to it, the plaintiff was nonsuited (*x*). And so, although the declaration, or plea of justification, allege the right of common to be appendant to a *messuage*, it must be proved that there is at least a curtilage belonging to it, on which the cattle may be *levant* and *couchant* (*y*).

But an allegation of right of common for all the plaintiff's cattle *levant* and *couchant* is supported although the common be not sufficient to feed all the cattle for a length of time (*z*).

Where the declaration in an action for disturbance of the plaintiff's right of common alleged that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, it was held that he was entitled to recover *pro tanto*, although it appeared that he was possessed of land only (*a*).

But in order to prove that the cattle in question are *levant* and *couchant*, it must be proved on an issue taken on the fact that they are connected with the land on which they are so alleged to be *levant* and *couchant* (*b*). In the case of a distress, those cattle only are said to be *levant* and *couchant* which have been there for a space of time long enough for them to have lain down and risen up again. But in a case of right of common appendant, *levancy* and *couchancy* is merely a mode of ascertaining the number of cattle which are entitled to the right of common (*c*), and actual *levancy* and *couchancy* need not be proved in an action for disturbance.

The plaintiff alleged a right of common of pasture for all commonable cattle *levant* and *couchant* on 100 acres of land in the plaintiff's possession, part of a certain common field over the said common field, every year when the same was sown with corn, after the corn was reaped, gathered, and carried away, until the said field, or some part thereof, was again sown with corn. This was held to be supported by proof that the plaintiff was a part-owner with the defendant and others, of a common field upon which, as stated in the declaration, the occupiers turned their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle were not maintained upon the land during
*316 *winter, and although the number was in proportion to the extent, and not the produce, of the land in respect of which the right was claimed (*d*). A right for all commonable cattle is proved by evidence of use by all the cattle which the party had, although he never had any sheep (*e*). It must also be proved that the cattle are the party's own cattle, or at least that he has a special property in them (*f*); and, in the case of common appendant, that they are commonable cattle.

Where the right of common is claimed by an inhabitant of a particular place in right of inhabitancy, he can claim for such only as are *levant* and *couchant* (*g*).

(*x*) *Scholes* v. *Hargreaves*, 5 T. R. 46, by Ld. Kenyon, C. J.; and the Court of K. B. afterwards approved of the nonsuit.

(*y*) Sir W. Jones, 227.

(*z*) *Willis* v. *Ward*,[1] 2 Chitty, 297.

(*a*) *Ricketts* v. *Salwey*, 2 B. & A. 360. And see *Bower* v. *Hill*, 2 Scott, 535.

(*b*) 1 Will. Saund. 346, *c*, in note.

(*c*) See the judgment of Bayley, J., *Cheeseman* v. *Hardham*, 1 B. & A. 706. It need not be proved that the land was actually used for supporting the cattle. *Bolam* v. *Atkinson*, *cor.* Bayley, J., Northd. Summ. Ass. 1827, *i. e.* in an action for *disturbance*. An allegation of a right of common for all commonable cattle "*levant* and *couchant*," is proved by a grant of reasonable common of pasture.

(*d*) *Cheeseman* v. *Hardham*, 1 B. & A. 706.

(*e*) *Manifold* v. *Pennington*,[2] 4 B. & C. 161.

(*f*) Bro. Common, 47; 2 Show. 328; 1 Wil. Saund. 346, *c*.

(*g*) 1 Roll. Ab. 308; 1 Will. Saund. 346, *e*, (3).

[1]Eng. Com. Law Reps. xviii. 341. [2]*Id.* x. 301.

Although a plaintiff in an action for disturbance of his right of common, whether against a commoner or stranger, may declare upon his possession only (*h*), (for possession is sufficient against a wrong-doer,) he must on the trial prove his right of common (*i*), such as he has alleged it to be in the declaration (*j*). And if the right to use the common for commonable cattle be subject to a condition precedent of making a money payment to the lord of the manor, it must be so alleged; for although the title need not be shown, the right must be stated (*k*). Disturbance—Title.

Proof of the uninterrupted enjoyment of a common for twenty years will in general, as in the case of other easements, be evidence to raise a legal presumption of a right by prescription, or at least by grant (*l*). An enjoyment for a shorter period may or may not afford such a presumption, according to the circumstances which support or rebut the right (*m*).

If the plaintiff should unnecessarily state his title to the right in the declaration, it seems that, provided he prove a title to the particular right claimed, the variance will not be fatal; for the disturbance is the gist of the action, and the title is mere inducement, and not traversable (*n*).

*In such an action against a stranger, or against a commoner for depasturing supernumerary cattle (*o*), it does not appear to be necessary for the plaintiff to prove that he has sustained any *specific injury*; for the consumption of the grass by the other cattle is in itself a diminution of the right and profit of the commoner, and considered to be sufficient proof of the damage alleged in the declaration; for if the other cattle had not been there, the plaintiff's cattle might have eaten every blade of grass which was consumed by the other; besides, the law considers that the right of the commoner is injured by the act, and therefore allows him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of encroachment (*p*). *317 Proof of damage.

It is said to be a *general rule*, that wherever an act injures another's right, and would be evidence in future in favour of the wrong-doer, an

(*h*) *Saunders* v. *Williams*, 1 Vent. 319. *Strode* v. *Byrt*, 4 Mod. 418. *Atkinson* v. *Teasdale*, 2 Bl. R. 817; 3 Wils. 278.

(*i*) B. N. P. 76; 1 Will. Saund. 346, (*z*). (*j*) Ibid.

(*k*) *Bolam* v. *Atkinson*, *cor.* Bayley, J. Northd. Summ. Ass. 1827.

(*l*) See tit. Disturbance—Grant—Prescription. Also 2 Will. Saund. 175, *d. Lewis* v. *Price*, *cor.* Wilmot, J. Worcester Spring Ass. 1761; 2 Will. Saund. 175, *a*. *Darwin* v. *Upton*, Ibid. *Bealy* v. *Shaw*, 6 East, 214. *Martin* v. *Goble*, 1 Camp. 323. The plaintiff being possessed of a house and land in *E.*, uses right of common in the manor of *W.* for sixty years, the common in *W.* being adjacent to the common in *E.*, it is a question of fact for the jury to determine, whether the user be referable to a mistake of the boundary, or to a legal right of common in *W.*; *Hethcrington* v. *Vane*,[1] 4 B. & B. 428. An inclosure made from a common twelve or thirteen years ago, with the knowledge of the steward and without objection, is evidence of a license by the lord, and ejectment cannot be brought against the tenant without previous notice to give up the land. *Doe* d. *Foley* v. *Wilson*, 11 East, 56. Common appurtenant may be claimed as well by grant within the time of legal memory, as by prescription, and after an unity of possession in the lord of the land in respect of which the right of common was claimed with the soil and freehold of the waste. Evidence that the lord's tenant had for fifty years past enjoyed the waste, was held to be evidence sufficient to warrant the jury in presuming a new grant of common as appurtenant, so as to support an action by the tenant for surcharging the common, and declaring on his possession of the messuage and land with the appurtenances, and that, by reason thereof, he was entitled of right to the common of pasture, as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture. *Cowlam* v. *Slack*, 15 East, 108. See also *Clements* v. *Lambert*, 1 Taunt. 205.

(*m*) Per Ld. Ellenborough, *Bealy* v. *Shaw*, 6 East, 214.

(*n*) B. N. P. 76; 4 Mod. 424; 1 Saund. 346, *a*, (*n*); *Ricketts* v. *Salwey*, 2 B. & A. 360. Yet if the plaintiff should set out an insufficient title, the declaration, it is said, would be bad. 1 Salk. 363; 2 Ld. Raym. 1230.

(*o*) See *Atkinson* v. *Teasdale*, 2 W. Bl. 817. Such action is maintainable although the plaintiff himself has been guilty of a surcharge. *Hobson* v. *Todd*, 4 T. R. 71.

(*p*) *Wells* v. *Watling*, 2 Bl. Rep. 1233. *Hobson* v. *Todd*, 4 T. R. 71. Taking away the manure dropped by the cattle is a sufficient damage. *Pindar* v. *Wadsworth*, 2 East, 254.

[1] Eng. Com. Law Reps. vi. 473.

action may be maintained for the invasion of the right, without proof of any specific damage (*q*); and this has been laid down by a writer of authority (*r*) to be a governing principle in these cases. As for instance, an action may be maintained for fishing in the plaintiff's several fishery, although it be neither alleged nor proved that the defendant caught any fish (*s*).

But if the defendant be the lord of the manor (*t*), or put his cattle upon the common with the lord's license, the plaintiff must prove a specific injury; and it would be insufficient to show that the cattle consumed the grass, as in an action against a stranger, without also proving that there was not a sufficiency of common left in order to support the action (*u*), for the lord is entitled to what remains of the gross, and may either consume it by his own cattle, or license another to depasture it; although in the case of a stranger it seems to lie on the defendant to show that a sufficiency of common is left for the plaintiff (*x*).

Defence. It is no defence to an action for surcharging the common that the plaintiff has also been guilty of a surcharge (*y*). A right of common is extin-

*318 guished *by unity of possession. A grant of land, &c. with common appurtenant, does not pass a right of common after the extinction by unity of possession, although those who have occupied the tenement since the extinction have used the common. *Secus*, if there had been a grant of all commons *used* therewith (*z*).

Proof under plea of justification. A plea of justification, claiming a right of common appendant for the defendant's commonable cattle *levant* and *couchant*, may be put in issue by a general replication, for it is but one entire title (*a*); or the plaintiff may specially traverse that they were the cattle of the defendant *levant* and *couchant* (*b*); and in either case the defendant must prove that the cattle are his own, or that he has a special property in them (*c*), for a man has no right to use the common with the cattle of a stranger, or with his own cattle *levant* and *couchant*, upon some other land, and not upon the land to which the right is appendant or appurtenant; but if he borrow cattle to compester his land, they may be put upon the common, for he has a special property in them (*d*). And where a man has common appurtenant for a specific number of cattle as appurtenant, it may be severed by grant and converted into a right of common in gross.

If the defendant justify under an alleged right of common, and it appear

(*q*) 1 Will. Saund. 346, *a*, in note. (*r*) Mr. Serj. Williams, 1 Will. Saund. 346, *a*.

(*s*) *Patrick* v. *Greenway*, *cor.* Lawrence, J., Oxford Spring Ass. 1796; cited 1 Will. Saund. 346, *b*.

(*t*) See the observations of Buller, J., in *Hobson* v. *Todd*, 4 T. R. 73; *Smith* v. *Feverell*, 2 Mod. 6; and 1 Will. Saund, 346, *b*, in note.

(*u*) *Smith* v. *Peverell*, 2 Mod. 6; 1 Saund. 346, b, (n). The plaintiff may declare against a license of the lord, as a stranger. *Hobson* v. *Todd*, 4 T. R. 71. And it lies on the defendant to prove the license, and sufficiency of common left. 1 Saund. 346, b. The lord may, by special custom, dig clay-pits, or do other acts in diminution of the right of common, or empower others to do so, without showing a sufficiency of common left. *Bateson* v. *Green*, 5 T. R. 411. *Clarkson* v. *Woodhouse*, 5 T. R. 412. *Place* v. *Jackson*,[1] 4 D. & R. 418. So by special custom he may, by consent of the homage, let parts for building. *Folkard* v. *Hemmett*, 5 T. R. 417. A commoner cannot justify cutting trees planted by the lord on the waste; he must bring case or an assize. *Kirby* v. *Sadgrove*, 1 B. & P. 13; 3 Anstr. 892; 6 T. R. 483. As to the right of the lord of a manor to approve wastes under the Statute of Merton, see *Duberly* v. *Page*, 2 T. R. 391; *Glover* v. *Lane*, 3 T. R. 445; *Shakespear* v. *Peppin*, 6 T. R. 741. There can be no approvement in derogation of a right of common of fishery; *Grant* v. *Gunner*, 1 Taunt. 435; nor where the tenants have a right to dig for gravel, or take estovers. *Duberly* v. *Page*, 2 T. R. 391.

(*x*) See the form of declaration, Herne, 125; 2 Mod. 6; 1 Lutw. 107; 3 Wils. 290; 1 Will. Saund. 146, *a*.; 9 Rep. 113, *a*.

(*y*) *Hobson* v. *Todd*, 4 T. R. 71.

(*z*) *Clements* v. *Lambert*, 1 Taunt. 205. See also *Morris* v. *Edgington*, 3 Taunt. 24.

(*a*) Skinn. 137; 2 Show. 328; *Robinson* v. *Raley*, 1 Burr. 316.

(*b*) Ibid. and *Bennet* v. *Reeves*, Willes, 227. (*c*) Bro. Common, 47; 2 Show. 328.

(*d*) *Mollitor* v. *Trevilian*, Skinn. 137; F. N. B. 180; Roll. Common, 402.

[1] Eng. Com. Law Reps. xvi. 204.

that the common has been inclosed for twenty years, the justification cannot be supported (*e*).

A plea claiming a prescriptive right of common for a certain number of beasts, generally, is not supported by evidence of a right of common of vicinage (*f*). Variance.

Proof of a prescription limited by an exception will not support a general prescription. Thus, proof of a prescription for all cattle, at all times of the year, (sheep only excepted for a certain time), will not support a prescription claimed for all cattle, &c. at all times of the year (*g*).

On issue joined, as to a right of common, the defendant may give in evidence a release of the right of common, although he might have pleaded it (*h*). Such a release however will not avail where the common belongs to land which is entailed, and which cannot pass by release any more than the land itself (*i*). Proof on issue joined on the right.

Upon issue taken in replevin on a replication by the plaintiff, alleging a prescription for commonable cattle *levant* and *couchant*, and averring that the cattle in question were *levant* and *couchant*, the burthen of proof lies on the plaintiff. If in such case the cattle have been distrained by the lord (*k*), and on the trial it appeared that some of the cattle were *levant* and *couchant*, *and that others were not, the issue would be found for the lord (*l*); and so it would be in trespass (*m*) for taking the cattle. But if in such a case the lord brought an action of trespass *quare clausum fregit*, and the defendant prescribed for his commonable cattle *levant* and *couchant*, and averred that he put such his commonable cattle *levant* and *couchant* upon the common, and upon issue taken, it appeared that some were and some were not *levant* and *couchant*, the defendant would be entitled to a verdict, the plaintiff having traversed the *levancy* and *couchancy*, instead of new assigning the trespass, by stating that he brought his action for depasturing the common with *other* cattle; and this upon the general principle, that in trespass it is sufficient for the defendant to prove that which excuses the trespass, although not to the extent of the number or amount specified in the declaration (*n*). Levant and Couchant. *319

The defendant cannot give his right of common in evidence under the general issue in trespass (*o*).

It has already been seen, that evidence of reputation is admissible to prove customary rights where many are interested (*p*), although such evidence be not admissible to prove a private prescriptive right. Reputation.

On issue joined on a custom pleaded that a customary tenant shall have common of pasture on the plaintiff's land, evidence is admissible of a cus-

(*e*) *Creach* v. *Wilmot*, 2 Taunt. 160, cited by Lawrence, J. *Hawke* v. *Baron*, 2 Taunt. 156. And see tit. Trespass.

(*f*) 12 Vin. Ab. Common, T. b. 18. L. E. 235, pl. 37; 13 Hen. 7, 13; *supra*, and tit. Variance.—Prescription.

(*g*) Carth. 241.

(*h*) Clayton, 9—8, C. 1, *Atkinson's Case*.

(*i*) Clayton, 9—8, C. 1, *Atkinson's Case*.

(*k*) A commoner cannot distrain the surplusage where another commoner puts more cattle on the common than are *levant* and *couchant;* 1 Roll. Ab. 320, 405, pl. 5; Yelv. 104; 2 Bulst. 117; and *semble*, he cannot, although *none* of the cattle have been *levant* and *couchant*. 1 Will. Saund. 346, *d*. Yet *qu*. where the right is limited to a certain number. *Hall* v. *Harding*, 4 Burr. 2431. *Levancy* and *couchancy* are incident to common appendant as well as appurtenant, and can be claimed only in respect of cattle sufficient to plough and manure the tenant's arable land. *Bennett* v. *Reeve*, Willes, 227; Co. Litt. 122, *a*.

(*l*) 2 Roll. Ab. 706, p. 41. *Sloper* v. *Allen*, 1 Brownl. 171; 1 Will. Saund. 346, *d*.

(*m*) But *qu*. whether in such case the commoner might not help himself, by entering a *nolle prosequi* as to the cattle which were not *levant* and *couchant*, and proceed for the rest?

(*n*) See tit. Trespass; and 2 Will. Saund. 346, *d*.

(*o*) Co. Litt. 283, *a;* Gil. Ev. 216.

(*p*) Vol. I. tit. Refutation. *Weeks* v. *Sparke*, 1 M. & S. 679; Carth. 181. For further observations, see tit. Custom.

tom for the lord to inclose parcels, and of a grant to the plaintiff under such circumstances (*q*).

Competency. The general rule is, that if the issue be on a customary right of common, by the establishment of which the witness would be benefited, he is incompetent; but that where he gives evidence to establish the private prescriptive right of another, he is competent (*r*). Thus, if the issue be on a right of common which depends upon a custom pervading the whole manor, the evidence of the commoner is inadmissible, because, as the right depends upon the custom, the record in that action would be evidence in another action brought by that very witness to try the same right (*s*) (1). In such a case, although the witness be not a party to the action, yet he claims under the same title with the party whose witness he is, and thereby immediately establishes his own title (*t*). So where the issue was upon the question whether the defendant was bound *ratione tenuræ* to repair a fence contiguous to a common on which the plaintiff prescribed for common appurtenant, it was held that another commoner was not a competent witness (*u*). Neither is a commoner competent to extend the limits of such rights. But the same reason does not apply where common is claimed by prescription in right of a particular estate; for if *A.* has a prescriptive right of common belonging to his estate, it does not follow that *B.*, who has also an estate in the same manor, has the same right; and the judgment for *A.* would not be evidence for *B.* (*x*). So if *A.*, *B.*, *C.* and *D.*, claim common in Dale, exclusively of *all other persons, and the right of *A.* comes in dispute, *B.* may be a witness to prove *A.*'s right of common there, for in effect he charges himself by proving that another has a right of common there (*y*).

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One who claims common *pur cause* of vicinage is not, it is said, incompetent; for this is no interest, but only an excuse for a trespass (*z*).

CONFESSION. *See* ADMISSION.

CONFIDENTIAL COMMUNICATION.

General rule. THE rule that a counsel, solicitor or attorney, shall not be permitted to divulge any matter which has been communicated to him in professional confidence, has already been adverted to as one that is founded on the most obvious principles of convenience (*a*). That is the privilege of the client, and is founded on the policy of the law, which will not permit a person to betray a secret which the law has entrusted to him (*b*). To allow such an

(*q*) *Arlett* v. *Ellis*,[1] 7 B. & C. 346. See further, *The Attorney General* v. *Gauntlett*, 3 Y. & J. 93.
(*r*) 3 T. R. 32; 1 T. R. 302. (*s*) Per Buller, J., 1 T. R. 302.
(*t*) B. N. P. 283; and see *The Duke of Somerset* v. *France*, 1 Str. 658.
(*u*) *Anscombe* v. *Shore*, 1 Taunt. 261.
(*x*) Per Buller, J., 1 T. R. 303. "And yet," adds the learned Judge, "there are cases which lay it down as a general rule, that one commoner cannot be a witness for another."
(*y*) Per Holt, L. C. J., in *Hockley* v. *Lamb*, 1 Ld. Raym. 731.
(*z*) B. N. P. 285. Where one of two adjoining commons, with common of vicinage, is fenced off but incompletely, so as still to admit of cattle straying from one to the other by means of a highway, the common by vicinage still continues. *Gullett* v. *Lopez*, 13 East, 348.
(*a*) Vol. I. tit. PRINCIPLES OF EVIDENCE.
(*b*) B. N. P. 284; Rayner Read. 111; 9 St. Tr. 387. *R.* v. *Earl of Anglesea.*

(1) [In trespass *quare clausum fregit*, where the defence was that the *locus in quo* was, and had been for sixty years, used by the inhabitants of Staten Island as a free and common fishery; an inhabitant of the island was held not to be a competent witness for the defendant. *Jacobson* v. *Fountain & al.* 2 Johns. 170. And a release by such inhabitant of his right to the fishery will not restore his competency, *Ibid.*]

[1] Eng. Com. Law Reps. xiv. 53.

examination would be a manifest hindrance to all society, commerce, and conversation (*c*) (1).

With respect to such communications, the mouth of the witness is for ever sealed, and he cannot reveal them at any time or in any proceeding, although the client be no party to it, however improbable it may be under the circumstances that any injury can result to him from the disclosure (*d*), and although the relation of attorney and client has ceased by the dismissal of the attorney (*e*).

The rule is strictly confined to counsel (*f*), solicitors and attornies (*g*) (2). It has even been held at *Nisi Prius*, that where a communication was made to the witness under the mistaken idea that he was an attorney, when the fact was otherwise, the witness was bound to reveal it. It extends, indeed, to a communication made to the clerk of an attorney (*h*); to an interpreter between a client and his counsel or attorney, for this may be essential to the communication between the parties, and the privilege rests upon the same grounds (*i*). But it does not, it seems, extend to a communication made to an attorney, which has been accidentally overheard by another witness (*k*), for this is owing to the negligence of the client himself (*l*). Nor to a letter written by the attorney to the client, and indorsed by the client (*m*). Nor to a communication made to an interpreter in the absence of the *attorney (*n*). Nor to what took place at the execution of a deed (*o*). Nor to an admission of a debt made by the attorney to the adverse party by direction of his client (*p*). Nor to proof of indentity (*q*).

To what persons the rule is confined.

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(*c*) See 12 Vin. Ab. B. a. pl. 1.

(*d*) *Wilson* v. *Rastall*, 4 T. R. 753. Per Buller, J., 4 T. R. 759. *Vide etiam*, *Sloman* v. *Herne*, 2 Esp. C. 695. *Rex* v. *Withers*, 2 Camp. 579. *Maddock* v. *Maddock*, 1 Ves. 262. *Bishop of Winton* v. *Fournier*, 2 Ves. 446.

(*e*) *R.* v. *Withers*, 2 Camp. 178; [6 Ves. 280.]

(*f*) In the case of *Foote* v. *Hayne*, 1 R. & M. 165, in an action for breach of promise of marriage, the L. C. J. would not allow the law-clerk of defendant's counsel to be examined, to prove the fact of the counsel's retainer by the defendant.

(*g*) *R.* v. *Duchess of Kingston*, 11 St. Tr. 246. [*Mills* v. *Griswold*, 1 Root. 388.]

(*h*) *Taylor* v. *Foster*,[1] 2 C. & P. 195.

(*i*) *Madame Du Barré's Case*, cited 4 T. R. 756.

(*k*) *Wilson* v. *Rastall*, 4 T. R. 753.

(*l*) *Gainsford* v. *Grammar*, 2 Camp. 10.

(*m*) *Meyer* v. *Sefton*,[2] 2 Starkie's C. 274.

(*n*) *Du Barré* v. *Livette*, Peake's C. 77.

(*o*) 5 Esp. C. 52. See *Bicknell* v. *Keppell*, 1 N. R. 21.

(*p*) *Turner* v. *Railton*, 2 Esp. C. 474.

(*q*) 2 D. & R. 347.

(1) [The earliest case that has been found on this subject is *Berd* v. *Lovelace*, 19 Eliz. Cary's Rep. 88, thus—Thomas Hawtry was served with a subpœna to testify his knowledge touching the cause in variance; and *made oath* that he had been and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry *shall not be compelled* to be deposed touching the same; and that he shall be in no danger of any contempt touching the not executing of the said process. In *Austen* v. *Vesey*, Cary's Rep. 89, for that it appeared *by affidavit*, that the witness was solicitor in the same cause to one of the parties, he was discharged, and *not admitted* to be examined. In *Kelway* v. *Kelway*, Cary's Rep. 126, upon *certificate* that Roger Taylor refused to be examined, because he solicits the plaintiff's cause; it is therefore ordered, that the defendant shall examine, before one of the commissioners of the court, the said Roger Taylor upon any interrogatory, which shall not be *touching the secrecy of the title*, or of any other matter *which he knoweth as solicitor only*. In *Dennis* v. *Codrington*, Cary's Rep. 143, the plaintant seeks to have Master Oldsworth examined touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled by subpœna, or otherwise, to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties, or with either of them by reason of any annuity or fee. See also *Wilson* v. *Grove*, Tothill, 177. These early decisions in chancery, though they seem to have been generally overlooked, contain the principles which are applied at this day.]

(2) [The rule does not apply to a student in the office of an attorney or counsellor. *Andrews & al.* v. *Solomon & al.* 1 Peters' Rep. 356.] {But it has been lately decided in *England*, that the rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself. *Taylor* v. *Foster*, 2 Carr. & Payne, 195.}

[1]Eng. Com. Law Reps. xii. 85. [2]*Id.* iii. 343.

To what communications.

The rule is not confined to communications made in the course of a cause, or with a view to a cause (*r*); but extends to all cases where the party applies for professional assistance (*s*), in respect of a cause contemplated, or matter in dispute or controversy (A). Though not to cases where the attorney is employed in matters which are not professional, as in a treaty for the purchase of an estate. The rule extends to facts which the attorney becomes acquainted with in the character of an attorney, although the communication was not made by his client (*t*). Such as
*322 communications made *by third persons who accompanied the client when he came to consult the attorney (*u*); and to the contents of a written instrument, which he has by delivery from his client (*x*). No other commu-

(*r*) *Cromacke* v. *Heathcote*,[1] 2 B. & B. 4. *Gainsford* v. *Grammar*, 2 Camp. 9; 6 Madd. 47. But see below note (*e*); and *Wadsworth* v. *Hamshaw*,[2] 2 B. & B. 5, in the note, where the contrary is said to have been decided in the Court of K. B.

(*s*) In *Williams* v. *Mundie*,[3] 1 Ry. & M. 34, Lord Tenterden is said to have held, that the rule extended to such communications only as were made pending a cause. In *Broad* v. *Pitt*,[4] 1 M. & M. 233, Best, C. J. said, that when called upon he should rule conformably with Lord Tenterden's ruling; but in the case of *Clarke* v. *Clarke*, 2 M. & M. 3, Lord Tenterden, C. J. held, that communications made to an attorney respecting a matter in dispute and controversy are privileged, though no cause was then commenced. His lordship, referring to what he had been supposed to have said in the case of *Williams* v. *Mundie*, observed, "I think I could not have said that it must relate to matters communicated strictly for the purpose of bringing an action, or to a cause actually existing. I certainly have been more inclined to restrict the privilege more than many other Judges; and I have been so very much in consequence of a cause to which my attention was drawn at a very early period of my professional life (before I was at the bar), which was tried on the Midland circuit, and in which Serjeant Adair went specially as counsel. It was an action for bribery; and on its appearing that a witness, who was called to prove conversations, was the attorney of the party, the Judge at once refused to allow the evidence to be gone into, and nonsuited the plaintiff. The nonsuit was set aside and a new trial had, on the ground that though the witness was the defendant's attorney, the communication was not made to him in his professional character. *Bramwell* v. *Lucas*,[5] 2 B. & C. 745, proceeded on the same principle; and accordingly an attorney there was held to be at liberty to give evidence of inquiries made of him by his client as to a mere matter of fact, for that his professional character was not then concerned. Suppose a party to consult his attorney whether or not he should bring or resist an action, I cannot doubt that such a communication would be privileged, though no suit was pending at the time. In the present case no suit was pending at the time; but after dispute had arisen, the plaintiff consulted an attorney on the subject, put documents into his hands, and steps were taken on them to render them effectual. I think that was a communication made to the attorney in his professional character, with respect to a matter then in dispute and controversy, although no cause was in existence with respect to it, and I think that such a communication is privileged." See *Parkhurst* v. *Lowton*, 2 Swanst. 199. In *Hargreave* v. *Hutchinson*, York Sum. Ass. 1834, Lyndhurst, L. C. B. said, that it had been held by the Judges, after consideration, that the rule was, that a communication to an attorney is privileged, if an action be pending or contemplated; and see 6 Madd. 47.—The Court (of Chancery) discharged so much of an order to produce papers as were sworn to be communications between the defendant and her country solicitor, and between her and her town solicitor, or between those persons either during the cause, or with reference to it, though previous to its commencement. *Hughes* v. *Biddulph*, 5 Russ. 190. So where the papers were written after the dispute had arisen, with a view to taking the opinion of counsel upon the matter in question, and which afterwards became the subject of suit. *Vent* v. *Pacey*, 4 Russ. 193. The attorney in a cause may be called on the opposite side, and asked who is his employer, in order to let in his acts and declarations. *Levy* v. *Pope*,[6] 1 M. & M. 410. Where the defendant's attorney's clerk was called merely to prove the fact of the receipt of a particular paper from the defendant, held that it was not a privileged communication. *Eicke* v. *Nokes*,[7] 1 M. & M. 305. The attorney cannot be asked whether, before the action brought, his client, the plaintiff, did not say that he would waive it. *Goodlight* v. *Bridge*, Loffft, 27.

(*t*) *Robson* v. *Kemp*, 5 Esp. C. 52. (*u*) *R.* v. *Withers*, 2 Camp. 579.

(*x*) *Beard* v. *Ackerman*, 5 Esp. 120.

(A) (*Bailly* v. *Robles*, 4 Mart. N. S. 362. The rule of law that counsel and attornies are not to be permitted to give evidence of facts imparted to them by their clients when acting in their professional character, is not confined to facts disclosed in relation to suits actually pending, but extends to all cases in which the counsel or attorney is applied to in the line of his profession, whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice or otherwise, unless indeed the client seemed to make his disclosures to the public, and, as it were, challenge the bystanders to hear him. *Parker* v. *Carter et al.* 4 Munf. 273. But the rule which excludes the proof of communications by a client to his counsel, is confined to cases in which the client is interested. *Hamilton* v. *Neel*, 7 Watts, 517. So also a person in no way connected with the counsel, present at a communication made to him by a client, is bound to testify. *Jackson* v. *French*, 3 Wend. 337. See note (A), Vol. I. pages 69 and 70.)

[1]Eng. Com. Law Reps. vi. 1. [2]*Id.* vi. 2. [3]*Id.* xxi. 375. [4]*Id.* xxii. 300. [5]*Id.* ix. 233. [6]*Id.* xxii. 343. [7]*Id.* xxii. 314.

nication, however confidential in its nature, is privileged, either by the relation or rank of the parties.

All other professional persons, whether physicians, surgeons, or divines, are bound to disclose the secrets which have been reposed in them in the practice of their profession, when called upon to do so for the purposes of justice (*y*). It has been held that a Roman catholic priest is bound to reveal secrets confided to him in the course of confession (*z*) (1). So a steward, servant, or private friend is bound to disclose a communication, however confidential it may be in its nature (*a*) (2). And a peer has no greater privilege in this respect than a commoner (*b*). In one case, indeed, it is reported that Lord Holt would not permit a trustee for the plaintiff and defendant, who had been employed by them in the purchase of offices, to be examined, on the ground that he should not be allowed to betray his trust (*c*). This, however, seems to be inconsistent with later authorities.

In a late case, where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament, it was held that he was bound to give his testimony; and that the evidence which a witness was called upon to give in a court of justice was to be considered as an implied exception in the Act (*d*).

Time of the communication.

As the rule is one of policy or necessity, and operates to the exclusion of evidence, its operation is strictly limited to communications made in the course of professional business, pending the relation of counsel or attorney, and client; for the policy on which the rule is founded extends no farther; and therefore it does not extend to any communication, although made to an attorney, if he was not employed as such, but only as a mere agent at the time (*e*); nor to any which was made before the commencement of the suit, whilst the witness did not act in the capacity of an attorney or clerk in court (*f*); nor to a gratuitous communication made to an attorney after the termination of the suit. Thus, upon an action brought to recover a sum paid on the compromise of a cause after interlocutory judgment, and the execution of an inquiry, it was held that the attorney in the first cause might be called upon to disclose, that his client, after the termination of that

(*y*) *Wilson* v. *Rastall*, 4 T. R. 753. *R.* v. *Duch. of Kingston*, 11 St. Tr. 243; Keb. 505; Vent. 197; Bac. Ab. Ev. A. 2; Skinn. 404.

(*z*) Peake's C. 77. *Butler* v. *Moore*, *cor.* Sir Mich. Smith, bart. Master of the Rolls, Macnall. 253. *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*a*) 2 Atk. 524. (*b*) 11 St. Tr. 246.

(*c*) Ld. Raym. 783. His giving such evidence would have been objectionable on another ground, since it exposed him to penalties.

(*d*) *Lee*, q. t., v. *Birrell*, 3 Camp. 337.

(*e*) *Wilson* v. *Rastall*, 4 T. R. 753; B. N. P. 284. *Crofts* v. *Pickering*, Vent. 197; 12 Vin. Ab. 38, B. a.

(*f*) *Vaillant* v. *Dodemead*, 2 Atk. 524.

(1) [A contrary decision was made by a court in New York. *Smith's case*, 2 New York City Hall Recorder, 77. See *note*, ibid. p. and *Phillip's case*, reported by W. Sampson, Esq. Confession made to a *protestant* divine will be received in evidence. *Smith's case*, ubi sup.] }*Comm.* v. *Drake*, 15 Mass. Rep. 161.{

(2) [A confidential agent or factor may be compelled to give evidence of matters confidentially communicated to him. *Holmes* v. *Comegys*, 1 Dallas, 439. {The banker of one of the parties in a cause is bound to answer what such party's balance was on a given day, as it is not a privileged communication. *Lloyd* v. *Freshfield*, 2 Carr. & Payne, 325.} So of a confidential clerk, as to facts which his situation brings to his knowledge. *Corp* v. *Robinson*, Circuit Court, Oct. 1809. Wharton's Digest, 275. {Reported 2 Wash. C. C. Rep. 289.} And any extraneous or impertinent communications, which are not instructions for conducting a case, are not privileged from disclosure, though made to counsel. *Riggs* v. *Denniston*, 3 Johns. Cas. 198. Nor information imparted to a counsellor in the character of a friend and not as counsel. *Hoffman & al.* v. *Smith*, 1 Caines's Rep. 157. See *Calkins* v. *Lee*, 2 Root, 363. *Sherman* v. *Sherman*, 1 Root, 486.]

cause, said that his demand arose upon a lottery transaction (*g*) (1). Nor in general to any communication, although made to an attorney, which is not made in professional confidence. In the case of *Annesley* v. *The Earl of Anglesea*, it was held, that a conversation which had been held twenty years ago between the Earl of Anglesea and his attorney, as to the prosecution *of the plaintiff for murder, might be inquired into, since it was not matter of professional confidence (*h*). Nor to any fact which the attorney acquired by any other means than by the *confidential* communication by the client. Thus, an attorney is compellable to identify the person of his client (*i*); to prove that his client swore to and signed an answer in Chancery, upon which he is indicted for perjury (*k*); to prove the execution of an instrument by his client, to which he is an attesting witness (*l*); to prove any collateral fact within his own knowledge, independently of any professional communication; as, to prove the hand-writing of his client (*m*), in an action of debt upon a bond, to prove that the consideration was usurious (*n*); to prove, where the question is as to an erasure in a deed or will, any facts as to the state of the instrument which he knows independently of a professional communication by his client (*o*): or to prove the contents of a written notice to produce papers (*p*): in short, the attorney may disclose any matter except that which has been confidentially and professionally entrusted to him by a client (*q*) (2).

Nature of the communication.

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Waver, &c.

The privilege is that of the client, and not of the witness (*r*); and therefore the Court will interfere to protect the client. although the witness be willing to betray his trust (*s*); and a Court of Equity has ordered such

(*g*) *Cobden* v. *Kendrick*, 4 T. R. 431.

(*h*) *Annesley* v. *Earl of Anglesea*, 8 St. Tr. 380. See *Crofts* v. *Pickering*, 1 Vent. 197. *Oneby's Case*, 12 Vin. Ab. B. a. pl. 2; March, 13; L. E. 81.

(*i*) *R.* v. *Watkinson*, 2 Str. 1122; B. N. P. 284; Cowp. 846.

(*k*) Per Ld. Mansfield, Cowp. 845.

(*l*) *Doe* v. *Andrews*, Cowp. 846. Every man, by attesting an instrument, pledges himself to come forward to prove it. *Ibid.* and *Ld. Say and Sele's Case*, 10 Mod. 40.

(*m*) 2 Haw. c. 46, s. 89.

(*n*) *Duffin* v. *Smith*, Peake's C. 108.

(*o*) B. N. P. 284; 1 Vent. 197.

(*p*) *Spenceley* v. *Schullenberg*, 7 East, 357. [And Mr. Day's note to that case.]

(*q*) It has been said that it does not extend to a communication made by a client to his counsel, where it is mere conveyance. *South Sea Company* v. *Jolliffe*, cited 2 Atk. 522.

(*r*) B. N. P. 284; *Petrie's Case*, cited 4 T. R. 751, 759.

(*s*) 9 T. R. 759; 2 Ves. jun. 189.

(1) [If after the relation of attorney and client has ceased, the latter voluntarily repeat what he had communicated while the relation existed, the attorney is not privileged from disclosing it. *Jordan* v. *Hess*, 13 Johns. 492.]

(2) [Where an attorney or counsellor, after the commencement of the suit, and without any communication from his client, acquires a knowledge of his hand-writing, he may be called upon to testify to its identity. *Johnson* v. *Daverne*, 19 Johns. 134. An attorney may be called upon to prove the execution of a deed intrusted to him by his client, and that it is in his possession, so as to entitle the opposite party, on his refusing to produce it after notice, to give parol evidence of its contents: But the attorney cannot be compelled to produce such deed, nor to disclose its date or contents. *Brandt* v. *Klein*, 17 Johns. 335. S. P. *Jackson* v. *M'Vey & al.* 18 Johns 330.

An attorney may give evidence that a bond was lodged with his client, by way of indemnity, or that his client expressed himself satisfied with a certain security—or any collateral facts. *Heister* v. *Davis*, 3 Yeates, 4. He may be examined whether a note put into his hands to collect was indorsed or not. *Baker* v. *Arnold*, 1 Caines' Rep. 258. So he may be compelled to disclose terms of compromise offered by him to his client's creditors. *M'Tavish* v. *Dunning*, Anthon's N. P. C. 82.

One who has signed a note as attorney for another, and had afterwards given bond for his principal to prosecute an appeal from a judgment on the note, was held not to be privileged thereby from giving evidence for the payee to prove its execution. *Phelps* v. *Riley*, 3 Conn. Rep. 266. See *Caniff* v. *Myers*, 15 Johns. 246.

An attorney or counsellor is not obliged to produce a paper, intrusted to him by his client, in order that the grand jury may inspect it on a charge of forgery against the client. *Anon.* 8 Mass. Rep. 370. *The State* v. *Squires*, 1 Tyler, 147. *R.* v. *Dixon*, 3 Bur. 1687. See 12 Mod. 391.][a]

[a] See *Lessee of Rhoades* v. *Selin*, 4 Wash. C. C. R. 715.

matter to be expunged (*t*). But the client may, if he will, wave this privilege, as he may any other (*u*). And if a counsel or attorney be called as a witness by his client, he is not protected from cross-examination as to the point upon which he has been examined in chief, although it was matter of confidential communication. But such cross-examination must be confined to the same matter, and must not be extended to other points in the cause (*x*).

The rule applies, whether the question be asked upon an examination in chief, or upon cross-examination (*y*).

Form of the oath.

The course of proceeding in Mr. *Aylott's Case* was somewhat singular. He had been counsel for the defendant, and being called as a witness for the plaintiff, the Court acceded to his request that he might not be sworn in the usual way on the *general oath*, but only to reveal such things as he knew before he was counsel, or as had come to his knowledge since by other persons, and the particulars to which he was to be sworn were specifically proposed; viz. what he knew concerning the will in question (*z*). Such a precaution, however, seems to arise out of an excessive tenderness of conscience. The general obligation of the oath to declare the whole truth, must, with reference to the subject-matter and occasion of the oath, be *necessarily understood to mean the truth, so far as it ought legally to be made known (*a*). *324

Exceptions.

It has been seen, that where an informer makes a disclosure to a magistrate, or agent of government, neither the names of the parties to whom the information has been given, nor the nature of the communication itself, is allowed to be revealed (*b*).

A clerk attending on a grand jury was not allowed to reveal what was given in evidence before the inquest, the jurors themselves being sworn to keep secret all that passes before them (*c*.) (1).

CONFIRMATION.

If the issue in tail does any act towards carrying an agreement or contract of his ancestor, into execution, it will become binding on him, and he will be compelled in equity to perform it (*d*).

CONSPIRACY.

Direct evidence. Circumstantial evidence.

Upon an indictment for a conspiracy, the evidence is either direct, of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the offence, is *circumstantial*. It is not necessary to prove any direct concert, or even meeting, of the conspirators (*e*). If several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy (*f*) (A).

(*t*) *Sandford* v. *Kensington*, 2 Ves. jun. 189.
(*u*) Phil. Ev. 108. {*Merle* v. *Moore*,[1] 2 Carr. and Payne, 275.}
(*x*) *Vaillant* v. *Dodemead*, 2 Atk. 524. (*y*) *Waldron* v. *Ward*, Styl. 449; 12 Vin. Ab. a.
(*z*) *Sparke* v. *Sir Hugh Middleton*, 1 Keb. 505, pl. 68; 12 Vin. Ab. B. a. pl. 4.
(*a*) See Paley's Moral Philosophy.
(*b*) Vol. I. Witness. On the trial of *Stone* for high treason (6 T. R. 527), Lord Grenville produced a letter of Jackson's, a fellow-conspirator, which had been transmitted to him from abroad in a confidential way, and stated that he could not possibly divulge by whom it had been communicated.
(*c*) Vin. Ab. Ev. 38.
(*d*) Com. Dig. Estate, b. 22; Co. Litt. 32; 3 Com. Dig. 41, 85. See also *Doe* v. *Morse*,[2] 1 B. & Ad. 365.
(*e*) 1 Bl. R. 392, 401. *R.* v. *Cope*, Str. 144. (*f*) *R.* v. *Lee*, MS.

(1) [In *The Commonwealth* v. *Tilden*, Feb. 1823, Norfolk County (Mass.), it was ruled by Putnam, J. that the attorney for the Commonwealth could not be called upon to testify to what passed in the grand jury's room.]

(A) (In an indictment for a conspiracy to defraud by means of false pretences, no overt act need be set

[1]Eng. Com. Law Reps. xii. 127. [2]*Id.* xx. 398.

A concert may be proved by evidence of a concurrence of the acts of the defendant with those of others, connected together by a correspondence in point of time, and in their manifest adaptation to effect the same object. Such evidence is more or less strong, according to the danger, publicity, or privacy of the object of concurrence, and according to the greater or less degree of similarity in the means and measures adopted by the parties; the more secret the one, and the greater the coincidence in the other, the stronger is the evidence of the conspiracy. In general, proof of concert and connection must be given before the prisoner can be affected by the acts of others (*g*).

Where it appeared that there was a conspiracy to levy war in the North Riding of Yorkshire, and that there was at the same time a similar conspiracy in the West Riding, in which latter only it took place, and there was no evidence to show that those in the one Riding knew of the conspiracy in the other, it was held that the former could not be implicated in the acts of the latter (*h*), although they concurred at the same time to the same object.

Upon an indictment against a card-maker, his wife and family, for a conspiracy to ruin another card-maker, it was proved that each had given
*325 money *to the apprentices of the prosecutor to put grease into the paste which he used, in order to spoil the cards; it was objected that no two of the defendants were ever together when this was done; but Pratt, C. J., said, that as they were all of one family, and concerned in making cards, this was evidence to go to a jury (*i*).

Upon the trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost in Cock-lane, Lord Mansfield informed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances (*j*).

Where the charge of conspiracy is in its nature cumulative, it may be proved by evidence of repeated acts. Thus, where the charge was of a conspiracy by the defendants, to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, and evidence was given of their having hired a house in a fashionable street, and that they represented themselves to a tradesman employed in furnishing it, as persons

(*g*) East's P. C. 97. A prisoner against whom the bill was ignored may, if not discharged, be called into the dock to be identified as one in company with the other prisoners (*cor.* Garrow, B.), *R.* v. *Deering*,[1] 5 C. & P. 165.

(*h*) Kel. 19; East's P. C. 97.

(*i*) *R.* v. *Cope*, Str. 144.

(*j*) *R.* v. *Parsons*, 1 Bl. B. 392.

forth, it is sufficient if the act is laid to be done for the purpose of defrauding. *Collins* v. *The Commonwealth*, 3 Serg. & R. 220. *Commonwealth* v. *M'Kisson*, 8 Serg. & R. 420. *The People* v. *Mather*, 4 Wend. 229. The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for an unlawful purpose. The offence is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it. *Commonwealth* v. *Judd & al.* 2 Mass. Rep. 329. *Same* v. *Tibbetts & al.* 2 Mass. Rep. 536. *Same* v. *Warren & al.* 6 Mass. Rep. 74. *Same* v. *Davis*, 9 Mass. Rep. 415. *State* v. *Rowley*, 12 Conn. Rep. 101. *Commonwealth* v. *Carlisle*, 1 Journal of Jurisprudence, 225. *State* v. *Buchanan*, 5 Har. & Johns. 317. Thus a conspiracy to manufacture any base and spurious commodity, with the intent to sell the same at public auction as good and genuine for the purpose of defrauding the purchasers of their money, although no sale be made, is an indictable offence. *Commonwealth* v. *Judd*. So also it is indictable as a conspiracy to charge any person with a crime and in pursuance thereof, falsely to affirm that he is guilty without procuring or intending to procure any indictment or any process civil or criminal against such persons. *Commonwealth* v. *Tibbetts*, 11 Mass. Rep. 536; or to commence suits against a person with the view of extorting money. *Leggett* v. *Postley*, 2 Paige, 599. But it is not an indictable offence for several persons to conspire to obtain money from a bank by drawing their checks on the bank when they have no funds there. *State* v. *Rickie*, 4 Halst. 223.

[1]Eng. Com. Law Reps. xxiv. 257.

of large fortune, evidence of a similar representation to another tradesman having been objected to, Lord Ellenborough admitted the evidence, saying, that as it was an indictment for a conspiracy to carry on the business of common cheats, cumulative instances were necessary to prove the offence (*k*).

Upon an indictment which charged the defendants with a conspiracy to cheat and defraud the prosecutor, *General Maclean*, by selling him an unsound horse, it appeared that one of the defendants (*Pywell*) had advertised the sale of certain horses, with a warranty of their soundness; and that another of the defendants, upon an application by the prosecutor at *Pywell's* stables, stated that he had lived with the owner of a horse then shown to the prosecutor, and that he knew him to be perfectly sound, and, as the agent of *Pywell*, would warrant him to be sound; the prosecutor purchased the horse, and discovered, soon after the sale, that he was nearly worthless. Lord Ellenborough held that no indictment in such a case could be maintained without evidence of concert between the parties to effectuate a fraud; and the defendants were acquitted (*l*).

Acts of conspiracy.

Where several conspire to procure an employment under government by corrupt means, it seems that a banker who receives the money in order to pay it over for that purpose, becomes a party to the conspiracy (*m*).

Act of one, evidence against the rest.

Where several combine together for the same illegal purpose, each is the agent of all the rest, and any act done by one in furtherance of the unlawful design, is, in consideration of law, the act of all (*n*) (A). And as a declaration accompanying an act strongly indicates the nature and intention of the act, or, more properly, perhaps, is to be considered as part of the act, a declaration made by one conspirator at the time of doing an act in furtherance of the general design, is evidence against the other conspirators. It is for the Court to judge whether a sufficient connection has been established to affect one person with the acts of others (*o*).

In *Stone's Case* (*p*), the defendant was indicted for treason, and charged with conspiracy with *Jackson* to collect and communicate intelligence to *326
the French government, in order to assist the King's enemies, &c.; after evidence has been given of a conspiracy for this purpose, a letter of *Jackson's* containing treasonable information, which had been transmitted to Lord Grenville from abroad, was admitted in evidence against the prisoner; and the case of *The King* v. *Bowes and others* was cited, where Buller, J., upon an indictment against the defendants for a conspiracy to carry away

(*k*) *R.* v. *Roberts and others*, 1 Camp. C. 399.
(*l*) *R.* v. *Pywell and others*,[1] 1 Starkie's C. 402.
(*m*) *R.* v. *Pollman and others*, 2 Camp. 233.
(*n*) *R.* v. *Stone*, O. B. 1796. (*o*) East's P. C. 97.
(*p*) 6 T. R. 527. Note, in this case Ld. Kenyon said that he should have doubted as to the admissibility of such evidence, if it had not been sanctioned by the authority of the Judges who sat at the Old Bailey on the late trials for treason; but he afterwards said that, on consideration, he thought they had done right in admitting the evidence.

(A) (To make the actions and declarations of a conspirator in furtherance of the common object, admissible in evidence against a co-conspirator, it is sufficient that the conspiracy has been proved by a *competent* witness. The court will not decide on his credibility. *Commonwealth* v. *Crowninshield*, 10 Pick. R. 497. Where on an indictment for a conspiracy to cheat a person out of his property, the guilt of one of the conspirators as to the fraudulent design was clearly proved, evidence that the other conspirator was present at the time the fraudulent design was carried into execution, and that he received a part of the property and sold it under a fictitious name, was considered sufficient for the jury to infer from it that he was an associate and confederate in the fraud by which it was obtained. *Com'th* v. *Warren*, 6 Mass. Rep. 74.) [*Collins* v. *Commonwealth*, 3 Serg. & Rawle, 220. See also *Ex parte Bollman* v. *Swartwout*, 4 Cranch, 75. 1 Robinson's Report of Burr's Trial, 21. 2 Ibid. 401, *& seq.*]

[1] Eng. Com. Law Reps. ii. 444.

Lady Strathmore, had laid down the same doctrine (*q*). So in the cases of murder and burglary, the acts of one are frequently received against another engaged in the same design.

In *Watson's Case* (*r*), after evidence of a treasonable conspiracy, to which the prisoner, who was upon his trial, was a party, it was held that papers found in the lodgings of a fellow-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, although no absolute proof had been given of their previous existence, strong presumptive evidence having been adduced to show that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers (*s*). The papers in this case were proved to be intimately and immediately connected with the objects of the conspiracy, as detailed in evidence. Upon the same trial, evidence having been given that a paper containing seditious questions and answers had been found in the possession of a fellow-conspirator, but had not been published, the Court doubted whether the paper was sufficiently connected by evidence with the object of the conspiracy to render it admissible, and it was not read; but they held, that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would clearly be admissible (*t*).

It seems, however, on the other hand, that a mere gratuitous assertion inculpating himself and others, although made by a fellow-conspirator, would not be evidence against any one but himself. As against himself it would be evidence, upon the general ground that any declaration or admission connected with the charge, be it oral or written, is admissible in evidence against the party who makes it (*u*); but, as against another person, it is no more than the mere gratuitous declaration of a stranger not upon oath.

Evidence to prove the existence of a conspiracy.

Although in general, upon principles already adverted to (*x*), the act or declaration of one man is not evidence against another who is charged as a fellow-conspirator, until such a privity and community of design has been established between them as affords a reasonable presumption that the act or declaration of one is the act or declaration of the other, made with his sanction, and therefore indicating his mind and intention; and although it follows, from these principles, that such a connection must be established
*327 *before the acts and declarations of one man can properly be used as evidence to show the designs of another, yet, in some peculiar instances, where it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from this rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy, previous to the proof of the defendant's privity.

In *Hardy's Case* (*y*), Buller, J., said, "In an indictment of this sort there are two things to be considered: first, whether any conspiracy exists; next, what share the prisoner took in that conspiracy." But the same learned

(*q*) 30th May, 1787. The cases of *The King* v. *Hardy and Tooke*, O. B. 1794, were also cited. See also *R.* v. *Salter*, 5 Esp. C. 125; where, on an indictment for a conspiracy to procure the discharge of a coachman, after proof was given of a meeting and conspiracy, at which the defendants were present, it was held that declarations made by others who had been so present were admissible.

(*r*) 2 Starkie's C. 140.[1]

(*s*) But it would be otherwise, if, as in *Hardy's Case*, the papers were found in the possession of persons after the prisoner's apprehension; those persons might have obtained possession of them after his apprehension. 2 Starkie's C. 141.[1]

(*t*) *Watson's Case*,[1] 2 Starkie's C. 141.

(*u*) See tit. Admissions.

(*x*) *Supra*, tit. Admissions; and see below, 328.

(*y*) Gurney's edition, vol. i. p. 360 to 369.

[1]Eng. Com. Law Reps. iii. 273.

Judge afterwards added, "Before the evidence (that is, of the conspiracy so proved to exist) can affect the prisoner materially, it is necessary to make out another point, namely, that he consented to the extent that the others did" (*z*).

The rule that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the Courts, in cases of conspiracy, have, out of convenience, and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence in order to establish the fact of a conspiracy, it is to be remembered that this is an inversion of the usual order, for the sake of convenience; and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved.

The case admits of this illustration:—Suppose a witness to overhear a conspiracy actually entered into between three persons whom he cannot identify; if there be circumstantial evidence to prove that *C. D.*, the defendant, was one of those conspirators, proof of the fact of conspiracy would first be admitted, and then the question would be, upon the circumstantial evidence, whether *C. D.* was one of the parties who so conspired.

It seems, however, that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy (*a*), although consultations for the purpose (*b*), and letters written in prosecution of the design, though not sent (*c*), are admissible.

Mere declarations.

Mr. J. Buller, indeed, in *Hardy's Case*, seems to have considered mere declarations of strangers to be evidence to prove the existence of a conspiracy, upon the ground of *necessity*. There appears, however, to be no authority for admitting such evidence in criminal cases upon the plea of necessity, which, in principle, is inadmissible.

The existence of a conspiracy is a *fact*, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a conspiracy existed amongst others, to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on *principles fully established, would not make the assertion evidence of the fact against strangers (*d*). *328

These positions are illustrated by the following authorities:

In the case of *Lord Stafford* (*e*) evidence was first given of a general conspiracy, before any proof of the particular part which the accused took in that conspiracy. And a similar course was adopted upon the trial of *Lord Lovat* (*f*).

Acts to prove a conspiracy.

In *Lord William Russel's Case* (*g*), *Lord Howard* was permitted to go into evidence of a conversation between himself and *Lord Shaftesbury*, as to the number of forces which he had in readiness, and (as observed by Mr. J. Buller) the Chief Justice repeated this to the jury as evidence of a *consult*, but not as affecting *Lord Russel*.

In *Hardy's Case*, upon an indictment for high treason, in conspiring the death of the King, it was proved that *Thelwall* (who was indicted for the

(*z*) See also the observations of Eyre, C. J., in the course of the same trial; where he says, "In the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the court is to be affected for his share of it."

(*a*) *Infra*, 328.

(*b*) *Lord Russel's Case;* and see the observations of Buller, J., in *Hardy's Case*, upon that case.

(*c*) *Infra*, 328.

(*d*) *Supra*, tit. Admissions. *Infra*, 328.

(*e*) 32 Car. 2, 3 St. Tr. 101.

(*f*) 19 Geo. 2, 9 St. Tr. 616.

(*g*) 35 Car. 2, 3 St. Tr. 306.

same offence, but was not upon his trial,) and the prisoner, were both members of the Corresponding Society. Evidence was admitted to prove that *Thelwall* brought a paper with him to a printer, and desired him to print it, on the ground that both being members of the society (of which the prisoner was secretary), and the paper having been produced by one of them, it was evidence to prove a circumstance in the conspiracy, although whether it would ultimately be so brought home to the prisoner, that he should be responsible for the guilt of publishing it, might be another question (*h*).

In the same case it was proposed to read a letter written by *Thelwall* to a private friend, containing several of the addresses of the society, and three of the Judges (*i*) were of opinion that the evidence was inadmissible, since the letter amounted to nothing more than a declaration, or mere recital of a fact, and did not amount to any transaction done in the course of the plot, for the furtherance of the plot; it was a sort of confession by *T.*, and not like a fact done by him; as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the Judges (*k*) were of opinion that the evidence was admissible, on the ground that everything said, and *à fortiori*, everything done by the conspirators, was evidence to show what the design was.

In the same case it was proposed to read a letter written by *Martin* in London, and addressed, but not sent, to *Margarot* in Edinburgh (both being members of the Corresponding Society), on political subjects calculated to inflame the minds of the people in the North. Eyre, C. J., was of opinion that this letter was not admissible in evidence, being in the nature of a confession only, and therefore not evidence against any but the party confessing; two of the Judges (*l*) agreed that a bare relation of facts by a conspirator to a stranger was merely an admission which might affect himself, but which could not affect a conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as an act to show the nature and tendency
*329 of *the conspiracy alleged, and which therefore might be proved as the foundation for affecting the prisoner with a share of the conspiracy.

Buller, J., was of opinion, that evidence of conversations and declarations by parties to a conspiracy, were in general, and of necessity, evidence to prove the existence of the combination; Grose, J., was of the same opinion, but added, that he considered the writing *as an act* which showed the extent of the plan.

Upon the last point it is observable, that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion, that a mere declaration or confession, unconnected with any act, would not have been admissible.

In the case of *Horne Tooke*, who was afterwards tried upon the same indictment, the draught of a letter intended to have been sent by *Hardy*, in answer to a letter, as secretary to the Corresponding Society, and found in his possession, was admitted in evidence (*m*).

Upon the same trial, a letter, purporting to have been written by the secretary of a society in Sheffield, and addressed to the prisoner, the secretary of the London Corresponding Society, but found in the possession of

(*h*) Per Eyre, C. B., to which the other Judges assented.
(*i*) Eyre, C. J., Macdonald, C. B., and Hotham, B.
(*k*) Buller and Grose, Js.
(*l*) Macdonald and Hotham, Bs.
(*m*) O. B. 1794.

Thelwall, another member of the society, who also acted as agent for the society, was admitted in evidence (*n*) without dissent.

Upon an indictment against the defendants, who were journeymen shoemakers, charging them with a conspiracy to raise their wages, evidence was admitted of a plan for a combination of journeymen shoemakers, formed and printed several years before; and it was proved by a witness who was a party to the association, that he and others acted upon the rules and regulations so proved in execution of the conspiracy; and this evidence was admitted by Lord Kenyon as introductory to the proof that the defendants were members of the society, and equally concerned; but he stated, that this would not be evidence against the defendants until it was proved that they were parties to the conspiracy (*o*).

Where one of several charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried (*p*).

It seems to make no difference as to the admissibility of the act or declaration of a fellow-conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter, for the making one a co-defendant does not make his acts or declarations evidence against another, any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted.

Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest (*q*).

Where part of a correspondence between two defendants, indicted for a *conspiracy to defraud the prosecutor in the sale of an annuity, had been *330
read upon the trial against the party on trial, whose defence was that he had been deceived by the other party, it was held that the whole of the correspondence previous to the consummation of the purchase, was admissible, but not the subsequent part (*r*).

Evidence is admissible of a conspiracy either before or after the day laid in the indictment (*s*).

Upon the trial of an indictment for a conspiracy to marry a poor couple in order to charge a parish, it must be proved that the husband is unable to maintain himself and his family; and it is not sufficient to show that he was a servant employed in husbandry (*t*). An averment that *J. S.* is *now* legally settled in a particular parish, is supported by evidence that he was settled there shortly before the finding of the indictment (*u*). It has been said, that it is necessary to show that the marriage was against the will of the parties (*x*). Conspiracy to marry paupers.

(*n*) *Hardy's Trial*, by Gurney, vol. i. 412, 413.

(*o*) *R.* v. *Hammond and Webb*, 2 Esp. C. 718.

(*p*) *R.* v. *Horne Tooke*, O. B. 1794. During the same sittings the indictment itself, with the officer's notes, are evidence, without the record formally drawn up. *Ib.*

(*q*) See 6 T. R. 528. See Lord Ellenborough's observations, 11 East, 584, *infra*, tit. TRESPASS.

(*r*) *R.* v. *Whitehead*,[1] 1 D. & R. 61.

(*s*) *R.* v. *Charnock & Keys*, 4 St. Tr. 570.

(*t*) 1 Esp. C. 304; and per Ashurst, J., indictments which have been sustained for injuries of this nature have been for procuring a marriage where the man was a pauper, and actually chargeable.

(*u*) *R.* v. *Tanner et al.* 1 Esp. C. 304.

(*x*) 4 Burr. 2106. In *R.* v. *Edwards* (8 Mod. 320), this offence seems to have been considered as indictable on the ground of conspiracy only; but in *R.* v. *Turrant*, (Burr. 2106), an information was granted against a single overseer.

[1]Eng. Com. Law Reps. xi. 316.

To marry paupers.

Buller, J., held, that the procuring the marriage by the gift of money was insufficient, without proof that some threat or contrivance was used for the purpose (*y*), and that it was against their consent.

Proof as to the means used.

In the case of *Lord Grey* and others, who were tried upon an information, which charged them with conspiring and intending to ruin *Lady Henrietta Berkeley*, a virgin, unmarried, and within the age of eighteen years, she being under the custody, &c. of the *Earl of Berkeley*, her father, and with soliciting her to desert her father, and commit whoredom and adultery with *Lord Grey;* and which also charged, that in prosecution of such conspiracy, they took away the *Lady Henrietta* at night from her father's house and custody, and against his will, the defendants were found guilty, although there was no proof that any force was used, and although it appeared, on the contrary, that *Lady Henrietta*, who was examined as a witness, concurred in the measures which were taken for her removal (*z*) (1).

Competency.

The wife of one defendant, in a case of conspiracy, is not a competent witness for another defendant, since an acquittal of the other defendants would occasion the acquittal of her husband (*a*) (2).

Varianee.

The indictment alleged that *A.*, *B.*, *C.* and *D.*, conspired together to obtain to the use of them, the said *A.*, *B.*, *C.* and *D.*, and certain other persons to the jurors unknown, a sum of money for procuring an appointment under government, the evidence negatived *D.*'s knowledge that *C.* was to have any part of it; the money having been lodged in his hands to be paid over to *B.*: it was held, that the averment as to the application of money was material, and that as to *D.*, the conspiracy was not proved as laid. (*b*).

Where the indictment charged a conspiracy to prevent masters from taking into their employment *any* apprentices, and the evidence was, that
*331 *the defendants attempted to prevent the masters from taking any apprentices in addition to those which they then had, it was held that the indictment was sufficiently supported by the evidence, since the effect was to prevent the masters from taking any apprentice into their service, as alleged in the indictment (*c*).

Where on an indictment for a conspiracy against *A.*, *B.* and *C.*, *C.* called a witness, and examined him as to a conversation between himself (*C.*) and *A.*, it was held that the counsel for the prosecution were at liberty to examine as to other conversations between *A.* and *C.*, although they tended chiefly to criminate *A.*, who had called no witnesses (*d*).

(*y*) *R* v. *Fowler and others*, East's P. C. 461. See CRIM. PLEAD. 2d edit. 685, 6.

(*z*) *R.* v. *Lord Grey and others*, East's P. C. 460: 3 St. Tr. 519.

(*a*) *R.* v. *Locker and others*, *cor.* Lord Ellenborough, 5 Esp. C. 107; 2 Stra. 1094. As to the competency of a person convicted of a conspiracy, see tit. INFAMOUS WITNESS.

(*b*) *R.* v. *Pollman*, 2 Camp. 231.

(*c*) *R.* v. *Ferguson and Edge*,[1] 2 Starkie's C. 489. See further, VARIANCE; and 1 Esp. C. 304. [*Commonwealth* v. *Ward*, 1 Mass. Rep. 473.]

(*d*) *R.* v. *Kroehl and others*,[2] 2 Starkie's C. 343. *Qu.* whether in such case the counsel for *A.* would be entitled to address the jury in answer to such fresh evidence?

(1) [On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been relieved on *habeas corpus*, was allowed to be given in evidence. *Commonwealth* v. *Hevice & al.* 2 Yeates, 114.]

(2) [Swift's Ev. 92. *Commonwealth* v. *Easland & al.* 1 Mass. Rep. 15, *acc.* But in South Carolina, where father and son were indicted for murder—the father being charged with having given the mortal wound, and the son with having been present, aiding and assisting—on the separate trial of the father, (who was first tried), the son's wife was held to be a competent witness for the defendant. *The State* v. *Anthony*, 1 M'Cord, 285.]

[1]Eng. Com. Law Reps. iii. 442. [2]*Id.* iii. 375.

CONSTABLE.

The regular proof that *A. B.* is a constable, is by the production and proof of his appointment, and swearing at the court-leet (*e*), or by justices of the peace (*f*) (1), on default of an appointment by the leet (*g*). It has, however, been seen, that even on a trial for murder, evidence that a party has acted as a constable is evidence to prove that he is one (*h*).

Where a constable acts under a warrant from a magistrate, it seems that he ought to keep the warrant for his own justification (*i*). For the proofs in actions against constables, see tit. Justices.

CONVICTION.

For the proof of a conviction, see Vol. I. and Index tit. Conviction.

For the effect of a conviction in proof, as a judgment, see Vol. I. Index tit. Conviction; and see also below tit. Justices.

A conviction is no evidence in a collateral proceeding for the party on whose evidence it has been obtained, although his name does not appear on the face of it (*k*); nor is it evidence to contradict the witnesses in a collateral proceeding, by showing that they had before given a different account before the committing magistrate (*l*).

Upon summary proceedings before magistrates, they are placed in the situation of a jury, and the degree of credit to be attached to the evidence is for their consideration and judgment. Since, however, the proceedings before them are usually of a criminal and penal nature, and as they are substituted for a jury of twelve men, who must, in order to convict, have all been satisfied by the evidence of the criminality of the defendant, the evidence ought to be fully satisfactory and convincing to the mind and conscience of the magistrate, before he pronounces the party to have been guilty. If any reasonable doubt exist in his mind, the party charged is entitled to the benefit of that doubt. Such cases, it is to be recollected, differ very *materially indeed from those where mere civil rights are concerned, and where the mere preponderance of evidence may be sufficient to decide the question (*m*). *332

In point of law, the evidence will support a conviction by a magistrate, if there was such evidence before him as would have been sufficient to have been left to a jury. If such evidence appear on the face of a conviction removed into the Court of King's Bench, the Court will not disturb the magistrate's decision, or examine to see whether the conclusion drawn by him be, or be not, the inevitable conclusion to be drawn from the evidence (*n*). So if the magistrate acquit, where there seems to be

(*e*) The wardmote-book, containing the entry of the election, should be produced. *Underhill* v. *Watts*, 3 Esp. C. 56.

(*f*) See the stat. 13 & 14 Ch. 2, c. 12, s. 15; 2 Haw. B. 2, c. 10, s. 37; Str. 1149; 1 Bac. Ab. 439; 5 & 6 W. 4, c. 49.

(*g*) Haw. B. 2, c. 10, s. 49.

(*h*) *Supra*, tit. Character. *R.* v. *Gordon*, Leach, 581. *Berryman* v. *Wise*, 4 T. R. 366; and *supra*, tit. Agent, *R.* v. *Verelst*, 3 Camp. 432. *R.* v. *Gardner*, 2 Camp. 531. *Lister* v. *Priestly*, Wightwick, 67.

(*i*) See Burn's J. tit. Constable, sec. 6, 24 Geo. 2, c. 44, s. 6.

(*k*) *Smith* v. *Rummens*, 1 Camp. 9. *Burdon* v. *Browning*, 1 Taunt. 520.

(*l*) *R.* v. *Howe*, 1 Camp. C. 461. [6 Esp. 124, S. C.]

(*m*) *Vide supra*, Vol. I.

(*n*) *R.* v. *Davis*, 6 T. R. 178. Paley on Convictions, 37; *R.* v. *Reason*, 6 T. R. 376; where, on a conviction for having in his possession a private and concealed still for the purpose of distillation, the evidence was that the still was found in the garden of the defendant's house, and that the house was in the county, but there was no evidence that the garden was in the county, the conviction was held to be bad. *R.* v. *Chandler*, 24 East, 267.

(1) [See *Wood* v. *Peake*, 8 Johns. 69. *Miller's Case*, 1 Browne's Rep. 349. *Chambers* v. *Thomas*, 1 Littell's Rep. 268. 3 Marsh. 538. *Johnston* v. *Wilson & al.* 2 N. Hamp. Rep. 202.]

primâ facie evidence to convict, his judgment cannot be questioned; for no other court can judge of the credit due to witnesses which are not examined there (*o*).

Though the commitment be under a defective warrant, the Court, if there was a precedent conviction, will, on a motion for a certiorari, presume a conviction sufficient to support the warrant (*p*).

Although a conviction may be formally drawn after the time of conviction, a different information cannot be substituted (*q*).

COPYHOLD.

Proof of title.

A COPYHOLD tenant proves his title by evidence of his own admittance, upon the surrender of a former tenant, by the production of the court-rolls, or by examined copies of them (*r*). These are the public rolls by which the inheritance of every tenant is preserved, and are the proceedings of the Manor-Court, which was formerly a court of justice (*s*). And they are evi-

Title of tenant.

dence even for one who claims under the lord (*t*); but they are not conclusive to the exclusion of evidence or mistake (*u*). And it is not necessary to produce a copy of the entries of the surrender and admittance stamped according to the stat. 48 Geo. 3, c. 149 (*x*).

The legal title is completed by the admittance of the tenant; till the admittance, the legal title remains in the surrenderor, who is a trustee for the surrenderee (*y*). But after admittance, the title of the tenant has relation to the time of the surrender, as against all but the lord, and consequently after admittance the tenant may recover in ejectment on a demise laid on a day subsequent to the surrender, but before the admittance (*z*). A copy of the copyholder's admittance of thirty years standing is evidence, although not signed by the steward (*a*).

*333 *Where the tenant brings ejectment, it is necessary to give some evidence to establish his identity with the party admitted (*b*).

Where a surrender has been made to the use of one for life, with remainder over to another, it is sufficient for the latter to prove the surrender, the admittance of the tenant for life, and his death; for the several interests constitute but one entire estate, and the admittance of the tenant for life enures to the benefit of the remainder-man (*c*). So if a copyholder devise to one for life, remainder over in fee.

Title of tenant by devise.

Formerly the practice was for the owner to surrender to the use of his will, and upon this surrender the will operated as a declaration of the use, and not as a devise, of the land. Hence, a devise of copyhold lands or of customary lands which passed by surrender or admittance, did not require any attestation under the Statute of Frauds, nor any signature, unless the signature were rendered necessary by the terms of the surrender to the use

Surrender.

of the will (*d*). But by the stat. 55 Geo. 3, c. 192, it is enacted, that the

(*o*) *R.* v. *Reason*, 6 T. R. 376. Paley on Convictions, 38. For the evidence in particular cases, see their respective titles, GAME, &c.

(*p*) *R.* v. *Taylor*,[1] 7 D. & R. 623. See tit. JUSTICES.

(*q*) K. B. Mich. T. 1827.

(*r*) B. N. P. 247.

(*s*) *Ib.*

(*t*) *Roe* v. *Hellier*, 3 T. R. 162.

(*u*) 25 Coke's Copyholder, sec. 40. Ld. Ray. 735. *Burgess* v. *Foster*, 1 Leon. 189. *Doe* d. *Priestly* v. *Calloway*,[2] 6 B. & C. 484

(*x*) *Doe* ex dem. *Bennington* v. *Hall*, 16 East, 208.

(*y*) 5 T. R 132.

(*z*) *Holdfast* v. *Clapham*, 1 T. R. 600.

(*a*) *Dean of Ely* v. *Stewart*, 2 Atk. 44. As to presumptive evidence of a surrender, see *Wilson* v. *Allen*, 1 J. & W. 620

(*b*) *Doe* d. *Hanson* v. *Smith*, 1 Camp. 197.

(*c*) 5 Mod. 306; Cro. Jac. 31; 1 Saund. 151; Com. Dig. Copyhold, [C.] 11.

(*d*) *Tuffnell* v. *Page*, 2 Atk. 37. *Carey* v. *Askew*, 2 Bro. Ch. Rep. 58. *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258. *Doe* d. *Cooke* v. *Danvers*, 7 East, 299, 322.

[1]Eng. Com. Law Reps. xvi. 306. [2]*Id.* xiii. 238.

disposal of copyhold estates by will shall be effectual, without a previous surrender to the use of the will (*e*). The will must be produced and proved. And now by the late statute 7 W. 4, and 1 V. c. 20, a will of copyhold, properly executed, is good, although the testator may not have surrendered to the use of his will, and though being entitled as heir, devisee, or otherwise, to be admitted, he may not have been admitted, and though there may be no custom, or only a limited custom, to devise or surrender to the use of the will. Although copyhold rolls mention a surrender to the use of the tenant's last will (*f*), and the admittance of *A.* as devisee under the will, it is no evidence of the title of *A.* without producing the will, because the land does not pass by surrender without the will, which must be shown as the best evidence of *A.*'s title (*g*).

Instructions for a will of copyhold lands, or of a customary estate passing by surrender and admittance, taken in writing by another in the presence and from the oral dictation of the party, although without the signature of the party, or any attestation, constitute a sufficient devise of the copyhold estate, and a good will under the statute of wills (*h*). So also, short notes of a will taken by a lawyer from the testator's mouth, have been held to be a good will in writing, although the testator died before they could be reduced to form (*i*). So is a draft of a will, the signing and publication of *which have been prevented by the testator's death (*k*). But now by the late st. 7 W. 4, 1 Vict. c. 20, s. 1, wills of copyhold and customary lands must be executed with the formalities which are requisite for the devising of freehold lands. *334

Proof of admittance.

After proof of the will, the claimant must prove the admittance of the testator, as also his own admittance; for till admittance, although after the surrender, the legal estate remains in the surrenderor, and descends to his heir (*l*). Some evidence of identity is requisite (*m*). The surrender by the testator to the use of his will is not evidence of seisin (*n*).

(*e*) Copyholds do not, under the 53 Geo. 3, c. 192, pass under the will of a devisor who died before admittance; the statute applies only to cases where a surrender alone would have made good the will. *King* v. *Turner*, 2 Sim. 547. Where a testator, possessed of freeholds and copyholds, after a specific devise of part of his copyhold to *R.*, devised all his real estates to the lessor of the plaintiff, held that as since the 55 Geo. 3, c. 192, where a surrender alone is necessary to the validity of the devise, validity to that extent is supplied by the Act, the copyhold passed under the residuary clause, independently of any question of intention. *Doe* d. *Clarke* v. *Ludlam*,[1] 7 Bing. 275, and 5 M. & P. 46.

(*f*) It is said that, previous to the late statute, the will need not have been in writing. 1 Watk. Cop. 130.

(*g*) *Jenkins* v. *Barker*, *per Tracy*, 1705. Bac. Ab. Ev. F. 632. The probate is no evidence of the devise of a copyhold. *Jervoise* v. *The Duke of Northumberland*, 1 J. & W. 520.

(*h*) *Doe* v. *Danvers*, 7 East, 299. There had been in that case (which was before the stat. 55 Geo. 3, c. 192) a surrender to the use of the will, and a probate had been granted in the Ecclesiastical Court.

(*i*) 1 Anderson, 34. See also 3 Leon. 79; 2 Keb. 128.

(*k*) *Wagstaff* v. *Wagstaff*, 2 P. Wms. 259. *Carey* v. *Askew*, 2 Bro. C. C. 58, cited by Lord Ellenborough, in *Doe* v. *Danvers*, 7 East, 324.

(*l*) *Roe* v. *Wroot*, 5 East, 137. *Roe* v. *Hicks*, 2 Wils. 15; Cro. Eliz. 148; 1 T. R. 600; Com. Dig. Copyhold, D. 2. *Wilson* v. *Weddell*, Yelv. 144. The admittance of tenant for life being the admittance of him in remainder, a devisee in remainder, after proof of the admission of the tenant for life, need not prove his own admittance. See *Auncelme* v. *Auncelme*, Cro. J. 31. An heir might before admittance devise copyholds descending to him. *King* v. *Turner*, 1 M. & R. 456. Although an unadmitted devisee or surrenderee (previously to the late stat.) would not. See *Doe* v. *Lawes*,[2] 7 Ad. & Ell. 211. Upon a devise of copyhold for life, remainder to the devisor's heir at law, who died intestate, and without ever having entered or in any way dealt with the reversion; held, that the right heir of the devisor was entitled to maintain ejectment without admittance. *Doe* v. *Crisp*, 1 P. & D. 37. Where, upon a devise of copyhold for life, and a full fine paid upon the admission of the tenant for life, the heir of the devisor had surrendered his reversion; held, that the lord might refuse admittance to the surrenderee, unless on payment of the fines payable in respect of the descent on the heir. *R.* v. *Dullingham*, *Lady of the Manor of*, 1 P. & D. 172. The words "lands of any tenure" in 3 & 4 Will. 4, c. 74, s. 77, extend to copyholds. *Shirly*, *ex parte*, 7 Dowl. 258.

(*m*) *Doe* v. *Smith*, 1 Camp. 197.

(*n*) Per Taunton, J., Win. Sum. Assizes, 1831. Roscoe on Ev. 456.

[1]Eng. Com. Law Reps. xx. 130. [2]*Id.* xxxiv. 81.

Surrenders and admittances are proved either by the original entries on the court-rolls, or by copies (*o*). Or, where there is no entry on the roll, by collateral evidence. Thus a surrender duly presented by the homage, but of which there is no entry on the roll, may be proved by extrinsic evidence (*p*). The surrender and admittance constitute but one entire conveyance, and the admittance has relation back to the time of the surrender, so as to vest the title in the surrenderee from that time (*q*). But now by the statute 7 Will. 4, & 1 Vict. c. 26, above cited, a will of copyhold properly executed is good, although the devisor, being entitled, as heir, devisee, or otherwise, to be admitted, may not have been admitted, and although there be no custom, or merely a limited custom, to devise or surrender to the use of the will. One who claims as grantee by the lord is tenant before admittance (*r*).

Title of tenant by descent or custom.

Custom is the very essence of copyhold tenures, and frequently regulates the course of descent; but where custom is silent, the descent is according *to the course of the common law (*s*), and therefore, upon the death of the tenant, if no custom intervene, the legal estate descends to the heir-at-law (*t*), who by the general law of copyhold may maintain an ejectment before admittance (*u*). His title is proved by evidence of the admission of the ancestor, his death, and the fact of heirship (*x*).

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Heir at law.

Customary heir.

If the party claim as customary heir he must show his title by proof of the custom (*y*). He must prove that the usage has existed time out of mind (*z*); and such usages are construed strictly (*a*). The most usual evidence to prove the custom are the court-rolls of the manor. Entries by the homage on these rolls are evidence, as between tenants of the manor, to prove the mode of descent, although no instances can be proved in which persons have taken according to that course (*b*). So the customary of a manor handed down with the court-rolls from steward to steward, is evidence of the course of descent within the manor, although not signed by any one (*c*).

(*o*) These must be duly stamped. *Doe* d. *Bennington* v. *Hall*, 16 East, 208. The lord may admit to a copyhold out of the manor even at a void court. The steward cannot without special authority. But an admittance by the latter at a void court, the proceedings being entered on the rolls, was held to be sufficient, as at the next court the tenants would have information of the fact. *Doe* v. *Whitaker*,[1] 5 B. & Ad. 409.

(*p*) As by the draft of the surrender from the muniments of the court, and the testimony of the foreman of the homage jury, who made the presentment. *Doe* d. *Priestly* v. *Calloway*,[2] 6 B. & C. 484. An entry on the roll is not conclusive, and a new title may be shown by averment or by evidence. *Burgess* v. *Foster*, 1 Leon. 289. *Brend* v. *Brend*, Cas. T. Finch, 254; Coke's Copyholder, s. 40. Lord Holt at Nisi Prius held that the rough draft of the steward was good evidence of admittance. Ld. Ray. 785.

(*q*) *Doe* d. *Bennington* v. *Hall*, 16 East, 208. *Holdfast* d. *Williams* v. *Clapham*, 1 T. R. 600. *Vaughan* v. *Atkins*, 5 Burr. 2764. *Roe* v. *Hickes*, 2 Wils. 15. In the case of bargainor and bargainee, the estate is in the bargainee before enrolment. Com. Dig. Bargain and Sale, B. 9.

(*r*) *Doe* v. *Whitaker*,[1] 5 B. & Ad. 409.

(*s*) *Doe* v. *Mason*, 3 Wils. 63. *Denn* v. *Spray*, 1 T. R. 466.

(*t*) *Denn* v. *Spray*, 1 T. R. 466. The succeeding lord of a manor is entitled to avail himself of a custom to seize copyhold lands *quousque*, which accrued to the preceding lord in default of the heir coming in to be admitted, and that although he be only devisee and not heir to the late lord; to entitle him however to enter and seize, the law requires that, on the death of the tenant, there shall be three proclamations for the heir to come in and be admitted, and that such should be made at three consecutive courts; and there is no distinction between proclamations in cases of seisure for a forfeiture, and for seisure of a copyhold *quousque*. *Doe* v. *Truman*,[3] 1 B. & Ad. 736.

(*u*) See *Doe* v. *Brightwen*, 10 East, 583. *Doe* v. *Hellier*, 5 T. R. 169. *Roe* v. *Hickes*, 2 Wils. 13. So in ejectment by the grantee of the reversion of a copyhold from the lord. *Doe* v. *Loveless*, 2 B. & A. 453.

(*x*) See tit. EJECTMENT BY HEIR—PEDIGREE.

(*y*) Co. Copyhold, 43; 3 Wils. 63. A custom to present a surrender at an indefinite period is void; *semble*, per Lord Tenterden. K. B. Easter T. 1827.

(*z*) 4 Leon. 242.

(*a*) 1 Roll. Ab. 624, pl. 1; 2 T. R. 466.

(*b*) *Roe* v. *Parker*, 5 T. R. 26.

(*c*) *Denn* v. *Spray*, 1 T. R. 466; 5 T. R. 26; 12 Vin. Ab. 215.

[1] Eng. Com. Law Reps. xxvii. 103. [2] *Id.* xiii. 338. [3] *Id.* xx. 485.

Entries on the rolls of a manor-court of the admissions of tenants in remainder, after the estate of the last tenant's widow, who held during her *chaste viduity*, are evidence of a custom for a widow to hold on that condition, so that ejectment may be maintained against her, as for a forfeiture on proof of incontinence, although no instances are in fact stated on the rolls, or proved, that such a forfeiture had ever been enforced (*d*). Three instances on the rolls, of husbands having been admitted as tenants by the curtesy, according to the custom, whose wives had been admitted during their lives, were held to be evidence to prove the custom, so as to entitle the husband of a deceased wife, who was heir-at-law, but who died before admittance (having first borne a child to her husband which died an infant), to hold for his life (*e*). Title of tenant by custom, &c.

A single instance of a surrender in fee by a tenant in special tail of a copyhold, has been held to be evidence of a custom within the manor, to bar entails by surrender, although the surrenderor had not been dead twenty *years, and although one instance was proved of a recovery suffered by a tenant in tail to bar the entail (*f*). *336

A paper signed by many deceased copyholders of a manor, stating what was the general right of *common* in each copyholder, and agreeing to restrict it, is evidence against other copyholders who do not claim under those who signed it (*g*), for it is at least evidence of the reputation which existed at the time within the manor. The custom of one manor is evidence to prove the custom in another, where both are subject to one common law of tenure (*h*).

Evidence of reputation is *admissible* to prove the existence of a manor; a great number of manors rest upon no other evidence (*i*); but it is in itself very weak evidence to establish any right, without proof of an enjoyment consistent with it (*k*). Evidence of manorial rights.

The general presumption is, that the waste land which adjoins to a road belongs to the owner of the adjoining freehold, and not to the lord of the manor; this of course is liable to be rebutted by evidence of acts of dominion and ownership (*l*) by the lord.

Where the question was, whether certain common land was the soil and freehold of the plaintiff, who had a right of common there, or of the defendant, who was the lord of the manor, it was held that counterparts of leases, by which the lord granted minerals to other persons in other parts of the uninclosed waste, were not admissible in evidence, without preparatory evidence by the defendant that the *locus in quo* was part of the entire

(*d*) *Doe* d. *Askew* v. *Askew*, 10 East, 520.

(*e*) *Doe* v. *Brightwen*, 10 East, 583. For the title of the wife as heir was complete without admittance, and that of the husband was also complete by operation of law; and the possession of the copyhold by the husband after the death of the wife, was referred to that title, and not to an adverse title, although he had been admitted after the death of the wife to hold to him, pursuant to a settlement, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir-at-law of the wife in ejectment brought within twenty years after the husband's death.

(*f*) *Roe* d. *Bennett* v. *Jeffery*, 2 M. & S. 92.

(*g*) *Chapman* v. *Cowlan*, 13 East, 8.

(*h*) 5 T. R. 26, per Lord Kenyon. See tit. Custom; and *Clarkson* v. *Woodhouse*, 5 T. R. 412.

(*i*) Per Abbott, L. C. J., *Steele* v. *Prickett*,[1] 2 Starkie's C. 466.

(*k*) Vide Vol. I. Index, tit. Reputation.

(*l*) *Steele* v. *Prickett*,[1] 2 Starkie's C. 463. Abbott, L. C. J., observed, "In some of the more ancient books of law a difference of opinion appears to have existed as to the right to the waste lands adjoining to public highways; but as far as my own experience goes, (and I have heard the opinions of many learned judges on the subject,) it has uniformly been laid down, that land under such circumstances is presumed, in the first instance, to belong to the owner of the adjoining freehold, and not to the lord of the manor." See *Grose* v. *West*,[2] 7 Taunt. 39; *infra*, tit. Trespass, *Liberum Tenementum*.

[1]Eng. Com. Law Reps. iii. 433. [2]*Id.* ii. 19.

waste, to parts of which those leases were applicable (*m*). And it was also held, that if the leases had been admissible in evidence, they would merely have shown the lord's title to the minerals, and not to the surface (*n*).

It has already been seen, that licences on the court-rolls granted by the lords of the manor to fish in a particular fishery, are evidence for one who claims under the lord, evidence having been given of the payment of the reserved rents, and of acts of enjoyment by the lords of the manor in modern times (*o*).

Title of the lord. Where the tenant holds according to the custom of husbandry of the manor, evidence that the lord has leased, for more than a century past, the coal and limestone in different parts of the manor, and has received rent for it, is evidence to explain the nature of the tenure, and to show that the freehold is in the lord, and not in the tenant (*p*).

Ancient admissions of the copyholder to *tres acras prati*, may be ex-
*337 plained *to mean the fore-crop, or *primâ tonsura* only, by evidence that no more has been enjoyed under such admissions (*q*).

The enfranchisement of a copyhold may be presumed from the long possession of the premises as freehold, and other circumstances, even as against the Crown (*r*). A copyholder in the manor *A.* has common in the wastes of the same lord's manor of *B.*, for cattle *levant* and *couchant* on his tenement in *A.*; this is evidence that the manors were formerly in different hands, for the estate of a copyholder is too weak to support a grant of common appurtenant in another manor (*s*).

Under a custom that the remainder-man coming into possession on the death of the tenant for life must be admitted, and pay a fine, if on the death of the tenant for life the next in remainder does not come in to be admitted and pay his fine, after proclamations made, and presentment made to a jury, the lord, it was held, may seize *quousque*, and maintain ejectment to recover possession in the meantime (*t*). The court-rolls are evidence of the *proclamations* recited to have been made in them (*u*). But where on the death of a copyholder of inheritance, the lord, after three proclamations to the heir to come in and be admitted, seized the estate into his hands, and afterwards granted it in fee to another, it was considered as an absolute seizure, and there being no custom to warrant it, it was held that it was irregular, and that the lord could not afterwards insist upon it as a seizure merely *quousque* (*x*).

To a fine. The lord may recover from a copyholder the fine assessed by him upon admittance, not exceeding two years value of the tenement, although there be no entry of the assessment of such fine on the court-rolls, but only a demand of such sum for a fine, after the value of the tenement has been found by the homage (*y*).

(*m*) *Tyrwhitt* v. *Wynn*, 2 B. & A. 554. (*n*) *Ibid.*

(*o*) *Supra*, Vol. I. Index, tit. PRESCRIPTION. *Rogers* v. *Allen*, 1 Camp. 309.

(*p*) *Brown* v. *Rawlins*, 7 East, 409. As to title under a power of appointment, see the case of *The Lord of the Manor of Oundle*,[1] 1 Ad. & Ell. 283.

(*q*) *Stammers* v. *Dixon*, 7 East, 200.

(*r*) *Roe* v. *Ireland*, 11 East, 280. A surrender had been made of the premises to churchwardens and their successors in 1636, without naming any rent. In 1649 the Parliamentary survey charged the churchwardens 6*d.* rent, under the head of freehold rents: and there was no evidence of any different rent having been paid since that time; and receipts had been given as for a freehold rent by the steward of the manor from 1803 to 1805 (the trial was in 1809). Lord Ellenborough, in giving judgment, said, "I would presume anything capable of being presumed, in order to support an enjoyment of so long a period. As Lord Kenyon once said, on a similar occasion, that he would presume not only one, but a hundred grants, if necessary, to support such a long enjoyment." See tit. PRESUMPTION; and see *Cowlam* v. *Slack*, 15 East, 108.

(*s*) *Barwick* v. *Matthews*,[2] 5 Taunt. 365. (*t*) *Doe* v. *Jenny*, 5 East, 522.

(*u*) *Roe* v. *Hellier*, 3 T. R. 162. (*x*) Ibid.

(*y*) *Lord Northwick Stanway*, 6 East, 56.

[1]Eng. Com. Law Reps. xxviii. 89. [2]*Id.* i. 135.

An assessment of a copyhold fine entered on the court-rolls as 100*l.*, cannot be reduced to 60*l.* by the lord's favour, without a new assessment (*z*); and therefore in such a case, where the lord sued for the fine, and the jury found the annual value of the premises to be 30*l.*, and gave a verdict for 60*l.*, it was held that the lord could not retain his verdict for 60*l.* (*a*).

Where the lord insists that the tenant has committed a forfeiture (*b*) by cutting down trees, and the tenant insists that they were cut down for the purpose of repairs, it is a question for the jury whether they were cut down with a *bonâ fide* intention so to apply them (*c*), although in fact none have been actually so applied till the expiration of several months after they were *cut down, and until after an action of ejectment has been brought by the lord for a forfeiture, and although many of them still remain unapplied, part of the premises being still out of repair (*d*). An appointment of one as steward may be proved to have been by parol (*e*). Proof of forfeiture. *338

COPYRIGHT. *See* PRIVILEGE.

CORPORATION (*f*).

A MISTAKE in the name of a corporation, who are plaintiffs, will not be material as a variance in evidence under the plea of the general issue (1). Where the corporation were sued in the names of "the mayor and burgesses of the borough of Stafford," and it appeared in evidence from the charter that they were incorporated by the name of "the mayor and burgesses of the borough of Stafford in the *county of Stafford*," it was held that the variance could not be objected to except by plea in abatement; and that to make it pleadable in bar, it should appear that there is no such corporation (*g*) (A). Variance in name.

Where a party had granted to a corporation certain rights, it was held,

(*z*) Ibid.; and 3 B. & P. 346.

(*a*) Ibid.

(*b*) The estate of a copyholder (*semble*) is not forfeitable for the act of his lessee, *Clifton's Case*, 4 Co. 27, a.; 1 Roll. Ab. 408, Copyhold (D.) pl. 17; 4 Leon. 241; Co. Litt. 63, a.

(*c*) *Doe* v. *Wilson*, 11 East, 56.

(*d*) The jury found for the defendant; and there being no evidence that the trees were to be applied otherwise than for repairs, the Court refused to disturb the verdict. 11 East, 56. See also *Blackett* v. *Lowes*, 2 M. & S. 494, where it was held that if a copyholder entitled to estovers cut down trees for *aliene* purposes, the lord will be entitled to them.

(*e*) Co. Litt. 61, b.; Dyer, 248, a.; Com. Dig. Copyhold, R. 5. But see *Carmarthen, Mayor, &c. of* v. *Linns*, 6 C. & P. 608, where it was held that the corporation might sue for tolls, although no interest passed by grant under seal.

(*f*) See as to municipal corporations, the stat. 5 & 6 Will. 4, c. 76; 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78; 1 Vict. c. 84. As to the oaths of allegiance and supremacy to be taken with oath of office, 13 C. 2; stat. 2, c. 1. The declaration in lieu of the sacramental test, 9 Geo. 4, c. 17. See OATH. Conservators were empowered to purchase lands in fee to them and their successors, to make bye-laws affecting strangers using the navigation, and the acts of any five of the committee appointed by the majority, under their hands and seals, were to bind the whole, and they were directed also to sue and be sued by the name of the conservators in the county of *S.*; held, that as it clearly appeared that they should take such lands by succession, and not by inheritance, although not created a corporation by express words, they were so by implication, and were therefore entitled to sue in their corporate name for injuries done to their lands, and were also entitled to receive the tolls as part of the profits of the lands of which an account was to be rendered. *Tone, Conservators of*, v. *Ash*,[1] 10 B. & C. 340. A bond by mayor and commonalty to the mayor is not good. Bro. Corp. pl. 63; 21 E. 4, 7, 12, 27, 69. So of presentation to living. Bro. Corp. pl. 63; 14 H. 8; Vin. Ab. tit. Corp. G. 2; Watson's Parson's Counsellor. And see *Salter* v. *Grosvenor*, 8 Mod. 303; Burn's E. L. tit. Dean and Chapter.

(*g*) *Mayor and Burgesses of Stafford* v. *Bolton*, 1 B. & P. 40; Bro. Misno. 73; 22 Edw. 4, c. 34. *Mayor, &c. of Lynn's Case*, 10 Coke, 122.

(1) [See *Medway Cotton Manufactory* v. *Adams & al.* 10 Mass. Rep. 360.]

(A) (*Concord* v. *M'Intire*, 6 N. Hamp. 527. *Methodist Episcopal Church* v. *City of Cincinnati*, 5 Har. 286. *Contra, Agnew* v. *Bank of Gettysburg*, 2 Harr. & Gill. 478. *Wood* v. *Jefferson County Bank*, 9 Cow. 205. *United States Bank* v. *Stearns*, 15 Wend. 314.)

[1]Eng. Com. Law Reps. xxi. 97.

in an action brought by the corporation against an assignee of the grantor, that the grant was evidence that the corporation was known by the name and description specified in the grant at the time of the grant, issue having been joined upon that fact (*h*).

Evidence of title.

The payment of rent to the bailiffs of a borough by the party, as tenant to a corporation, admits a tenancy from year to year, although a deed of demise has been prepared and executed by the bailiffs and some of the aldermen of the corporation, but has not been sealed with the corporation

*339 *seal (*i*) (A). If in ejectment by a corporation a demise by deed be alleged, it need not be proved (*k*).

The payment of rent by the predecessors of bailiffs of a corporation as bailiffs, is evidence of a tenancy by the corporation, and not by the bailiffs, and consequently an ejectment cannot be maintained against the two existing bailiffs (who have not paid rent) without notice to the corporation, in order to determine the tenancy (*l*).

On an election of town councillors, under the statute 5 & 6 Will. 4, c. 76, the returning officer's duty is only ministerial, to return the candidate who has the actual majority, and the elector must take it upon himself to decide whether the candidate for whom he votes is properly qualified or not; the voting papers are the proper evidence of the election, although not the record of it; but when produced, they must be proved to be the same that were given in at the election (*m*).

Actions against.

An action of trespass or trover lies against a corporation (*n*) (B). In an action of trover for a detention by the servants of a corporation within the scope of their employment (as where the agents of the Bank of England detain a number of bank-notes), it appears to be unnecessary to prove that the detention was authorized by the corporation under their seal (*o*); at all events, an authority will be presumed after a verdict which finds the fact of a conversion by the corporation. So they may be guilty of a disseisin (*p*), or false return (*q*).

Assumpsit lies against a corporation whose power of drawing and ac-

(*h*) *Mayor, &c. of Carlisle* v. *Blamire*, 8 East, 487; vide *supra*, Vol. I. Index, tit. ESTOPPEL. [See also, *Dutchess Cotton Manufacturing Company* v. *Davis*, 14 Johns. 238.]

(*i*) *Wood* v. *Tate*, 2 N. R. 247; and see tit. EJECTMENT. An entry in the minutes of a corporation, not being under seal, is not evidence of an agreement with a tenant as to allowance in respect of rent. *Ludlow Corporation* v. *Charleton*, 9 C. & P. 242.

(*k*) *Furley* v. *Wood*, 1 Esp. C. 198.

(*l*) *Doe* v. *Woodman*, 8 East, 228. See *Goodtitle* v. *Wilson*, 11 East, 334.

(*m*) *R.* v. *Ledgard*, 3 N. & P. 513.

(*n*) See the authorities, *Yarborough* v. *The Bank of England*, 16 East, 6. Where the mayor *de facto* ordered weights and measures, which were afterwards examined at a full meeting of the corporation, and used to regulate those in the market, held that the corporation was liable, although there was no contract under the corporate seal, and the mayor was subsequently displaced. *De Grave* v. *Monmouth, Corp. of*,[1] 4 C. & P. 111.

(*o*) Ibid. And see tit. AGENT; and *R.* v. *Bigg*, 3 P. Wms. 427. [See *Garvey* v. *Colcock*, 1 Nott. & M'Cord, 231. *Bank of Columbia* v. *Patterson's Ex'ors*, 7 Cranch, 299.] And *Smith* v. *Birmingham Gas Comp.*[2] 1 Ad. & Ell. 526. *Tolson* v. *Warwick G. L. Comp.*[3] 4 B. & C. 962. *Doe* v. *Pearce*, 2 Camp. 96.

(*p*) Bro. Corp. pl. 24; and Lord Ellenborough's judgment, 16 East, 9. [See *Weston* v. *Hunt*, 2 Mass. Rep. 502.]

(*q*) 16 East, 7, and the cases there cited.

(A) (The seal of a private corporation is not evidence of its own authenticity, but must be proved. *Jackson* v. *Pratt*, 10 Johns. 381. *Den* v. *Vreelandt*, 2 Halst. 352. *Foster* v. *Shaw*, 7 Serg. & R. 163. But the affixing of the seal need not be proved by a witness who saw it done. *Foster* v. *Shaw*.)

(B) (*Hawkins* v. *Dutchess and Orange Steamboat Company*, 2 Wend. 452. *Goodloe et al.* v. *City of Cincinnati*, 4 Har. 500. *Chesnut Hill Turnpike* v. *Rutter*, 4 Serg. & Rawle, 16. *Riddle* v. *Proprietors of Locks and Canals*, 7 Mass. 187. So also trespass for mesne profits lies against a corporation. *M'Cready* v. *Guardians of the poor*, 9 Serg. & R. 94.)

[1]Eng. Com. Law Reps. xix. 300. [2]*Id.* xxviii. 140. [3]*Id.* x. 482.

cepting bills has been recognized by a statute (*r*). But unless authorized by a statute an action of *assumpsit* does not lie either by or against a corporation (*s*).

A bye-law may narrow the number of electors, but cannot limit the number of the eligible, nor disqualify an integral part of the electors (*t*.)

Where a member of a corporate body can derive any personal advantage from the verdict, he is excluded by the general principle; accordingly upon an issue on a *mandamus*, whether the election of common councilmen in a borough was not confined to persons of a particular description, it was held that one who fell within that description was not competent, since the limitation enhanced the value of his own situation (*u*). Competency.

*But upon the question, whether to qualify a man to be a common councilman it was not necessary that he should be an inhabitant, and also have a burgage tenement, the Court held that one who was an inhabitant only was competent, because he came to disqualify himself (*x*). *340

Where an action was brought by a corporation on a custom, it was held that one who had acted in defiance of the custom was not competent to disprove it (*y*).

A freeman is not competent to support a corporate title to rent, where the rent is reserved to the use of the corporation (*z*). The corporation of Kingston being lords of a manor, approved part of the common, reserving a rent to the use of the corporation, and a freeman was held to be incompetent (*a*). But where the question was, whether the defendants had a right to be freemen, and it appeared that there were commons belonging to the freemen, an alderman was permitted to prove the negative, none but aldermen being privy to the making persons free (*b*). Where the members of a corporation cannot derive *any private* advantage from the subject-matter which concerns the public only, they are competent witnesses, and, therefore, although the mayor and commonalty of the city of London are entitled to tonnage on coal, but the mayor and sheriffs have the toll for the benefit of the corporation at large, and no particular individual is benefited by it, the freemen, it has been held, are competent witnesses to support the privilege (*c*). Where a freeman of a corporation is interested, the usual mode of removing the objection is by disfranchisement (*d*) (1). A release to the corporation of his interest in the subject-matter of the suit is insufficient when he has still an interest in the general funds (*e*).

(*r*) *Murray* v. *East India Comp.*[1] 5 B. & A. 204. See *Slarke* v. *Highgate Archway Comp.*[2] 5 Taunt. 792. *Broughton* v. *Manchester Waterworks Comp.*[3] 3 B. & A. 1.

(*s*) *East London Waterworks Comp.* v. *Bailey*,[4] 4 Bing. 283.

(*t*) Per Lord Mansfield, *R.* v. *Spencer*, 3 Burr. 1827. As to notice of meeting, see *R.* v. *Kynaston*, 2 Selw. 1143.

(*u*) *Stevenson* v. *Nevinson*, Lord Raym. 1353. (*x*) Ld. Raym. 1353. Str. 583.

(*y*) *Company of Carpenters* v. *Hayward*, Doug. 60. (*z*) *Burton* v. *Hinde*, 5 T. R. 174.

(*a*) Ibid. (*b*) *R.* v. *Phillips & Archer*, per Lee, C. J., B. N. P. 289.

(*c*) *R.* v. *Mayor, &c. of London*, 2 Lev. 231; Vent. 351; 1 Vern. 254; 1 Burn's Ecc. Law, 94. *R.* v. *Carpenter*, 2 Show. 47. But see *Dowdeswell* v. *Nott*, 2 Vern. 217; and the observations of Buller, J., B. N. P. 290. And see tit. Interest; Witness; and Append. Vol. II. 340.

(*d*) 2 Jones, 116; 2 Lev. 236. A judgment of disfranchisement on a *scire facias* in the Mayor's Court, and two *nihils* returned, the witness not having been summoned, and knowing nothing of his disfranchisement, does not render him competent, the corporation being interested. *Brown* v. *Corporation of London*, 11 Mod. 225; and see *The Saddlers' Company* v. *Jones*, 6 Mod. 166. *Weller* v. *Governors of the Foundling Hospital*, Peake's C. 153.

(*e*) *Doe* v. *Tooth*, 3 Y. & J. 19. A corporator is not competent to prove a custom which excludes foreigners. *Davis* v. *Morgan*, 1 C. & J. 587.

(1) [See Digest of cases, as to the competency of corporators as witnesses, in Peake on Evidence, Ch. III. sect. 3.]

[1]Eng. Com. Law Reps. vii. 66. [2]*Id.* i. 268. [3]*Id.* v. 215. [4]*Id.* xiii. 435.

An admission by an indifferent member of a corporation is not evidence against the corporation (*f*). But what is said by an officer respecting his office in a corporation is evidence against the corporation in an action of disturbance of office (*g*). And so are admissions by the surveyor of a corporation, in respect of a house belonging to a corporation (*h*) (A).

COSTS.

Costs must be included in the amount for which the debtor is in *execution*, under the compulsory clause in stat. 33 Geo. 3, c. 5, s. 3 (*i*).

Costs are not to be allowed to any plaintiff upon any counts or issues on
*341 *which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs (*k*).

COUNSEL.

Defence by. *See* Stat. 6 & 7 W. 4, c. 114.

COUNTY. *See* VENUE.

In general, by the common law, it is necessary to prove the offence to have been committed within the county or division where the indictment is found, and for which the jurors are returned.

By the 5 & 6 Edw. 6, c. 10, upon an indictment for homicide where the death happens, the jurors may inquire as to the stroke, though given in another county. And by a number of other statutes, offences under particular circumstances may be inquired of in other counties than those in which they are committed (*l*).

Locality of crimes. The common-law rule, that the offence must be proved to have been committed in the county where the indictment is laid, does not exclude collateral evidence, although arising in another county, tending to show the commission of the crime in the first. Thus, proof of possession of stolen goods by the prisoner in one county, is evidence on a charge of his having stolen them in another (*m*). And in the case of treason, it seems, that after evidence given of the treason in the county in which it is laid, evidence may be given of other instances of the same crime committed in another county, as explanatory of the acts committed in the first (*n*). Thus where a levying war is laid as the treason, the levying war in another county is evidence to show the nature of the acts in the county in which treason is laid (*o*). So in the case of conspiracy, evidence of acts done in any other county may be adduced tending to prove the existence of a conspiracy, provided an overt act be proved in the county in which the indictment is laid (*p*).

By the stat. 7 G. 4, c. 64, s. 12, felonies or misdemeanors committed on the boundaries of two or more counties, or within the distance of 500 yards

(*f*) *Mayor of London* v. *Long*, 1 Camp. 23. (*g*) Ibid. 25. Per Lord Ellenborough.
(*h*) *Peyton* v. *Governors of St. Thomas's Hospital*, 4 M. & R. 625.
(*i*) *Robins* v. *Creswell*,[1] 2 Ad. & Ell. 23.
(*k*) R. G. Hill. T., 2 Will. 4. A distinct issue is raised on each count by the general issue pleaded to the whole. *Cox* v. *Thompson*, 2 C. & J. 498. *Bright* v. *Bevan*, 1 D. P. 730.
(*l*) See Crim. Plead. C. 1.
(*m*) *Butler's Case*, East's P. C. 776. Although the contrary has been held, *Evans's Case*, East's P. C. 776, per Holt, C. J.
(*n*) Kel. 33; 4 St. Tr. 410. *R.* v. *Hensay*, Burr. 650; 2 Haw. c. 46, s. 183.
(*o*) Cases of *Damaree*, *Purchase*, and *Willes*, 8 St. Tr. 218. *Deacon's Case*, Fost. 8.
(*p*) *R.* v. *Brisac*, 4 East, 164. *R.* v. *De Berenger and others*, 3 M. & S. 67.

(A) (See *Williams* v. *Bank of Michigan*, 7 Wend. 540. *Scarsburgh Turnpike Co.* v. *Cutler*, 6 Verm. 315.)

[1] Eng. Com. Law Reps. xxix. 18.

of any such boundary, or begun in one county and completed in another, may be tried in any or either. And by s. 13, offences committed on any person, or in respect of any property in or upon any coach, waggon, cart, or other carriage employed in any journey, or on board any vessel employed in any voyage, may be tried in any county through any part of which such coach, &c. shall have passed in the course of such journey or voyage; and in all cases where the side, centre, or other part of any highway, or the side, centre, or other part of any river, canal, or navigation, shall constitute the boundary between any two counties, the felony or misdemeanor may be tried in either of those counties through or adjoining to, or by the boundary *whereof such waggon, &c. shall have passed in the course of the journey or voyage. *342

See further, tit. False Pretences.—Forgery.—Larceny, &c.

COVENANT.

The evidence in an action of covenant is closely confined by the nature of the pleadings; the plaintiff is bound to show his title to sue, and to point out the particular breaches of covenant of which he complains, and the defendant is obliged to show the grounds of his defence specially upon the record. The most usual pleas are the—

1. Plea of *non est factum.*
2. That the deed was obtained by *duress.*
3. Denial of the plaintiff's performance of a *condition precedent.*
4. Denial of the *breach* of a covenant.
   { not to assign without license;
   { for quiet enjoyment.
5. Of entry and *eviction.*
6. Denial of plaintiff's title as *assignee.*
7. Denial of the defendant's liability as *assignee.*
8. A release, &c. (*q*).

Non est factum.

By the rules of Hill. Term, 4 W. 4, in covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable (A).

Upon the plea of *non est factum* the plaintiff must produce the deed, if pleaded with a profert, and prove the execution in the usual way (*r*). If

(*q*) See Ind. tit. Deed.—Release.

(*r*) See Ind. tit. Deed. A party named in a deed of covenant may sue, though he does not execute the deed. If there be mutual covenants between *A.* and *B.* on the one part, and *C.* and *D.* on the other, and *B.* does not seal the deed, yet covenant lies by him against *C.* and *D.* 2 Roll. 22, l. 35; Com. Dig. tit. Fait. (A. 2.) (G. 2.) See also *Cooper* v. *Child*, 2 Lev. 74; *Gilly* v. *Copley*, 8 Lev. 138. Abbott on Shipp. 166, 5th edit. *Secus*, where the party who sues is a stranger to the deed. Where an indenture of lease was made between *A.* for and on behalf of *B.* on the one part, and *C.* on the other part; *A.* being authorized by a writing, but not under seal, and *A.* executed the deed in his own name; it was held, that *B.* could not maintain covenant on the deed, although *C.*'s covenant purported to be made with *B.* *Berkeley* v. *Hardy*,[1] 5 B. & C. 355. Note, that the execution of a counterpart by a lessee is but *evidence* of his execution of the original. *Ibid.* As to the construction of covenants, see *Barton* v. *Fitzgerald*, 15 East, 530; *Gainsford* v. *Griffiths*, 1 Saund. 59; *Howell* v. *Richards*, 11 East, 633; *Browning* v. *Wright*, 2 Bos. & Pull. 13. A recital in a lease of mines of an agreement to pull down a smelting-house and rebuild it larger, followed by express covenants to maintain and leave it in good and sufficient repair, amount to a covenant in law to erect the building, and the covenant tending to the support and maintenance of the thing demised passes with the reversion, and the assignee may therefore maintain the action. The agreement appearing to have been between the assignor of the plaintiff and two others, reciting that he had an interest of one undivided third

(A) (Under a statute of Ohio, *non est factum* is a plea of the general issue in covenant, to which a notice of set-off may be appended. *Granger* v. *Granger*, 6 Har. 41. See also *Provost* v. *Calder*, 2 Wend. 517.)

[1] Eng. Com. Law Reps. xi. 251.

*there be no other plea on the record, all the other averments stand admitted (A); and after proof of the defendant's execution of the deed, nothing remains on the part of the plaintiff but to prove the amount of his damages (*s*). It may be observed that the deed itself, when proved, is evidence against the defendant who has executed it, of all the facts recited in the deed. If, for instance, a lease describe the demised land as meadow-land, this is evidence that it was such at the commencement of the term (*t*). And an assignment of the original lease by the lessor, executed on the back of the original deed, is evidence against the assignee of such original deed (*u*). But if the defendant by his plea admit the execution of the deed, he admits so much of the deed as is stated in the declaration, but no more; and if the plaintiff seeks to prove some other recital of the deed not specified in the declaration, he must prove the execution of the deed (*x*).

Variance. If there be any material variance between the declaration and the deed proved, it will be fatal under this plea. The declaration stated, that by a certain indenture it was witnessed, that as well in consideration of certain furnaces to be erected by the plaintiff, *A. B.* did demise, &c.; but on the production of the deed, it appeared to be as follows, "That as well in consideration of the erecting the furnaces, as also of building certain houses and payment of rent, *A. B.* did demise," &c.; and it was held that the variance was fatal (*y*).

of the premises; held, that it was to be considered as a separate contract with him according to his interest, and the covenants were to be construed with reference to such separate and limited interest. *Simpson* v. *Easterby*,[1] 9 B. & C. 505, and judgment was affirmed in error,[2] 6 Bing. 645. And see *Saltoun* v. *Houston*,[3] 1 Bing. 433; *Bulby* v. *Wells*, Wilmot, 346. *Spencer's Case*, 5 Co. 16 b. Shep. Touch. (Preston's edit.) 171.

Where the tenant for life, with remainder over, by indenture demised to the plaintiff, his executors, &c. for a term of 15 years without any express covenant for quiet enjoyment, and died before the term expired, the plaintiff was evicted by the remainder-man; held, that the executor of the tenant for life was not chargeable with the covenaat at law, and that no covenant could be implied from the recital of the agreement for a lease for 15 years, subject to the covenants thereinafter contained, the demise by indenture being the completion and performance of that agreement. *Adam* v. *Gibney*,[4] 6 Bing. 656. And see *Swan* v. *Searles*, Dyer, 257, and Bendl. 150; *Hyde* v. *Canons of Windsor*, Cro. Ell. 553; Shep. Touch. 160, and Com. Dig. 100. An action of covenant does not lie against a subsequent chairman of a board of directors on a deed under the seal of the former one, although executed by him for and on behalf of the company. *Hall* v. *Bainbridge*, 1 M. & G. 42; 1 Sc. N. R. 151; and 8 Dowl. 583.

(*s*) B. N. P. 172. *Michael* v. *Stockwith*, Cro. Eliz. 120.

(*t*) *Smith* v. *Woodward*, 4 East, 585. (*u*) *Nash* v. *Turner*, 1 Esp. C. 217.

(*x*) *Williams* v. *Sills*, 2 Camp. 519. *Watson* v. *King*, 4 Camp. 272.

(*y*) *Swallow* v. *Beaumont*, 2 B. & A. 765. See tit. DEED. 2 Ld. Raym. 792. *Howell* v. *Richards*, 11 East, 633. See also tit. VARIANCE. A covenant by articles of agreement, between the commander of a post-office packet with the several owners, to pay the yearly sum of —*l.*, or such other sum as should be allowed by Government, to each and their several and respective executors, &c. in such parts and proportions as were set against their respective names, was held to be a several covenant, and that each was entitled to sue in respect of his separate interest, and that they could not maintain a joint action. *Servante* v. *James*,[5] 10 B. & C. 410.

Where in covenant the allegation was, that four "demised by indenture;" held, that it imported a sealing and delivery by the four; and that, upon the issue "*non est factum*," after proof by the plaintiff of the execution of the counterpart by the defendant, the latter might produce the lease, and show that it was executed by two only, and that it was a fatal variance between the proof and the declaration. *Wilson* v. *Wolfryes*, 6 M. & S. 341.

Covenant by the reversioner against the assignee of the grantee. The declaration stated, that *A.* and *B.* did grant license for a term of years to *C.* to continue a channel open through the bank of a navigation, in order that the waste water might pass through the channel to the mills of *C.*, the latter paying a certain annual sum therein mentioned. Breach, non-payment of that annual sum. *Semble*, that upon the face of the declaration *A.* and *B.* must be considered as having the sole ownership of the navigation, and the sole power of granting this privilege; and in that case, that the deed would operate as the grant of an interest in an hereditament, and that the assignee of the grantee would be liable to an action by the reversioner, within the statute 32 Henry 8. By the deed produced in evidence, *A.* and *B.* were described as persons having the greatest proportion or share in the profits of the navigation. Held, that by this deed it appeared that

(A) (*M'Neish* v. *Stewart*, 7 Cow. 474. *Thomas* v. *Woods*, 4 Cow. 173. *Legg* v. *Robinson*, 7 Wend. 194. *Cooper* v. *Watson*, 10 Wend. 202.)

[1]Eng. Com. Law Reps. xvii. 428. [2]*Id.* xix. 188. [3]*Id.* viii. 368. [4]*Id.* xix. 194. [5]*Id.* xxi. 98.

*In covenant by a lessor against lessee it is no variance if the plaintiff makes profert of the said indenture, and at the trial produces the counterpart executed by the lessee (*z*).

For the defendant's evidence under this plea, see tit. DEED.

The proof of this plea lies upon the defendant (*a*); and it has been said that it is sufficient, in support of such a plea, to prove that the deed was given under an arrest made by the plaintiff without any cause of action, or under an arrest without good authority, though for a just debt; or under an arrest by warrant from a justice for felony, where no felony has been committed; or that a felony having been committed, the arrest was unlawfully made use of to procure the execution of the deed (*b*). There are contradictory decisions upon the question, whether duress of the goods as well as of the person will avoid a deed (*c*); since, however, duress must be specially pleaded, the question cannot well arise upon the evidence in an action upon the deed. It is however to be observed, that in the case of *Astley* v. *Reynolds* (*d*), it was held that *assumpsit* would lie to recover money paid under duress of goods. Plea of duress.

It is laid down in Buller's Nisi Prius, that if *A.* menace me, except I make unto him a bond of 40*l.*, and I tell him I will not do it, but I will make unto him a bond of 20*l.*, the Court will not expound this bond to be voluntary upon the maxim: "*Non videtur consensum retinnuisse si quis ex præscripto minantis aliquid immutavit* (*e*).

Proof of the performance of a condition precedent, when put in issue by the defendant's plea, cannot be dispensed with, although the condition has been performed according to a subsequent parol agreement. The plaintiff covenanted to build two houses for 500*l.*, and in an action for the money, averred that he had built the houses within the time. It was held that he could not be admitted to show that the time had been enlarged by a subsequent parol agreement, and that the houses had been built within the enlarged time (*g*). Condition precedent.*

Proof of the breach.—The breach must be proved as it is laid in the declaration (*h*). Breach, &c.

the grantors had not the power of granting the privilege of which the deed, as set out in the declaration, purported to be a grant, and therefore that there was a variance. Held also, that the deed showed that the assignee of the grantee was not bound by the covenants, inasmuch as it appeared that the grantors had not any legal or equitable estate in an hereditament. *Earl of Portmore* v. *Bunn*,[1] 1 B. & C. 694.

(*z*) *Pearse* v. *Morrice*, 3 B. & Ad. 396.

(*a*) 5 Co. 119; B. N. P. 172. See tit. DURESS.

(*b*) B. N. P. 172; Aleyn, 92. *Wooden* v. *Collins*, Mich. 9 Geo. 2. See tit. DURESS. [16 Mass. Rep. 511.]

(*c*) This is affirmed in 1 Roll. Ab. 687, and denied in *Sumner* v. *Feryman*, Hil. 1708. 11 Mod. 201. But in *Astley* v. *Reynolds*, Str. 915, it was held that *assumpsit* would lie for money obtained under duress of goods.

(*d*) Stra. 915. But see *Lindon* v. *Hooper*, Cowp. 414. Vide *supra*.

(*e*) B. N. P. 173; Bac. Reg. 22.

(*g*) *Littler* v. *Holland*, 3 T. R. 590.

(*h*) Where the lessee of premises, demised as a public-house, covenanted that he would use his best endeavours to keep it open as a licensed house, and it having been underlet to several tenants, at length, through the misconduct of one, the license was refused by the magistrates; held, that it lay on the defendant to show that after the withdrawal of it, he did some act to obtain the renewal of the license, but that it was for the jury to say whether the plaintiff, in never having himself taken any steps to obtain the grant of the license, had sustained any substantial damage, and if not, that he was entitled only to nominal damages. *Linder* v. *Pryor*,[2] 8 C. & P. 518. Upon a covenant in the assignment of a lease, that the assignor would not keep any licensed victualling house, &c. within the distance of half a mile from the premises assigned; held that

* See tit. ASSUMPSIT, 67. Where the declaration stated an agreement by the plaintiff's testator to sell premises and the defendant to purchase, and that by the indenture of bargain and sale the defendant did covenant to pay the purchase-money on a day stated, "as the consideration of such sale and purchase, with interest, to the completion of the purchase;" held, to be an independent covenant, and that the money might be recovered without tender of a conveyance. *Muttock* v. *Kinglake*, 2 P. & D. 343; and 10 Ad. & Ell. 50.

[1] Eng. Com. Law Reps. viii. 188. [2] *Id.* xxxiv. 509.

*Where it was assigned thus, "that the defendant had not used a farm in a husbandlike manner, but, on the contrary, had committed waste;" it was held that it was not sufficient to prove that the defendant had used the farm in an unhusbandlike manner, but that he was bound to prove that the defendant had been guilty of *waste* (*i*).

Where the covenant was to keep all trees standing in an orchard whole and undefaced, reasonable use and wear only excepted; the cutting down trees past bearing, the landlord being likely to get back his premises at the end of the term in an improved condition, was held to be no breach of the covenant (*k*).

In covenant, the mean tenant may recover against his under-lessee, for not repairing, the costs of an action for not repairing brought by the original lessor (*l*).

The proof of the breach not to assign must of course depend upon the terms of the covenant (*m*).

Not to assign, &c. without licence.

On a covenant not to set, let, or assign over (*n*), without leave, it was held that an under-lease amounted to a breach (*o*). But where the covenant was not to assign, transfer, or set over, it was held that an under-letting was not a breach of the covenant (*p*). Where the proviso was that the lease

*346 *should be void if the lessee assigned, or otherwise parted with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term, without leave, in writing, it was held that the terms included an under-lease (*q*). A covenant that the lessee,

the covenant was to be construed half a mile by the nearest mode of access between the places. *Leigh* v. *Hind*,[1] 9 B. & C. 774.

Defendant on a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estate to the amount of 19,000*l.* within a year. Held, that on his failing to do so, the trustees were entitled to recover the whole 19,000*l.* in an action of covenant, though no special damage was laid or proved, and an inquisition on which nominal damages had been given was set aside and a new writ of inquiry awarded. *Lethbridge* v. *Mytton*,[2] 2 B. & A. 772. Where the Crown lessee of duchy lands had underlet on a building lease, with a covenant that he would apply for and do his utmost to procure a renewal, but his offer was only of a fine to the amount of two years' rack-rent, paid by the occupiers, the Crown requiring as a fine a sum short of three years annual value of the premises; held, that the covenant was to be construed to impose on the covenantor no more than to pay a reasonable fine, but that the fine so claimed by the Crown being found by the jury as reasonable, and that the covenantor having declined to renew on those terms, could not be said to have done his utmost endeavour to obtain a renewal within the meaning of the covenant. *Simpson* v. *Clayton*,[3] 4 Bing. N. C. 758; and 6 Sc. 469. Upon a covenant for appearing at any insurance office within the bills of mortality, and answer questions, and do any act to enable the plaintiff to effect a policy on the defendant's life, and not to do any act to avoid such insurance, breach, that the defendant went beyond the limits of Europe; held, that the defendant, being bound to take notice of the conditions of the policy, the declaration was bad for want of averring that he had notice of the policy having been effected, the defendant having no means of knowing at what office, or the terms of their policies, at which the plaintiff might, at his own option, insure. *Vyse* v. *Wakefield*, 8 Dowl. 377; and 6 M. & W. 442.

(*i*) *Harris* v. *Mantle*, 3 T. R. 307.

(*k*) *Good* v. *Hill*, 2 Esp. 690.

(*l*) *Neale* v. *Wyllie*,[4] 3 B. & C. 533. Action by mean tenant against under lessee for overloading chamber with meal. Lord Abinger held, Liv. Sum. Ass. 1835, that the plaintiff was not entitled to recover damages recovered against him by the original lessor. Note, there was no distinct evidence of application by plaintiff to defendant to defend an action brought against plaintiff.

(*m*) In an action of covenant, the breaches are specified in the declaration; but in an action on a bond for the performance of covenants, or to indemnify, the defendant may require a particular of the breaches on which the action is brought. Tidd's Pract. 526.

(*n*) An assignment by a deed which is void, is no breach of the covenant. *Doe* v. *Powell*,[5] 5 B. & C. 308.

(*o*) *Ree* v. *Harrison*, 2 T. R. 426. Such a covenant is a fair and usual covenant. *Morgan* v. *Slaughter*, 1 Esp. C. 8. But the taking a lodger is not a breach of a covenant not to underlet. *Doe* v. *Laming*, 4 Camp. 77.

(*p*) *Crusoe* v. *Blencowe*, 2 Bl. R. 766; 3 Wils. 224.

(*q*) *Doe* v. *Worseley*, 1 Camp. 20, *cor.* Lord Ellenborough. A lease by the lessee for the whole term amounts to an assignment. *Halford* v. *Hatch*, Doug. 178. Where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term," it

[1] Eng. Com. Law Reps. xvii. 495. [2] *Id.* xxii. 181. [3] *Id.* xxxiii. 522. [4] *Id.* x. 172. [5] *Id.* xi. 241.

his executors or administrators, will not assign, does not bind his assignees (*r*).

Under a covenant not to assign, it is not sufficient to show an assignment by operation of law (*s*). As under a sale by the sheriff who has seized the lease under a *fieri facias* (*t*); or where the assignees under a commission assign the bankrupt's lease (*u*); or where, as it seems, executors dispose of the testator's term (*x*); otherwise where an assignmnnt is effected in fraud of the covenant, as by means of a warrant of attorney to confess a judgment, in order that the judgment-creditor may take the lease in execution (*y*). Where the covenant is not to assign, set over, or otherwise let the demised premises, it is not sufficient to show that a stranger is in possession of the premises, for he may have been a tortious intruder (*z*). But where the covenant was not to *aliene*, assign, or part with the possession, it was held to be sufficient to prove a stranger to be (*a*) in possession (*b*).

Where the plaintiff declares on a covenant for quiet enjoyment (*c*), if the covenant be *general*, he must show in his declaration that the eviction was

Breach.—Quiet enjoyment.*

was held that proof that the lessee had entered into partnership with *A.* and agreed that he should have the use of a back room, and other parts of the premises exclusively, was evidence of a forfeiture. *Roe* d. *Dingley* v. *Sales*, 1 M. & S. 297.

(*r*) *Doe* d. *Cheere* v. *Smith*,[1] 5 Taunt. 795.

(*s*) Assigns are construed to mean voluntary assigns, as contradistinguished from assigns by operation of law; per Lord Ellenborough, 3 M. & S. 358. But the alienation by executors, as in case of bankruptcy, may be restrained by express words. See below, note (*u*).

(*t*) *Doe* d. *Mitchinson* v. *Carter*, 8 T. R. 57.

(*u*) *Doe* v. *Bevan*, 3 M. & S. 353; 3 Wils. 237. *Fox* v. *Swan*, Sty. 483. *Weatherill* v. *Gearing*, 12 Ves. 513. The Courts have construed assigns to mean voluntary assigns, as contradistinguished from assigns by operation of law; and further, that the immediate vendee from the assignee in law is not within the proviso. The reason is, that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in the case of carrying on the bankrupt's trade in a public house. *Secus* under a covenant for re-entry in case lessee should become bankrupt, or the lease be assignable under a commission of bankrupt. *Doe* v. *Smith*,[1] 5 Taunt. 795. So where the party expressly covenants for his executors. *Roe* v. *Harrison*, 2 T. R. 425. As to the case of a devise by will, see *Berry* v. *Taunton*, Cro. Eliz. 331; Shepp. Touchstone, 144; *Crusoe* v. *Bugby*, 3 Wils. 237; *Swan* v. *Fox*, Styles, 482.

(*x*) *Seers* v. *Hind*, 1 Ves. jun. 295.

(*y*) *Doe* v. *Carter*, 8 T. R. 300. *Doe* v. *Skeggs*, cited 2 T. R. 134.

(*z*) *Doe* v. *Payne*,[2] 1 Starkie's C. 86.

(*a*) 4 Taunt. 766; but see Ld. Ellenborough's observation in *Doe* v. *Payne*,[2] 1 Starkie's C. 87.

(*b*) For other decisions on this subject, see tit. EJECTMENT.—FORFEITURE.

(*c*) This covenant runs with the land, and binds the assignees; and there is no difference between an assignment of an inheritance and a term for years. *A.* devised for a term to *B.*, who assigned his interest to *C.*, and covenanted with him and his assigns for quiet enjoyment; *C.* demised to *D.*, who was evicted for a forfeiture by *B.* before the assignment to *C.*; and it was held that *D.* might maintain an action of covenant against *B.* *Lewis* v. *Campbell*,[3] 3 Moore, 35. And see *Thursby* v. *Plant*, 1 Will. Saund. 241, b. [*Binney* v. *Hann*, 3 Marsh. 324.]

* The words "*concessi & demisi*," import a covenant in law. Bac. Ab. tit. Covenant, [B] Shepp. Touch. 160; Com. Dig. Cov. [A.] 4. The covenant in such case eases with the estate out of which it is granted. *Adams* v. *Gibney*,[4] 6 Bing. 656. In an action for not accepting shares in a railroad, which by the contract were to be transferred and paid for by the 1st of March or any intermediate period, paying for them at par, with all calls, the plaintiff binding himself to *execute* a legal transfer to the defendant on that day, it appeared that the plaintiff had procured the transfers from a third party, executed, as to the name of the transferee, in blank, which he tendered on the 1st of March to the defendant, and that calls due before that day had not been paid as required by the local Act previous to any transfer; held, upon objection, that the plaintiff having contracted for a conveyance from *him*, it must be intended to be a conveyance in the statutory form, and upon the implied covenant of the plaintiff for title, and that the implied covenant from the third party was not the same thing; secondly, that the objection upon the local Act had been waived by an agreement by the defendant that the plaintiff should not pay such instalments; and lastly and chiefly, that the conveyance required by the Act being clearly one by *deed*, an instrument with the name of the vendor in blank at the time of the sealing and delivery was void. *Hibblewhite* v. *M'Morine*, 6 M. & W. 200. A covenant in law is restrained by a particular covenant. *Nokes* v. *James*, 4 Co. 80; 1 Will. Saund. 60; and *supra*, note (*c*). *Line* v. *Stephenson*,[5] 4 Bing. N. C. 678;[6] 5 Bing. N. C. 183; where express covenants for warranty are introduced, none can be implied from the general terms. See *Stannard* v. *Forbes*,[7] 6 Ad. & Ell. 572; and see *Line* v.

[1]Eng. Com. Law Reps. i. 270. [2]*Id.* ii. 307. [3]*Id.* iv. 258. [4]*Id.* xix. 194. [5]*Id.* xxxiii. 492. [6]*Id.* xxxv. 77. [7]*Id.* xxxiii. 149.

*made by a person claiming by a legal title inconsistent with his own (*d*) (1); and his proof must correspond with such averment (*e*). If the eviction has been obtained by means of legal process, the plaintiff should prove the execution and judgment, and show how it was obtained. Where the covenant is particular against interruption or eviction by the lessor or grantor, or some other specified person, the plaintiff need not allege, and of course need not prove the title of the party interrupting or evicting him (*f*) (2).

The plaintiff must show some act done, or disturbance of his possession, which amounts to a breach of the covenant. A mere verbal disturbance, by prohibiting the tenant of the covenantee from paying rent, will not amount to a disturbance (*g*).

Plea of entry and eviction.

In support of this plea in excuse for the non-performance of a covenant the defendant must prove such an entry or eviction as was sufficient to prevent the performance of the covenant.

On a covenant to repair the dwelling-house, proof, under this plea, of an entry into the back-yard would not be sufficient, unless it appeared that his entry wholly prevented the defendant from repairing the house (*h*).

In an action of covenant for quiet enjoyment against *A.*, and any person by his means, title or procurement, it is sufficient to prove by way of breach, a claim of dower by the wife of *A.* (*i*); or an entry by the wife of *A.*, the latter having purchased jointly with his wife (*k*); or by the appointee of
*348 *A.*, under a power to which *A.* was party (*l*); or by the eldest son of *A.*, claiming under a settlement made by *A.* (*m*).

Where the defendant covenanted that he had not *permitted*, nor suffered to be done, any act whereby an estate was encumbered, it was held that the assenting to an act which he could not prevent was not a breach of the covenant (*n*).

(*d*) *Tisdale* v. *Sir W. Essex*, Hob. 34. *Foster* v. *Pierson*, 4 T. R. 617. *Buckley* v. *Williams*, 3 Lev. 325; Lofft, 460. *Hurd* v. *Fletcher*, 1 Doug. 43. *Evans* v. *Vaughan*,[1] 4 B. & C. 261. *Spencer* v. *Marriott*,[2] 1 B. & C. 457. *Brooks* v. *Humphries*,[3] 5 Bing. N. C. 55; 6 Sc. 756. Where the lease contains a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot, upon an eviction by a paramount title, recover under the implied covenant for general title, implied in the word "demise." *Merrill* v. *Frame*, 4 Taunt. 329.

(*e*) *Hobson* v. *Middleton*,[4] 6 B. & C. 295.

(*f*) *Perry* v. *Edwards*, 1 Str. 400. *Lloyd* v. *Tomkins*, 1 T. R. 671. Such a covenant extends to *tortious acts* by the specified person. 1 Str. 400. *Nash* v. *Palmer*, 5 M. & S. 374. *Forte* v. *Vine*, 2 Roll. R. 21; 2 Saund. 181, a.

(*g*) 1 Brownl. 81.

(*h*) B. N. P. 165.

(*i*) Godbolt, 333; Pal. 340.

(*k*) *Butler* v. *Swinnerton*, Pal. 339.

(*l*) *Hurd* v. *Fletcher*, 1 Doug. 43.

(*m*) *Evans* v. *Vaughan*,[1] 4 B. & C. 261.

(*n*) *Hobson* v. *Middleton*,[4] 6 B. & C. 295. A tortious disturbance by a stranger is insufficient. 2 Saund. 178 (n). *Dudley* v. *Folliott*, 3 T. R. 587.

Stephenson,[5] 4 Bing. N. C. 678. Where a superior landlord distrains on an under-tenant by deed, the latter cannot sue in assumpsit, but must resort to an action of covenant against his lessor. *Schlenker* v. *Moxey*,[6] 3 B. & C. 789. The covenant for quiet enjoyment relates to the assignor's own acts subsequent to the terms vesting in him against any subleases or assignment before granted by the assignor. Per Lord Ellenborough. *Barton* v. *Fitzgerald*, 15 East, 542. A covenant by the lessor, that the lessee *paying rent* shall quietly enjoy, is not a conditional covenant. *Dawson* v. *Dyer*, 5 B. & Ad. 584.

(1) [See Yelv. 30, *note* (1), and the cases there collected. Dalison, 58, pl. 8—110, pl. 2. *Nash* v. *Palmer*, 4 M. & S. 374. *Greenby* v. *Wilcocks*, 2 Johns. 1. *Folliard* v. *Wallace*, 2 Johns. 395. *Kent* v. *Welsh*, 7 Johns. 258. *Patton* v. *Kennedy*, 1 Marsh, 389, *acc.* A covenant for quiet enjoyment extends only to disturbances, &c. made by virtue of rights existing at the time the covenant is made, and not to those afterwards acquired. *Ellis & al.* v. *Welch*, 6 Mass. Rep. 246.]

(2) [The covenant for quiet enjoyment goes to the possession and not to the title, and is broken only by an entry and expulsion from the possession, or some actual disturbance of it. *Waldron* v. *M'Carty*, 3 Johns. 471. *Kortz* v. *Carpenter*, 5 Johns. 120. See also *Van Slyck* v. *Kimball*, 8 Johns. 198. In North Carolina, a recovery in trespass *quare clausum fregit* against the grantee, is sufficient evidence of a breach of the covenant for quiet enjoyment. *Williams* v. *Shaw*, 2 Taylor, 197.]

[1]Eng. Com. Law Reps. x. 327. [2]*Id.* viii. 129. [3]*Id.* xxxv. 28. [4]*Id.* xiii. 175. [5]*Id.* xxxiii. 492. [6]*Id.* x. 227.

Under a covenant to keep a house in repair, it is sufficient to keep it in substantial repair, according to the nature and circumstances of the building (*o*); therefore evidence is admissible as to the state and circumstances of the house at the time of the demise (*p*). Covenant to repair.

On a covenant to keep in repair during the term, an action may be brought during the term (*q*). It is not sufficient evidence of a breach of covenant to show that the house was destroyed by a tempest, unless the covenantor has delayed to repair it beyond a reasonable time (*r*).

Upon the execution of a bond, the obligee by deed-poll (releasing a former bond payable by the party's executors, &c., for which the latter had been substituted) covenanted not to sue on the latter bond in the lifetime of the obligor; and that if any other should sue in his name, and recover, that the obligee would pay the obligor, during his life, the interest on the sum recovered; held, that it was no bar to an action by an assignee of the bond suing in the name of the obligee; and that, if the action had been brought for the benefit of the obligee, the defendant should have pleaded the fraud (*s*). Covenant not to sue.

Covenant by lessor against the assignee of lessee, for non-payment of rent; plea, that before the rent became due the defendants assigned, the replication asserting forth a covenant by lessee, his executors and administrators, not to assign without license: held, that the action being founded on privity of estate, the obligation ceased when the privity was destroyed; the plaintiff's *remedy against the defendant, if within the covenant, was on the covenant not to assign (*t*). Covenant not to assign. *349

Where the plaintiff declares as assignee (*u*), and his title is put in issue

(*o*) It is not meant that the house should be delivered up in an improved state, or that the effect of the elements should be averted, but only that it should be kept in the state in which it was before the demise, by the timely expenditure of money and care. *Gutteridge* v. *Munyard*, 1 Mo. & R. 334. *Burdett* v. *Withers*,[1] 7 Ad. & Ell. 136. And see below, tit. WASTE; and *Auworth* v. *Johnson*,[2] 5 C. & P. 239. *Harris* v. *Jones*, 1 Mo. & R. 334. *Gutteridge* v. *Munyard*, 1 Mo. & R. 334. A covenant to repair is not broken by alterations and improvements, where improvements are contemplatod in the lease, as where the covenant is to keep in repair; (*inter alia*) *Improvements*. *Doe* v. *Jones*,[3] 4 B. & Ad. 126. But under a covenant to repair and uphold (*inter alia*) brick walls, the pulling down a brick wall, separating the court-yard from another yard, is a breach. *Doe* v. *Bird*,[4] 6 C. & P. 196. So if a doorway be broken into the adjoining house, it is a breach of the covenant to repair. *Doe* v. *Jackson*,[5] 2 Starkie's C. 93. A covenant to put the premises, within a reasonable time, in a state of habitable repair, and deliver them up in such state, means such a state, as well with respect to safety as the comfort of the class of persons, and the purpose for which they were to be occupied. *Belcher* v. *M'Intosh*, 2 M. & R. 186. A tenant under a covenant to repair is liable for repairs only; he is not liable for any extra expense, *e. g.* for expense which would be incurred by laying a floor on an improved plan. *Soward* v. *Leggatt*,[6] 7 C. & P. 613. A tenant from year to year is bound merely to keep the premises wind and water tight. *Leach* v. *Thomas*,[7] 7 C. & P. 327. Under a covenant to keep and leave the house in as good repair as it was in at the time of making the lease, the tenant is bound only to do his best to keep it in the same plight; ordinary and natural decay, is no breach of the covenant. Fitz. Ab. Cov. 4; Shepp. Touch. 169.

(*p*) *Burdett* v. *Withers*,[8] 7 Ad. & Ell. 636. *Stanly* v. *Towgood*,[9] 3 Bing. N. C. 4. *Mantz* v. *Goring*,[10] 4 Bing. N. C. 451.

(*q*) *Luxmore* v. *Robson*, 1 B. & A. 584. (*r*) Shepp. Touch. 173.

(*s*) *Morley* v. *Frere*,[11] 6 Bing. 547.

(*t*) *Paul* v. *Nurse*,[12] 8 B. & C. 486.

(*u*) Before the stat. 32 Hen. 8, c. 34, the action of *debt* for rent lay for the assignee of the reversion at common law; and the action being founded on privity of estate, was local. *Walker's Case*, 3 Rep. 22, b.; 4 Mod. 81. *Glover* v. *Cope*, 4 Mod. 80; 1 Will. Saund. 241, *c.* in note. The effect of the above statute was to transfer a privity of contract, and to enable the assignee of the lessor to maintain covenant against the lessee. *Thursby* v. *Plant*, 1 Will. Saund. 237. The lessor might, at common law, maintain debt or covenant for rent, or not repairing, or other covenant running with the land, against the assignee of the lessee; but the action was local, as founded in privity of estate. *Walker's Case*, 3 Rep. 22; 5 Hen. 7, 19, a.; 1 Will. Saund. 241, *c.* in note; and consequently such an action by the assignee of the reversion against the assignee of the lessee is also local, and must be brought in the county where the land lies. *Ibid.* Where *J. B.* seised in fee conveyed to the defendant in fee, to the use that *J. B.*, his heirs and assigns, might take to his use a rent issuing out of the premises, and the defendant covenanted with *J. B.*, his heirs and assigns, to

[1]Eng. Com. Law Reps. xxxiv. 57. [2]*Id.* xxiv. 298. [3]*Id.* xxiv. 37. [4]*Id.* xxv. 352. [5]*Id.* iii. 352. [6]*Id.* xxxii. 654. [7]*Id.* xxxii. 527. [8]*Id.* xxxiv. 187. [9]*Id.* xxxii. 12. [10]*Id.* xxxiii. 409. [11]*Id.* xix. 161. [12]*Id.* xv. 273.

Plea denying title of plaintiff.

by one or more of the defendant's pleas, he must prove his title as alleged (*x*) (A); whether as assignee of the reversion, by proof of the due execution of the assignment (*y*); as assignee of the estate of a bankrupt, by proof of the several steps of bankruptcy, and of the assignment (*z*), if an assignment be essential to title; as heir (*a*) of the covenantee; or as his devisee or his executor, according to the circumstances of the case.

The production of an original lease for a long term, with proof of possession for seventy years, affords presumptive evidence of all mesne assignments (*b*).

Where the action is by an assignee of the reversion on a covenant to pay rent, and the assignment is traversed, the plaintiff may either prove a conveyance duly and regularly made, or a payment of rent to him by the defendant (*c*).

Plea denying derivative liability of defendant.

So if the defendant, by one or more pleas, deny that he is bound by the covenant, the plaintiff must prove the liability as assignee (*d*). Upon a *covenant which runs with the land, proof that the defendant is heir will support a declaration which charges him generally as assignee (*e*).

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So the assignee, under a plea to that effect, may show an assignment of the term to another before breach (*f*). Notice of such assignment to the plaintiff is unnecessary (*g*); the assent of the assignee will be presumed (*h*).

The defendant may object that he is assignee of part only, where he is charged as assignee of the whole (*i*).

pay the rent, and to build on the premises; it was held that the lessee of *J. B.* could not maintain an action on either covenant against the defendant, for there was no privity either of contract or of estate. *Milnes* v. *Branch*, 5 M. & S. 411. [*Lienon* v. *Ellis*, 6 Mass. Rep. 331.]

(*x*) After a lease for twenty-one years, the lessee sublet the premises of *M.* for the term wanting twenty-one days, and afterwards assigned all his interest in the underlease and reversion to the original lessor, which the latter assigned, with all his interest in fee, to the plaintiff by way of mortgage; *M.* also afterwards assigned all his interest in the term granted to him, to the defendants by way of mortgage, but the latter never entered. Held, first, that the intermediate interest in the underlease, carved out of the original lease, still remained as a barrier between the original term and the inheritance, and that the immediate reversion did not merge in the larger estate; secondly, that it was not necessary that the original lessor should have been the grantee of the whole of his immediate lessee's reversion, in order to enable him to sue upon the covenants incident to that reversion; and lastly, that the defendants having received the lease in pursuance of the assignment to them, they became legally possessed, and their legal liability as assignees could not be affected by any trusts created in the deed of assignment; the plaintiffs were therefore entitled to sue on the covenants in such underlease for rent. *Burton* v. *Barclay*,[1] 7 Bing. 745.

(*y*) See tit. DEED.

(*z*) See tit. BANKRUPTCY.

(*a*) See the several titles DEVISEE, EXECUTOR, HEIR, &c.

(*b*) *Earl* v. *Baxter*, 2 Bl. 1228.

(*c*) Peake's Ev. 283, *Doe* v. *Parker*,[2] there cited; and see *Carrick* v. *Blagrave*,[3] 1 B. & B. 531.

(*d*) If he be charged as assignee of the whole, when in fact he is assignee of part only, the non-joinder of the other tenants in common ought, it seems, to be pleaded in abatement. *Merceron* v. *Dawson*,[4] 5 B. & C. 479. In covenant by the lessor against the executor of the assignee of the lessee, become insolvent, for rent accruing subsequently to the death of such assignee; held, that if the latter assented to the assignment made under the 7th Geo. 4, c. 57, and acted as tenant of the premises, his executor was liable as representing the assignee. *Abercrombie* v. *Hickman*, 3 N. & P. 676.

(*e*) *Derisley* v. *Custance*, 4 T. R. 75.

(*f*) Where the defendant proved that he had executed the assignment, but it had not been delivered to the assignee, but remained in the hands of the defendant's solicitor, who had a lien upon it, it was held to be sufficient. *Odell* v. *Wake*, 3 Camp. 394.

(*g*) *Pitcher* v. *Tovey*, 1 Salk. 81. *Taylor* v. *Shaw*, 1 B. & P. 21.

(*h*) *Ibid.*

(*i*) *Hare* v. *Cator*, Cowp. 766.

(A) (The execution of a lease and the possession of the defendant is evidence sufficient, *prima facie*, to charge a defendant as assignee for the non-payment of rent, but it is not conclusive on him. *Williams* v. *Woodward*, 2 Wend. 487. *Lansing* v. *Van Alstyne*, 2 Wend. 563. And if the issue is made upon the question whether the defendant holds as assignee, the plaintiff must prove the assignment to the defendant. *Lansing* v. *Van Alstyne*.)

[1]Eng. Com. Law Reps. xx. 315. [2]*Id.* ii. 307. [3]*Id.* v. 178. [4]*Id.* xi. 277.

Where the plaintiff declared against the assignees under a commission of bankrupt against the lessee, and averred in the usual form that the estate, right, title, &c. of the lessee came to the defendants by assignment thereof duly made, by virtue of which said assignment they entered into the demised premises, and were possessed thereof for the residue, &c.; it was held, that the averment was not satisfied by proof that the assignees had advertised the lease for sale, (without stating themselves to be the owners), and without taking any possession of the premises (*k*). But it was said by Lord Ellenborough, that if a bidder had been found, and the defendants had accepted the bidding, that would have been evidence of their assent to take to the premises. And where the assignees of a bankrupt paid rent, not as tenants, but for the purpose of preventing a distress upon the premises where the bankrupt's goods remained, under a protest that they did not mean to adopt the term, unless upon a trial made it should be found to be valuable, and the premises were put up to sale with the plaintiff's concurrence, it was held that they were not liable to covenant for rent, although they had kept the keys of the premises for four months, no application having been made to them to deliver them up (*l*).

*If the plaintiff state the particulars of the defendant's title, they must, if traversed, be proved as laid (*m*). But under a general allegation, it is sufficient *primâ facie* evidence to prove payment of rent or possession by the defendant (*n*). *351

Proof of possession by the defendant, or of payment of rent, is *primâ facie* proof that he is assignee. But still the defendant may show that the title is in another, and prove that he is under-tenant only, even though the reversion of but one day be left in the original lessee (*o*). So the devisee of the equity of redemption, the legal estate being in a mortgagee, is not liable to a covenant running with the land (*p*). So he may show that he is but *appointee*, and as being in by the *appointor*, not liable on a covenant binding on assigns (*q*). But an actual entry or possession is not essential

(*k*) *Turner* v. *Richardson and another*, 7 East, 335. See also 1 Esp. C. 234; and see *Page* v. *Godden*,[1] 2 Starkie's C. 209. Where a party assigned all his property in trust for his creditors, and the assignees, shortly after, advertised the property assigned for sale, including a lease, for which there being no bidder, they tendered the key of the premises; held, that the words of the assignment being large enough to include leasehold interests, it was a question for the jury whether, after the defendants were aware of the existence of the lease, they had so dealt with the property as to make themselves assignees of it, and liable to the covenants; but not, if they had done no more than fairly try, by putting up the lease for sale, whether any benefit could be made of it. *Carter* v. *Warne*,[2] 1 M. & M. 479. And see *Wheeler* v. *Bramah*, 3 Camp. 340. *Hanson* v. *Stevenson*, 1 B. & Ad. 303; and *Clarke* v. *Hume*,[3] 1 Ry. & M. 207. In order to charge the assignees of a bankrupt, some evidence must be given of their acceptance of the lease; see 6 G. 4, c. 16, s. 75 *Copeland* v. *Stephens*, 1 B. & A. 593. The allowing the bankrupt to carry on the trade upon the premises for the benefit of creditors, under the occasional superintendance of the assignee, is an acceptance, although the assignee by letter to the landlord, disclaim the acceptance. *Clarke* v. *Hume*,[3] 1 Ry. & M. 207. So where assignees, chosen on the 8th, suffered the bankrupt's cows to remain on the premises till the 10th, during which time they were, however, milked by order of the assignees, who had received the key of the premises from the messenger. *Welsh* v. *Myers*, 4 Camp. 368. See further *Hastings* v. *Wilson*,[4] Holt's C. 290. *Hanson* v. *Stevenson*, 1 B. & A. 303. It has been held, that the provisional assignee of an insolvent must be taken to have consented to accept the property. *Crofts* v. *Pick*,[5] 1 Bing. 354. *Doe* v. *Andrews*,[6] 4 Bing. 348. Under the Insolvent Acts, 53 G. 3, c. 102, and 1 G 4, c. 119, the permanent assignees are not bound to accept it. See the stat. 7 G. 4, c. 57, s. 93, and 1 & 2 Vict. c. 110, ss. 37 & 50. A trustee under an assignment for the benefit of creditors has a reasonable time for consideration whether he will take the lease. *Carter* v. *Warne*,[2] M. & M. 479.

(*l*) *Wheeler* v. *Bramah*, 3 Camp. 340; and now see the statute 6 Geo. 4, c. 16, s. 75. [See *Hanson* v. *Stevenson*, 1 B. & A. 303.]

(*m*) *Turner* v. *Eyles*, 3 B. & P. 461. (*n*) *Doe* v. *Williams*,[7] 6 B. & C. 41.

(*o*) *Holford* v. *Hatch*, Doug. 178. *Hare* v. *Cator*, Cowp. 766.

(*p*) *Mayor, &c. of Carlisle* v. *Blamire*, 8 East, 487.

(*q*) *Roach* v. *Wadham*, 6 East, 289. Where the contract for the purchase of leasehold premises amounted

[1]Eng. Com. Law Reps. iii. 358. [2]*Id.* xix. 336. [3]*Id.* xxi. 417. [4]*Id.* iii. 107. [5]*Id.* viii. 345. [6]*Id.* xiii. 460. [7]*Id.* xiii. 105.

to render the assignee of the whole term of a lease liable to the covenant for payment of rent (*r*).

If the plaintiff charge the defendant through a variety of deeds, instead of charging him generally by virtue of divers mesne assignments, and these be put in issue by the plea, the plaintiff must prove the deeds as stated (*s*). In respect of a defence on the ground of illegality of contract, there is no difference between a contract by parol and one under seal (*t*).

Under the plea of release (which must be by deed), it must be proved that the release was executed subsequently to the breach of covenant

In covenant for non-repair, the defendant, it is said, may examine the plaintiff's witnesses generally as to the state of the premises at the time of the demise, but not as to particular defects, and when they arose (*u*).

A plea of expulsion to a declaration on covenant for non-payment of rent, is not supported by evidence of a mere trespass (*x*). But an expulsion from part suspends the whole rent (*y*).

The evidence peculiar to the pleas of Accord and Satisfaction, Infancy, is treated of elsewhere, under the proper titles.

*352 *COVERTURE. *See* HUSBAND AND WIFE.

CRIMINAL CONVERSATION.

The plaintiff, in an action for criminal conversation with his wife, must prove, 1st. The marriage; 2dly. The fact of adultery; 3dly. It is usual to adduce evidence in aggravation of damages.

Marriage. 1st. *His Marriage.*—The plaintiff must prove a marriage in fact; proof of cohabitation and reputation are insufficient (*z*) (1). But this is the only instance in civil cases in which such evidence is insufficient, and the exception in this case is founded partly on the consideration that the proceeding is of a penal nature, and partly as a rule of policy and convenience, to pre-

only to an equitable agreement, and there was no legal assignment, it was held that, being equitable assignee of the whole interest, the obligation was co-extensive with that interest, and that the purchaser was liable to indemnify the plaintiff, the equitable assignor, against all damages incurred by reason of breaches of covenant on the lease subsequent to the date of the agreement. *Close* v. *Wilberforce*, 1 Beav. 112.

(*r*) *Williams* v. *Bosanquet*,[1] 1 B. & B. 238, overruling *Eaton* v. *Jaques*, Doug. 438. See 7 T. R. 312; *Stone* v. *Evans*, Woodfall's L. & T. c. 3, s. 15; Co. Litt. 46. b.; 1 Ld. Raym. 367. *Grattan* v. *Diggles*, 4 Taunt. 766. But it seems that in order to charge an executor as assignee, it must be proved that he entered on the premises. *Tilney* v. *Norris*, 1 Ld. Raym. 553.

(*s*) 3 B. & P. 461.

(*t*) In covenant for rent, it is a good plea that the premises were let for the express purpose of being used for drawing oil of tar or pitch, contrary to the provisions of the Building Act. *Gas-light and Coke Company* v. *Turner*,[2] 5 Bing. N. C. 666; 7 Sc. 778; 6 Bing. N. C. 324. On an agreement for relinquishment of a trade for a consideration, and covenant against exercising at any time thereafter the trade of a common carrier to and from certain places, held that the Court could not enter into the reasonableness of the restraint in respect of the consideration, nor declare the covenant void by reason of the restriction being unlimited. *Archer* v. *Marsh*,[3] 6 Ad. & Ell. (Q. B.) 959; and 2 Nev. & P. 562. Also *Hitchcock* v. *Coker*,[4] 6 Ad. & Ell. 438; overruling *Horner* v. *Graves*,[5] 7 Bing. 735. A covenant in a lease of a brewery, that the lessor would not carry on the trade during the demise, is void, as being an instrument of trade. *Hinde* v. *Gray*, 1 Sc. N. S. 123. But see *Archer* v. *Marsh*, and *Hitchcock* v. *Coker*, *supra*.

(*u*) *Young* v. *Mantz*, 6 Sc. 277. See *Stanley* v. *Towgood*, 3 Sc. 313; and 3 Bing. N. S. 4.

(*x*) *Hodgkin* v. *Queenborough*, Willes, 131. B. N. P. 177.

(*y*) Co. Litt. 148. b. *Walker's Case*, 3 Rep. 22. b.

(*z*) *Morris* v. *Miller*, 4 Burr. 2057. The reason assigned by Lord Mansfield is, that otherwise parties might be liable to such actions on evidence made by the plaintiff who brings the action. In an action for criminal conversation, the plaintiff and his wife being Quakers, the register of their marriage and proof of its having been celebrated according to the forms of that society, held sufficient. *Deane* v. *Thomas*, 1 M. & M. 361. In an action for criminal conversation, the letters of the wife to her husband and others are admissible in evidence to show the state of the wife's feelings, although they may also state that which would not strictly be evidence. *Willis* v. *Bernard*,[6] 8 Bing. 376.

(1) {*Kibby* v. *Rucker*, 1 Marsh, 391, *acc.*}

[1]Eng. Com. Law Reps, v. 72. [2]*Id.* xxxv. 264. [3]*Id.* xxxiii. 254. [4]*Id.* xxxiii. 98. [5]*Id.* xx. 310. [6]*Id.* xxi. 325.

vent the setting up of pretended marriages for bad purposes (*a*). Even the defendant's admission of the fact has been said to be insufficient (*b*).

The defendant was surprised at a lodging with the plaintiff's wife, and on being asked where *Major Morris's* wife was, he answered, "in the next room;" this was holden to be insufficient, for it was nothing more than a confession of the reputation that she went by the name of the plaintiff's wife, and not a confession of the fact of marriage (*c*).

Where, however, the defendant has seriously and solemnly recognized the marriage, it seems, upon principle, that his acknowledgment is admissible evidence of the fact (*d*) (1).

Since the action is against a wrong-doer, it seems to be sufficient to prove *a marriage according to any religion, as in the case of Anabaptists, Quakers and Jews (*e*). The evidence to prove a marriage, in fact, which will be more fully considered hereafter (*f*), usually consists in proving an examined copy of the register, and in the testimony of some one who was present at the ceremony, or who can identify the parties, by evidence of their signatures in the register (*g*). So the identity may be proved by other circumstances sufficient to satisfy the jury; such as that a wedding dinner was given upon the occasion of the marriage; that the lady left her house for the purpose of being married, and afterwards was known and addressed by her husband's name (*h*) (A). *353

2dly. *The fact of Adultery.*—The evidence of this fact, which, from

(*a*) 4 Burr. 2057. *Birt* v. *Barlow*, Doug. 102.

(*b*) Peake's L. Ev. 358. *Birt* v. *Barlow*, Doug. 162. But see tit. Admission.—Polygamy.

(*c*) *Morris* v. *Miller*, Burr. 2057; B. N. P. 27. In strictness, however, and upon general principles, it is difficult to exclude such evidence from the consideration of the jury. To rely upon such evidence to prove a fact, the circumstances of which are peculiarly within the plaintiff's own knowledge, and consequently where better proof might be had, and to substitute for it the mere declaration of the defendant, which may be founded on nothing more than the mere assertion of the parties themselves, would fully warrant the highest degree of suspicion and jealousy, so as to induce the jury, on the recommendation of the Court, to require better evidence. Still cases may occur where evidence resting on the same foundation, but merely stronger in degree, would be not only evidence, but almost conclusive of the fact. Suppose, for instance, that in some other proceeding where it was necessary to prove the same marriage, the present defendant had made an affidavit setting forth all the circumstances of the marriage, and that he was himself present at the ceremony, could it be said that such evidence would not be most cogent to prove the fact of marriage? And yet it would be evidence of the same class with the former, and its admissibility would rest on no other basis than any other assertion made by the defendant would do. (Vide *supra*, tit. Admissions; *Rigg* v. *Curgenven*, 2 Wils. 399; and Lord Ellenborough's observations in *Dickenson* v. *Coward*, 1 B. & A. 679; where he says, "I take it to be quite clear, that any recognition of a person standing in a given relation to others is *prima facie* evidence, against the person making such recognition, that such relation exists.") These observations, which are made for the purpose of preserving the entirety of a general principle, regard the theory rather than the practice in such cases; for it is quite clear that a jury would be fully warranted in refusing to find the fact of marriage upon evidence so slight, when evidence so much better might be adduced.

(*d*) See the last note, and *supra*, 20.

(*e*) B. N. P. 28, cites *Woolston* v. *Scott*, per Dennison, J. at Thetford, where the plaintiff was an Anabaptist, and recovered 500*l*. See *Ganer* v. *Lady Lanesborough*, Peake's C. 17. But it was formerly doubted whether it was not necessary to prove that the marriage was celebrated according to the rites of the church.

(*f*) Tit. Marriage.—Polygamy.

(*g*) In consequence of an expression by Mr. J. Buller, in the case of *Birt* v. *Barlow*, a doubt has been raised whether, if the original register be produced, the subscribing witnesses ought not to be called. This doubt seems to be wholly destitute of foundation; the object of such proof is not to bind a party by the contents of an instrument, but merely to prove the identity of the parties; and therefore the objection does not arise, that evidence is adduced to authenticate the instrument different from that which the parties have themselves constituted.

(*h*) See *Birt* v. *Barlow*, Doug. 162.

(1) {Therefore the declaration of the defendant, that he knew A. B. was married to the plaintiff, and that with full knowledge of that fact he had seduced and debauched her, may be given in evidence in proof of the marriage. *Forney* v. *Hallacher*, 8 Serg. & Rawle, 159.}

(A) (Marriage is a civil contract, and may be completed in any words of the present tense, without regard to form. *Hantz* v. *Sealy*, 6 Binn. 405. But general reputation is no evidence of marriage in an action for criminal conversation. *Weaver* v. *Cryer*, 1 Dev. 337.)

Fact of adultery.

its very nature, is usually circumstantial (*i*), must be sufficient to satisfy the jury (*j*) that an adulterous intercourse has actually taken place (1) (a). Proof of familiarities, however indecent, is insufficient, if there be reason to apprehend, from the fact of the parties being interrupted, or on any other circumstance, that a criminal conversation has not actually taken place.

The nature of the proofs upon this head are too obvious to require specification. They usually consist in evidence of indecent familiarities between the parties (*k*); their elopement; their passing as man and wife at the inn; of the season, frequency and privacy of their meetings, and of all other circumstances attending their intercourse, and indicating the nature of it (2).

Where a discovery has been made by a servant, it is of importance to show that it was promptly communicated to the party injured; if it was not made till after a quarrel or dismissal from the service, or after a long interval, the evidence labours under great suspicion.

Letters written by the defendant to the wife frequently afford strong evidence of the nature of their intercourse (*l*).

Where the statute of limitation has been pleaded so as to exclude the recovery of damages for adulterous intercourse, which took place at a greater distance of time than six years previous to the commencement of the action, it has been held that anterior acts of adultery are still evidence for the purpose of showing the nature of the connection which subsisted within the six years (*m*).

*354 *The confession of the wife will be no evidence against the defendant (*n*); but a discourse between the wife and the defendant is evidence (*o*), as also are letters written by the defendant to the wife.

Damages.

3dly. *Evidence of Damage.*—There is no case in which the damages depend more upon the particular circumstances of the case than in the action for adultery. The injury to the husband in the dishonour of his bed—the alienation of his wife's affections—the destruction of his domestic comforts, and the suspicion cast upon the legitimacy of her offspring, is usually visited with considerable damages where there has been no fault on the part of the plaintiff. It is a trite observation, that such a loss does not admit of any pecuniary estimate or compensation; this is true: but on the other hand, such damages, if not an adequate retribution, constitute the only

(*i*) In the Causes Celèbres, tom. 18, p. 451, the law of *England* on this subject is thus caricatured: "Les preuves de l'adultere des femmes sont très difficiles: il faut que le mari puisse prouver qu'il a, comme dit. Madame Pernelle du Tartuffe, *vû de ses propres yeux:* autrement il n'est pas ecouté."

(*j*) Presumptive evidence of the fact is sufficient in the Ecclesiastical Courts. See *Loveden* v. *Loveden*, 2 Hag. Con. 2. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; per Sir W. Scott, Ib. And see *Chambers* v. *Chambers*, 1 Hagg. Con. 444. *Williams* v. *Williams*, Ib. 299. *Elwes* v. *Elwes*, Ib. 277. *Cadogan* v. *Cadogan*, 2 Hagg. Con. 4. *Wood* v. *Wood*, 4 Hagg. Eccl. Rep. 138 (*n*).

(*k*) *Duke of Norfolk* v. *Germaine*, 8 St. Tr. 27. (*l*) B. N. P. 28.

(*m*) *Duke of Norfolk* v. *Germaine*, 8 St. Tr. 27.

(*n*) B. N. P. 28. *Baker* v. *Morley*, Guildhall, 1739.

(*o*) *Ibid.* So letters written by the wife to the defendant and received by him, would, coupled with his conduct after the receipt, be evidence against him. See the observations of Sir W. Scott, *Loveden* v. *Loveden*, 2 Hagg. 52.

(1) [The same evidence that would warrant a divorce for adultery would probably be sufficient to support an action for criminal conversation. With respect to the former, Sir William Scott says, direct evidence of the facts is not required, but the rule is, that there must be such proximate circumstances proved, as on their own nature and tendency satisfy the legal conviction of the court, that the criminal act has been committed. *Williams* v. *Williams*, 1 Haggard's Rep. 299. *Elwes* v. *Elwes*, ibid. 278. See *Torre* v. *Summers*, 2 Nott. & M'Cord, 267.]

(2) [When the injury is stated to have been committed within certain days, proof of improper freedom must first be given within the limited period, before evidence of the act at a different time can be received. *Gardner* v. *Madeira*, 2 Yeates, 466.]

(a) (What is sufficient proof of adultery, on a petition for divorce. *Gould* v. *Gould*, 2 Aikens, 180. *Randall* v. *Randall*, 4 Greenleaf, 326. *Anderson* v. *Anderson*, *Id.* 100.)

one which the law can award; and the impossibility of giving full redress is a bad reason for giving none, and for depriving morality of one of its safeguards.

Evidence in aggravation usually consists in showing the rank and quality of the plaintiff; the condition of the defendant; that he was received by the plaintiff as a friend or relation; that he was dependent on the plaintiff; that he was a man of fortune and condition; that the plaintiff and his wife, previous to the seduction, lived upon terms of affection and domestic comfort. For this purpose general evidence (*p*) is admissible by any witness acquainted with the family, who can testify to their demeanour and conduct, and to the terms on which they lived. Letters written by the wife to the plaintiff previous to any suspicion of a criminal intercourse are also admissible with the same view; but, in order to obviate all suspicion of collusion in such case, it is essential to give reasonable evidence to show that the letters had existence at the time (*q*); as by proof that the wife, at the time of writing, showed or read them to a witness (*r*); and it is desirable, under such circumstances, to explain the reason of the wife's living apart from the husband at the time when she wrote such letters (*s*). But it does not appear to be essential to give such explanatory evidence where there is no ground to suspect collusion (*t*) (1). Evidence in aggravation.

The wife's letters to a third person, written before suspicion of the criminal intercourse, are also admissible, although they contain facts which are not in themselves admissible evidence (*u*).

The opinion which a witness has formed of the wife's affection for her husband, from the anxiety which she has expressed for him, and her mode of speaking of him during his absence, is also evidence to the same end (*v*).

Proof of a settlement, and provision for the children, is also evidence in aggravation (*x*).

*The representation made by the wife to her husband on the eve of her elopement is admissible, as part of the *res gestæ*, in order to remove all suspicion of connivance on the part of the husband (*y*). *355

The plaintiff cannot go into general evidence of the wife's good conduct until an attempt has been made to impeach it (*z*).

The defendant, under the general issue, will be entitled to enter into any evidence to disprove the marriage, or the fact of adultery, or to show that the plaintiff has sustained no injury in law or fact. It has, in one instance, been held that the defendant might prove the plaintiff's connection with other women after his marriage, in bar of the action (*a*); but in a subse- Evidence for defendant in bar.

(*p*) Ld. Ellenborough, in *Trelawney* v. *Coleman*, 1 B. & A. 90, is reported to have said, "What the husband and wife say to each other is evidence to show their demeanour and conduct." But *qu.* whether the evidence in such case ought not to be general.

(*q*) *Trelawney* v. *Coleman*,[1] 2 Starkie's C. 191; 1 B. & A. 90. *Edwards* v. *Crock*, 4 Esp. C. 39. *Willis* v. *Bernard*,[2] 8 Bing. 376.

(*r*) *Ibid.* *Edwards* v. *Crock*, 4 Esp. C. 39.

(*s*) *Trelawney* v. *Coleman*,[1] 2 Starkie's C. 191.

(*t*) *Ibid.*

(*u*) *Willis* v. *Bernard*,[2] 8 Bing. 376.

(*v*) *Ibid.*

(*x*) B. N. P. 27. Evidence of the amount of the *defendant's* property is not admissible with a view to damages; per Alderson, B. *James* v. *Beddington*,[3] 6 C. & P. 589. Contra, 1 Selw. N. P. 25. See tit. MARRIAGE.

(*y*) *Hoare* v. *Allen*, 3 Esp. C. 276.

(*z*) See tit. CHARACTER.

(*a*) By Ld. Kenyon, in *Wyndham* v. *Ld. Wycomb*, 4 Esp. C. 16. *Sturt* v. *Marquis of Blandford*, there cited.

(1) {In Pennsylvania, the husband cannot support this action, after an agreement of separation made with his wife—if such agreement be voluntary on his part, and not constrained. *Fay* v. *Derstler*, 2 Yeates, 278.}

[1]Eng. Com. Law Reps. iii. 308. [2]*Id.* xxi. 325. [3]*Id.* xxv. 553.

quent case (*b*), it was decided that the fact went in mitigation of damages only.

The defendant may show in mitigation the misconduct of the plaintiff, in respect of illicit connection with other women (*c*), or ill treatment of the wife; that he turned her out of doors, and refused to maintain her (*d*).

It was laid down by Lord Mansfield as clear law, that if a woman be suffered to live as a prostitute with the privity of her husband, and a man be thereby drawn into criminal conversation, no action will lie: it is a damage without an injury. But if it be not with the husband's privity, it will only go to the damages, let her be ever so profligate. And Pratt, C. J., declared himself to be of the same opinion, in a similar case, about the same time (*e*).

So if the criminal connection can be shown to have taken place with the husband's privity and *consent*, the action will not be maintainable (*f*); for a plaintiff cannot be allowed to recover damages in a court of justice grounded on his own turpitude; and besides, the maxim applies *volenti non fit injuria*.

In one case it was held (*g*), that proof that the husband and his wife
*356 were *parted upon articles of separation, was a bar to the action; but in a latter case, the propriety of that decision has been doubted. And at all events, where the husband does not, by the articles of separation, renounce all future intercourse and society with his wife, and all assistance to be derived from her in respect of the education of his children, the separation will not be a bar to the action (*h*).

(*b*) *Bromley* v. *Wallace*, 4 Esp. C. 237. (*c*) *Bromley* v. *Wallace*, 4 Esp. C. 237.

(*d*) B. N. P. 27. A witness called to prove the previous harmony of the husband and wife, may be cross-examined as to declarations made by her previous to the adultery, of ill usage by him. *Winter* v. *Wroot*, 1 Mo. & R. 404.

(*e*) *Smith* v. *Allison*, Sittings at West. *cor.* Ld. Mansfield, after Trin. 5 Geo. 3, B. N P. 27. But in a previous case of *Cibber* v. *Sloper*, (per Lee, C. J., cited B. N. P. 27,) it was holden that the action lay, although the privity and consent of the husband to the defendant's connection with the wife were fully proved.

(*f*) B. N. P. 27. *Hodges* v. *Windham*, Peake's C. 39. *Duberley* v. *Gunning*, 4 T. R. 655. The plaintiff is entitled to recover, unless he is shown to have been in some degree a party to his own dishonour, by giving a general license to the wife to conduct herself generally as she pleased towards men, or to have assented to the particular instance, or to have renounced totally and permanently all advantage from her society; all which, as well as the amount of damages for the loss of the society of such a person, are questions for the jury. *Winter* v. *Henn*,[1] 4 C. & P. 494. And even where the husband had never published his marriage, and only occasionally visited her, whilst living with her mother as an unmarried daughter, and permitted her to receive the visits of other men, and to follow a profession particularly exposed to danger; held, that such circumstances were only in mitigation of damages, and not in bar of the action. *Calcraft* v. *Lord Harborough*,[2] 4 C. & P. 499. In *Trevanion* v. *Daubuz*, Bodmin Sum. Assizes, 1834. Roscoe on Evidence, 482. Patteson, J. told the jury that the neglect or misconduct of the husband was only matter of mitigation, but that if his conduct was occasioned by a desire to get rid of his wife, if he had thereby encouraged the advances of the defendant, and testified a desire to throw her away, they would properly find for the defendant; and see *Winter* v. *Henn*,[1] 4 C. & P. 498. *Howard* v. *Burtonwood*, 1 Sel. N. P. 10. *Hoare* v. *Allen*, Sel. N. P. 11. 3 Esp. C. 276.

(*g*) *Weedon* v. *Timbrel*, 5 T. R. 357. *Bartelot* v. *Hawke*, Peake's C. 7. In the latter case the husband and wife had been separated by articles, and Lord Kenyon said, that if the parties were separated by mutual consent at the time, he was of opinion that the husband could not maintain the action, for it was impossible to receive any injury by losing the society of a wife whom he had already abandoned; but proof being given of adultery previous to the separation, the plaintiff had a verdict. In *Hodges* v. *Windham*, Peake's C. 39, the parties living apart under articles of separation at the time of the adultery, Lord Kenyon himself said, that he doubted on the question, but allowed the case to proceed, taking a note of the objection. Lord Ellenborough, in *Chambers* v. *Caulfield*, 6 East, 248, *infra*, note (*h*), said, that he did not consider the question as concluded by the case of *Weedon* v. *Timbrel*; and Abbott, C. J., in *Graham* v. *Wigley*, 2 Roper's Husband and Wife, 323, 2d ed., held that a voluntary separation without deed, so that a suit was still maintainable for restitution of conjugal rights, was no bar.

(*h*) *Chambers* v. *Caulfield*, 6 East, 244.

[1] Eng. Com. Law Reps. xix. 491. [2] *Id.* xix. 494.

Mere separation for the sake of convenience, as where the parties are servants in different families (*i*), is no bar; neither is any voluntary separation without deed (*k*).

The defendant may show, in mitigation of damages, that the wife had before eloped, or had been connected with others; that she had borne a bastard before marriage (*l*); that she had been a prostitute previous to her connection with the defendant (*m*); that she was a woman of loose conduct, and notoriously bad character; that she made the first overtures and advances to the defendant (*n*) (A); that his means and expectations are inconsiderable. Evidence for defendant in mitigation.

Where, on cross-examination of the plaintiff's witnesses, it was insinuated that the plaintiff had left his wife abroad against her will; a letter written by her on that occasion, and before the criminal acquaintance with the defendant commenced, was held to be admissible evidence (*o*).

Evidence aimed against the previous character and conduct of the wife is obviously of a dangerous nature, and not to be resorted to, unless it be of a strong and decisive cast; a failure in the attempt to affect the character of the wife at a time previous to the criminal intercourse, would probably increase the amount of the damages very considerably.

A declaration made by the wife at the time of eloping from the husband, that she fled through fear of personal violence, is evidence in an action against the adulterer (*p*).

The letters of the wife to the defendant are not in general evidence for *the latter (*q*). Where, however, they were written previously to any illicit intercourse, they may be admissible for the purpose of showing solicitation by the wife (*r*). *357

The recovery against another defendant, in respect of a similar cause of action, which accrued during the same period, is no bar to the action (*s*).

CRUELTY TO ANIMALS, 5 & 6 Will. 4, c. 59.

CUSTOM (*t*).

Customs, with a view to the present object, may be classed, 1. As the *general* and ancient customs of the realm; 2. Particular *local* customs; 3. Different kinds of.

(*i*) *Edwards* v. *Crock*, 4 Esp. C. 39.

(*k*) Per Abbott, C. J., in *Graham* v. *Wigley*, 2 Roper's Husb. and Wife, 323, 2d ed. *supra*, note (*f*).

(*l*) *Roberts* v. *Malston*, per Willes, C. J., Hereford, 1745; B. N. P. 296.

(*m*) B. N. P. 27. But it is there also laid down, that the defendant cannot give evidence of the general reputation of her being or having been a prostitute, for that may have been occasioned by her familiarity with the defendant; though, perhaps, having laid a foundation, by proving her being acquainted with other men, such general evidence may be admitted. But acts of misconduct by the wife with others after the adultery are not admissible. Per Ld. Kenyon, *Elsam* v. *Fawcett*, 2 Esp. C. 562.

(*n*) *Elsam* v. *Fawcett*, 2 Esp. C. 562; 1 Sel. N. P. 25. *Gardiner* v. *Jadis*, 1 Sel. N. P. 25. [See *Torre* v. *Summers*, 2 Nott & M'Cord, 267.]

(*o*) *Willis* v. *Bernard*,[1] 8 Bing. 376.

(*p*) Per Ld. Ellenborough, 6 East, 188. Here the evidence is admissible, because it explains the nature of the act; the general rule is, that her unconnected declarations are not evidence on either side. *Winsmore* v. *Greenbank*, Willes, 577.

(*q*) *Baker* v. *Morley*, B. N. P. 28.

(*r*) *Elsam* v. *Fawcett*, 2 Esp. C. 562.

(*s*) *Gregson* v. *M'Tuggart*, 1 Camp. 415.

(*t*) Prescription is always personal, and made in the name of a certain person and his ancestors, and those whose estate he hath; custom is local, and alleged in no person, but that within a manor, &c. is such a custom, and that serves for those who cannot prescribe in their own name, because not in the name of any person certain as inhabitant of a town, &c. *Foiston* v. *Crachroode*, 4 Co. 31.

(A) (*Norton* v. *Warner*, 9 Day, 172. The rank and condition of the plaintiff in life, cannot be given in evidence in an action for criminal conversation, to increase or diminish the damages, but evidence of unkind treatment by him of his wife, produced by drunkenness or otherwise, is admissible. *Ibid.*)

[1] Eng. Com. Law Reps. xxi. 325.

Mercantile customs, which are not part of the ancient law, but have been ingrafted into it; 4. Customs, or rather *usages*, which are so common and prevalent as to afford a presumption of their adoption as matter of contract in particular instances.

General customs. It would be foreign to the present purpose to observe upon the first of these classes. Such customs constitute a large portion of the *lex non scripta*, or common law of the land. These are not matter of evidence; where a doubt arises concerning them, it is to be resolved by the Judges in the several courts of justice. They are, to use the language of Sir W. Blackstone, the depositaries of the laws, the living oracles who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land (*u*).

Local customs. 2dly. Particular customs which affect the inhabitants of particular districts.

The customs of *Gavelkind* and *Borough English* are noticed by the law without proof (*v*), but other private customs must be pleaded and proved. The customs of London differ from others in point of trial. If the existence of the custom be brought in question, it is not tried by a jury, but by certificate from the lord mayor and aldermen by means of the recorder (*x*), unless the corporation be interested in the custom, as where they claim a right of taking toll, and then they are not allowed to certify in their own behalf (*y*).

In order to establish a particular local custom before a jury, it must be shown that it has existed so long that the memory of man runneth not to the contrary; for if it appear to have originated within time of legal memory, that is, since the beginning of the reign of Richard I., it is not a good custom (*z*).

Next it must appear, that the usage has been *continued;* for if there be any chasm or interruption of the right within the time of legal memory, there must have been a revival or beginning within the time of legal memory, which will avoid the custom. But an interruption in the possession or enjoyment only, though for 10 or 20 years, will not destroy the custom; as, if
*358 *the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, although they do not use it for 10 years, it only becomes more difficult to be proved; but if the *right* be discontinued, though but for a day, the custom is at an end (*a*). It must also have been peaceable, and acquiesced in, and not subject to contention and dispute; for since customs originate in common consent, their being immemorially disputed at law, or otherwise, is a proof that such consent was wanting.

Customs must also be reasonable, or rather, taken negatively, must not be unreasonable (1), which, according to Sir Edward Coke (*b*), is not to be always understood of every unlearned man's reason, but of artificial or legal reason, warranted by authority of law; upon which account a custom may be good, though the particular reason of it cannot be assigned, for it sufficeth, if no good legal reason can be assigned against it (*c*) (A).

(*u*) 1 Comm. 69. A custom which runs through the whole land is the common law. Per Littleton, J.; Y. B. 8 Ed. 4, 18, 19.
(*v*) Co. Litt. 175.
(*x*) Cro. Car. 516.
(*y*) Hob. 85.
(*z*) 1 Bl. Comm. Introd. s. 3; 2 Roll. 269, l. 10, 45. See tit. PRESCRIPTION.
(*a*) 1 Com. Int. s. 3.
(*b*) 1 Inst. 62.
(*c*) 1 Com. Int. s. 3; 1 Inst. 62. A custom that none but a freeman, or the widow or partner of a free-

(1) [See *Freary & al.* v. *Cook*, 14 Mass. Rep. 488. *Gallatin* v. *Bradford*, 1 Bibb, 209.
(A) (A usage of plaisterers to charge one-half part of the size of the windows, where the price agreed

To constitute a legal custom, it is not only necessary that its existence should be established by evidence, and also that it should be reasonable, but that it should be certain, compulsory, and consistent (*d*). Requisites of.

The usual evidence of custom consists in acts of usage within the knowledge and experience of living witnesses; upon which alone, and without the aid of more remote evidence of a documentary or traditionary nature, the presumption of a custom may be built (*e*).

It consists also in the proof of court-rolls, customaries, and other ancient writings, the nature and force of which, in the proof of customary descents and tenures, have already been considered (*f*); and also in reputation and traditionary declarations, and in such decrees, judgments, and other documents *as fall within the general principle on which reputation is admissible (*g*). *359

With respect to reputation and traditionary declarations, as applied to the proof customs, some rules are to be observed which have already been noticed. Proof by reputation.

1st. They must be supported by evidence of the exercise of such right or custom (*h*); 2dly, must be of a public nature (*i*); 3dly, derived from

man, shall sell by retail in a city or the suburbs, is valid. *Mayor of York* v. *Welbank*,[1] 4 B. & A. 438. Where there is a custom to exclude foreigners from exercising a trade within a corporation, a bye-law to support the custom, which gives a penalty to any but the corporation, is bad. *Totterdell* v. *Glazby*, 2 Wils. 266. A custom is good for a tenant to have a way-going crop. *Wigglesworth* v. *Dallison*, 1 Doug. 201; that he may leave the way-going crop in the barn, *Beavan* v. *Delahay*, 1 H. B. 5; that beech shall be deemed to be timber, *Aubrey* v. *Fisher*, 10 East, 446. A custom for the churchwardens to set up monuments in a church without the consent of the rector or ordinary is illegal. *Beckwith* v. *Harding*, 1 B. & A. 508. See also *Fryer* v. *Johnson*, 2 Wils. 28. So is a custom to appoint separate churchwardens and overseers, and make separate rates for a borough within a parish, and the rest of the parish. *R.* v. *Gordon*, 1 B. & A. 524. So, though a custom for all the *inhabitants of a parish* to play at all kinds of lawful games, at all seasonable times, within a particular close, is good, such a custom for *all persons* for the time being, being in the same parish, is bad. *Fitch* v. *Rawling*, 2 H. B. 393. So a custom for poor and indigent householders, living within a particular district, to cut and carry away rotten boughs and branches, cannot be supported, the description of persons being too vague. *Selby* v. *Robinson*, 2 T. R. 758; and see *Steel* v. *Houghton*, 1 H. B. 51. *Worlledge* v. *Maning*, 1 H. B 53, n.; *R.* v. *Price*, 4 Burr. 1925. See tit. Manor. A custom contrary to the principles of resulting trust is bad. *Lewis* v. *Lewis*, 2 M. & R. 449. To seize and burn unwholesome meat is good. *Vaughan* v. *Howard*, 1 Mod. 202; 2 Mod. 56. So for a leet jury to destroy measures found by them to be false, is lawful. *Wilcock* v. *Windsor*,[2] 3 B. & Ad. 43. A custom for the lord of a manor to inclose without limit, is bad. *Arlett* v. *Ellis*,[3] 7 B. & C. 346. And a custom depriving the rector of his common-law right when not immemorial, cannot be established by mere long usage; nor will an allegation of a custom "in parishioners" to elect be supported by evidence of the exercise by "parishioners paying church rates." *Arnold* v. *Bishop of Bath and Wells*,[4] 5 Bing. 316; 1 B. & Ad. 605.

(*d*) See 1 Bl. Comm. 78, 9.

(*e*) Usage, though it be not ancient, which is admissible and unopposed by opposite evidence, is usually conclusive. *R.* v. *Hoyte*, 6 T. R. 430.

(*f*) See Copyhold; and Vol. I. Ind. tit. Custom.

(*g*) B. N. P. 295. *R.* v. *Eriswell*, 3 T. R. 709. *Morewood* v. *Wood*, 14 East, 327, n.

(*h*) Vol. I. Ind. tit. Custom.

(*i*) Ibid.; and *Weeks* v. *Sparke*, there cited, 1 M. & S. 679; B. N. P. 295. Because, according to Lord Kenyon, all mankind being interested in the subject, it is to be presumed that they will be conversant with and discourse together about it, which cannot apply to private prescription. 14 East, 327, n.

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on includes the cost of materials, is unreasonable and bad. *Jordan et al.* v. *Meredith*, 3 Yeates, 318. A usage in a particular place, for masters of vessels stranded there, to sell the cargo when there is no necessity for the sale, can have no validity. *Bryant* v. *Commonwealth Ins. Co.*, 6 Pick. 131. So also a custom to take anything from another's land, is not a lawful custom. *Waters* v. *Lilly*, 4 Pick. 145. But a custom of masters of ships engaged in the whaling business, to enter into a species of partnership which is termed mateship, is a reasonable custom, and a contract made conformably to it is binding upon the owners, unless prohibited by them. *Baxter* v. *Rodman*, 3 Pick. 435. So also that freight money in a particular voyage, is the perquisite of the master. *Halsey* v. *Brown*, 3 Day, 346; or that gin may be stowed on deck at the shipper's risk. *Barber* v. *Brace*, 3 Conn. Rep. 9. But evidence of a custom of persons travelling in the same direction, for the leading carriage to incline to the right, the other making the transit at the same time to the left, cannot control the general law that a traveller may use the middle, or either side of a public road at his pleasure, and is not bound to turn aside for another travelling in the same direction, provided there be convenient room to pass on the one hand or the other, although it is the duty of the leading traveller to yield reasonable accommodation. *Bolton* v. *Colder*, 1 Watts, 360.)

[1]Eng. Com. Law Reps. vi. 479. [2]*Id.* xxiii. 29. [3]*Id.* xiv. 53. [4]*Id.* xv. 459.

persons likely to know the facts (*k*); 4thly, must be general (*l*); 5thly, must be free from suspicion (*m*).

By court-rolls. The entry by homage on the court-roll is evidence to prove a custom within the manor, although there be no evidence of the exercise of that custom in any particular instance; for it is the solemn opinion of the homage, delivered upon oath upon being convened to inquire into the point, and founded on all the information which tradition and personal observation can give them (*n*). So an ancient writing found amongst the court-rolls of a manor, and delivered down from steward to steward, and purporting to be *ex essensu omnium tenentium*, is evidence to prove a customary mode of descent, as that the lands shall descend to the eldest sister where there is no son or daughter (*o*).

It has been held that a single instance of a surrender in fee by a tenant in special tail of a copyhold estate, was (being unresisted by other evidence) evidence to prove a custom within the manor to bar entails by surrender, although the surrenderor had not been dead twenty years (*p*).

Custom of different districts. In general, the custom of one manor or other district (*q*) is not admissible to prove the existence of the same custom in another manor, for without some general connecting link the existence of the custom in one place affords no presumption of the existence of a similar custom in another. But if the custom in question be a particular incident to some general tenure which is common to two manors or districts, then the existence of the incident custom in one is evidence of its existence in the other also (*r*); otherwise a custom in one parish is no evidence of the existence of the same custom in an adjoining parish (*s*); and the custom in one archdeaconry is not admissible to show that the same usage prevails in another archdeaconry (*t*). Where the issue was upon a custom in the borough of Hastings, which was stated to be one of the Cinque-ports, it was held that a customal was evidence which represented the custom to exist in each of the Cinque-ports, *360 although it was *urged that it was not admissible to prove a custom alleged to be the custom of Hastings and not co-extensive with the Cinque-ports (*u*).

So, in some instances, where an analogy arises from the nature of the subject-matter, one custom may be evidence to prove another; as with respect to the right of soil in fen lands, or the profits of mines (*x*). Where the question was as to the right of a copyholder in fenny and marshy lands to dig up the lord's soil for turf, evidence was admitted of the custom in an adjacent manor.

Mercantile customs. 3dly, The Customs of Merchants, or *Lex Mercatoria.*—These are, in strictness, a branch of the general law of England. For although the learned writer of the Commentaries has classed the Customs of Merchants under the same head with Local Customs (*y*), they are very different in many essential respects, particularly in the following: they are general and binding on all without proof, and it is not necessary that they should have prevailed for time beyond legal memory, and they may be valid, although inconsistent

(*k*) Vol. I. Ind. tit. Custom.
(*l*) Ibid. B. N. P. 295.
(*m*) Ibid.
(*n*) 5 T. R. 26.
(*o*) *Denn* v. *Spray*, 1 T. R. 466.
(*p*) *Roe* v. *Jeffrey*, 2 M. & S. 92, *supra*.
(*q*) Where there was no evidence of the existence by custom, for the Crown to have the feudal right of primer seisin, or *l'année de succession*, upon a fief, being one of the five great fiefs in Jersey; held, that it could not be supported, the existence of such a right in one country affording no inference in favour of it in another; and parties claiming such a feudal burden are bound to establish by custom in the country where it is sought to be established. *Attorney-General* v. *Symonds*, 1 Knapp, 390.
(*r*) *Duke of Somerset* v. *France*, Str. 652; 3 Keb. 90; Fost. 41, 44; Doug. 495; Cowp. 808.
(*s*) *Furneaux* v. *Hutchins*, Cowp. 808.
(*t*) *Ruding* v. *Newell*, Str. 933; Fost. 41; Doug. 495.
(*u*) *Moore* v. *The Mayor, &c. of Hastings*, 10 St. Tr. Append. 137.
(*x*) Per Lord Hardwicke, 2 Atk. 189.
(*y*) 1 Comm. 75; Winch. 24.

with the old common law. This system of customs is of mercantile invention and practice, and has been ingrafted into the common law for the benefit of trade and commerce. It is curious to observe the process by which those rules, which were in the first instance adopted by merchants for their own convenience, have become embodied with the common law; and it is useful to do so in order to distinguish between those mercantile customs which have been thus introduced, and others which are not already recognized by the law, but which may nevertheless be established by proof, and others again which may be used in evidence for the sake of the presumptions which they afford as to the intention of the parties in particular instances.

General mercantile customs, which have frequently become the subject of legal investigation in the course of evidence, when ascertained by long experience to be of public use and utility, are at last recognized and adopted by the law without further proof. It would be evidently fruitless and nugatory to go on requiring the same proof of usage in every particular instance (1). Hence that custom or usage which was at first but *evidence* of the intention of the parties becomes at last a general rule of law; and this has happened in some instances even where the mercantile custom has been inconsistent with the rules of common law, as in the instance of bills of exchange (*z*) (2).

When such general customs have been adopted and recognized by the law, they are no longer subject to variation according to new practices and devices introduced by merchants (A).

Not subject to variation.

It is a mistake to suppose that the law, in recognizing the *lex mercatoria*, adopts it subject to all the new fashions of merchants, or liable to be explained *toties quoties* by their practice and understanding on the subject. Such evidence may indeed be applicable where no general rule has been established, and is frequently received for such purposes; but it may be laid down as a general position, that where a mercantile rule has become part of *the general law, no evidence of usage can be received to contradict or alter it, any more than such evidence would be admissible to impugn any other rule of common law. *361

Thus in the case of *Edie* v. *East India Company* (*a*), where the question was whether a bill of exchange indorsed to *C.* without the addition of the words "*or order*," was negotiable, it was held that evidence was inadmissible to show that by the custom of merchants such an instrument was not negotiable, the Courts having already decided in two instances in the affirmative (*b*). In that case Mr. J. Foster said, "Much has been said about the custom of merchants, but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts; the true distinction is between general customs (which are part of the common

(*z*) The history of these instruments affords a singular instance of the tendency of such customs to ingraft themselves into the common law. Formerly the Courts would not recognize the custom of merchants with respect to any but foreign bills of exchange; they then relaxed in favour of inland bills drawn by *merchants;* and finally held that the custom was binding upon all. It is usual even at this day to describe a bill of exchange to have been drawn according to the custom of merchants, although the necessity of proof, or even of the allegation, has long been exploded.

(*a*) Burr. 1216.

(*b*) *Moore* v. *Manning*, Comyns, 311. *Acheson* v. *Fountain*, 1 Str. 557. [*Homer* v. *Dorr*, 10 Mass. Rep. 26. *Henry* v. *Risk & al.* 1 Dallas, 265. *Stoever* v. *Whitman*, 6 Binney, 417. *Bowen* v. *Jackson*, Circuit Court, April, 1807. Wharton's Digest, 262.]

(1) [*Consequa* v. *Willing & al.* 1 Peters' Rep. 230.]
(2) [*Barber* v. *Brace*, 3 Conn. Rep. 9.]
(A) (*Branch* v. *Brumley*, 1 Call. 127.)

law), and local customs, which are not so. This custom of merchants is the general law of the kingdom; part of the common law; and therefore ought not to have been left to the jury after it had been settled by judicial determinations." And in the case of *Pillans* v. *Van Mierop* (*c*), *Lord Mansfield* said a witness cannot be admitted to prove the law of merchants.

A custom, however prevalent it may be amongst merchants, must be sanctioned by the Courts as reasonable, before it can be considered as a general and legal custom (*d*) (A). In the case of *Hawkins* v. *Cardy* (*e*), the plaintiff alleged a special custom amongst merchants in the declaration, to which the defendant demurred, and thereby admitted the existence of the custom, when the Court held that the custom was void, and gave judgment for the defendant.

If a mercantile custom be insisted upon which the law has not recognized, or if there be a doubt as to the existence of the custom, it is proper to prove it as a fact by evidence (*f*) (B). Such a custom must be proved by evidence of facts, and not by mere speculative opinions (*g*) (C); by means of witnesses who have had frequent and actual experience of the custom (*h*). The testimony of those who speak from report only and not from particular instances within their own knowledge, if receivable at all, is of no weight (*i*).

Common usage; 4thly, Customs or usages which are not recognized by the law of the land, but which may be used as presumptive evidence (*k*) (1) as to the intention of the parties in particular instances.

Presumptions from. Where parties have not entered into any express and specific contract, a *362 *presumption nevertheless arises that they meant to contract and to deal

(*c*) Burr. 1669. [*Thomas* v. *O'Hara*, 1 Rep. Conn. Ct. 306.]

(*d*) *Todd.* v. *Reid*,[1] 4 B. & A. 210. (*e*) Carth. 466; 1 Ld. Raym. 130.

(*f*) By Wilmot, J., 2 Burr. 1228. Where a plaintiff, a ship-broker, claimed half commission as reasonable compensation for having done all in his power to procure the hire of the ship, a memorandum for the charter-party having been signed, but the contract went off, and the ship got employed; held, that the alleged custom not being proved, he could not maintain the action. *Read* v. *Rann*,[2] 10 B. & C. 438.

By the custom of London, a ship-broker is not entitled to charge for trouble in procuring a charter for a ship, where the treaty goes off and the contract is incomplete, although it goes off through the act of the owner. *Broad* v. *Thomas*,[3] 7 Bing. 99; and 4 C. & P. 338.

(*g*) Per Foster, J., *Edie* v. *The East India Company*, Doug. 519.

(*h*) Skinn. 54, pl. 7; Burr. 1228; Doug. 519.

(*i*) Per Lord Kenyon, C. J., *Savill* v. *Barchard*, 4 Esp. C. 53. [*Thomas* v. *O'Hara*, 1 Rep. Conn. Ct. 306.]

(*k*) If there be a general usage to deal with common carriers in their way (*i. e.* for a general lien), all persons dealing in the trade are supposed to contract with them on the footing of the general practice, adopting the general lien into their particular contract. Per Lord Ellenborough, C. J. in *Rushforth* v. *Hadfield*, 6 East, 519. A custom which runs through the whole land is the common law. Per Littleton, J., Y. B. 8 Ed. 4, 18.

(A) (To make a custom or usage of trade obligatory as a law of that trade, it must be certain, uniform, reasonable, and sufficiently ancient to be generally known. *United States* v. *Duval*, 1 Gilpin, 356. *Harris* v. *Carson*, 7 Leigh, 632. *Buck* v. *Grimshaw*, 1 Edw. 140. But usages among merchants should be sparingly adopted as rules of law by courts of justice, as they are often founded upon mere mistake, and in want of comprehensive views of the full bearing of principles. *Donnell et al.* v. *Columbian Insurance Co.*, 2 Sumner's C. C. R. 366.)

(B) (Usage is generally admissible to show that a transaction was not usurious. *Dunham* v. *Day*, 13 Johns. R. 40. *Crump* v. *Trytitle*, 5 Leigh, 251. So also to prove that by the custom of trade in *Philadelphia*, on the purchase and sale of cotton, the vendor must answer the vendee for any latent defect, though there be neither warranty nor fraud on the part of the vendor. *Snowden* v. *Warder*, 3 Rawle, 101, Gibson, C. J. dissenting. See also *Sewell* v. *Gibbs*, 1 Hall, 602. So also to prove a usage of commission merchants, in the city of New York, to effect insurance on goods consigned to them for sale on commission, without express orders from their consignors. *De Forest* v. *Fulton Ins. Co.*, 1 Hall, 84.)

(C) (*Austin* v. *Williams*, 2 Ohio Rep. 64.)

(1) [Evidence of the usage of sportsmen is admissible. *Morgan* v. *Richards*, 1 Brown's Rep. 171. *Loring* v. *Gurney*, 5 Pick. Rep. 15.]

[1] Eng. Com. Law Reps. vi. 404. [2] *Id.* xxi. 106. [3] *Id.* xx. 62.

according to the general usage, practice and understanding, if any such exist, in relation to the subject matter (*l*) (A). Thus in an action on a policy of insurance, evidence is admissible to show the custom of a particular branch of trade, for every insurer is presumed to be acquainted with the practice of the trade in which he insures, although it has been but recently established (*m*), and the usage has existed but for a year.

Although the custom of one manor be not evidence to prove the existence of a similar custom in a different one, yet the case is different where the question concerns a particular branch of trade (*n*), for then it seems that the manner of carrying on trade at one place may be evidence of the mode of carrying it on at another. Thus in an action on a policy on a ship on a fishing voyage to Labrador, evidence of the custom in the Newfoundland trade was admitted to prove that there had been no unnecessary delay in unloading the cargo (*o*).

Where an agreement between parties is general or doubtful, the custom and usage of the country in which it was made are frequently evidence of the terms upon which the parties meant to contract; for in the one case, their silence raises a presumption that they intended to be governed by the usual course of dealing, in such cases, prevalent in the neighbourhood; and in the latter, it is reasonable to suppose that they intended to use the dubious term in that sense in which it was generally understood, either in the neighbourhood, or in the particular course and habit of dealing to which the agreement relates. Thus a tenant from year to year generally is bound to manage the land in a husbandlike manner, according to the custom of the country (*p*). So, although in general six months notice is necessary to determine a tenancy from year to year of lands, a longer may be necessary, or a shorter sufficient, according to the custom of the country, without any express contract to that effect (*q*). So where the terms of the hiring of a servant are doubtful, they may, it seems, be explained by the custom as to hiring servants in that country (*r*).

So, where the tenant's time of entry is doubtful, the usage and custom of the country as to the time of entry is evidence (*s*). And even where the contract is special, and by deed, evidence of custom is admissible to establish rights consistent with and consequent upon the stipulations in the contract: as to show that a tenant under a lease is entitled to an away-going crop, according to the custom of the country (*t*) (B); or that a heriot is due by custom on the death of a tenant for life, although not mentioned in the

(*l*) Doug. 519. *Savill* v. *Barchard*, 4 Esp. C. 53.
(*m*) Per Ld. Mansfield, Doug. 495.
(*n*) Per Buller, J. *Noble* v. *Kennoway*, Doug. 495.
(*o*) *Noble* v. *Kennoway*, Doug. 493.
(*p*) *Powley* v. *Walker*, 5 T. R. 373; *sup.* 58.
(*q*) *Roe* v. *Wilkinson*, Butler's Co. Litt.; and *Roe* v. *Charnock*, Peake's C. 5; *infra*, tit. EJECTMENT.
(*r*) *Navestock* v. *Standon Massey*, B. S. C. 719; Bott, 238. But in that case it seems to have been unnecessary to resort to such evidence in order to establish the settlement; and Ashton, J., did not put the case on that footing. And see *R.* v. *Skiplam*, 1 T. R. 490.
(*s*) Evans's Pothier, vol. ii. p. 335; and see tit. PRESUMPTION.
(*t*) *Wigglesworth* v. *Dallison*, 1 Doug. 101, affirmed in the Exchequer Chamber.

(A) (Usage of trade cannot be set up, either to contravene an established rule of law, or to vary the terms of an express contract. But all contracts made in the ordinary course of business, without particular stipulation expressed or implied, are presumed to be made in reference to any existing usage or custom relating to such trade; and it is always competent for a party to resort to such usage to ascertain and fix the terms of the contract. *Sewell* v. *Gibbs and Jenny*, 1 Hall, 602. *Lawrence* v. *The Stonington Bank*, 6 Conn. Rep. 521. See also *Dunham* v. *Dey*, 16 Johns. Rep. 367. *Rankin* v. *The American Ins. Co.* 1 Hall, 619. *Homer* v. *Don*, 10 Mass. Rep. 26. *Murray* v. *Hatch*, 6 Mass. Rep. 477. *Lewis* v. *Thatcher*, 15 Mass. Rep. 431. *Harris* v. *Carson*, 7 Leigh, 632. *Watkins* v. *Crouch*, 5 Leigh, 522.)

(B) (Where a right of way is granted without any designation of the place in the deed, it becomes located by usage for a length of time. *Winthrop* v. *Berger*, 12 Johns. R. 222. And when the custom of a country or a particular place is established, it may enter into the body of a contract without being inserted. *Stulz* v. *Dickey*, 5 Binn. 285; *Van Ness* v. *Pacard*, 2 Pet. 148.)

lease (*u*); for such customs are not repugnant to the contracts, but consistent with them, and the rights are consequent upon the taking of the land. But no customary right can be established which is *inconsistent* with the terms of a contract.

*363 *A custom for a lord of a manor to have common of pasture in all the lands of his tenants for life or years, is void, because the custom is contrary to the lease (*x*); nor would the custom of the country be evidence to show a different time of quitting from that expressed in the lease (*y*).

Where, indeed, the terms used in a contract are of dubious meaning, the custom and usage of the country, or of any particular class of persons, as merchants conversant with the term, to use it in a particular sense, is evidence that the parties themselves so intended to use it. But where the meaning of the terms is plain and unequivocal, and *à fortiori*, where the law has annexed a particular meaning to the use of the term, it seems to be an universal rule that no evidence can be admitted of a custom or usage to receive such terms in a different sense (*z*) (A).

Where a lease was from Michaelmas generally, it was held that it must be taken *primâ facie* to import new Michaelmas, and that evidence could not be admitted to show the understanding of the parties that the holding was to be from old Michaelmas (*a*); and the same rule seems equally to exclude the evidence of custom and usage for the purpose of showing that old Michaelmas was meant, since such evidence is merely the means of showing in what sense the contracting parties meant to use the particular term in question (*b*).

So a *reddendum*, in an old renewed lease, of so many quarters of corn, means the Winchester, and not the customary bushel (*c*).

An agreement to sell a number of acres of land generally, must be understood of statute, and not of customary, acres (*d*).

(*u*) P. C. *White* v. *Sayer*, Palm. 211.
(*x*) P. C. *White* v. *Sayer*, Palm. 211.
(*y*) Per Le Blanc, J., 6 East, 122.
(*z*) See PAROL EVIDENCE.

(*a*) *Doe* d. *Spicer* v. *Lea*, 11 East, 312. This case seems to overrule that of *Forley* v. *Wood*, there cited; in which Lord Kenyon held at *Nisi Prius*, that evidence was admissible, that, by the custom of the county of Kent, all demises to hold from Michaelmas commenced at old Michaelmas. *Qu.* however, whether, when the lease mentions a particular time for the commencement of the tenancy (as, Lady-day), and by the custom of the country it is usual to enter on the tillage lands at Candlemas, and the rest of the premises at Lady-day, the lease may not be considered as specifying the substantial time of holding, and as silent with respect to the subordinate terms of entry, so as to admit evidence of the custom. See the *dictum* of the Court in *Doe* v. *Snowden*, 2 Bl. R. 1225. *Doe* v. *Watkins*, 7 East, 551. *Doe* v. *Spence*, 6 East, 120. *Doe* v. *Howard*, 11 East, 498.

(*b*) In *Doe* v. *Benson*,[1] 4 B. & A. 588, the distinction was taken between a letting by parol, in which case such evidence is admissible, and a letting by deed or other writing; but it seems that in the case of *Forley* v. *Wood*, there was a written lease. See Runnington's Eject. 112.

(*c*) *Muster*, *&c. of St. Cross* v. *Lord Howard de Walden*, 6 T. R. 338. *R.* v. *Major*, 4 T. R. 750. By the stat. 22 & 23 Car. 2, c. 12, the buyer of corn by any other than the Winchester measure, forfeits 40*s.* besides the value of the corn. See *R.* v. *Arnold*, 5 T. R. 353; and see *Hockin* v. *Cooke*, 4 T. R. 314; 1 Roll. R. 420.

(*d*) *Morgan* v. *Tedcastle*, Poph. 55. *Wing* v. *Earle*, Cro. Eliz. 267. *Waddy* v. *Newton*, 8 Mod. 276. But see 2 Roll. R. 67; Cro. Eliz. 665. *Sir J. Bruin's Case*, cited 6 Rep. 67.

(A) (A usage or custom will be admitted to ascertain the nature and extent of contracts, not arising from express stipulations, but from implications, presumptions, and acts of an equivocal character; or to ascertain the true meaning of particular words in a given instrument, where these words have various senses. But it will not be admitted to control, vary, or contradict a written and express contract. *The Schooner Reeside*, 2 Sumner's C. C. R. 567. See also *Schieffelin* v. *Harvey*, An. N. P. 59. [A commercial usage will be considered as established a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it. *Smith* v. *Wright*, 1 Caines R. 43.] And where the usage of an individual is known to a person with whom he transacts business, this usage may be given in evidence for the purpose of proving the contract or understanding between the parties in relation to the business transacted. *Loring* v. *Gurney*, 5 Pick. 15.)

[1] Eng. Com. Law Reps. vi. 527.

On the question, whether a liberty to cruize for six weeks authorize the party to cruize for the space of six weeks in the whole, taken at different intervals, *Lord Mansfield* held that the conduct of the captain in other instances under similar circumstances was admissible in evidence (*e*).

On a question whether unnecessary delay had been practised, the witness was admitted to state in evidence that the delay had not been greater than they had practised upon similar occasions (*f*) (1).

*Upon the same principle, the law of a foreign country where a contract has been made, is evidence to show the intention of the parties, and the nature and effect of the contract (*g*). *364

A custom, as well as a prescription, being entire, must be proved as laid. A plea of justification under a custom for the tenants of a *particular* copyhold estate to cut turf, is not supported by proof of a custom for all the copyholders generally to cut turf (*h*). Variance.

Where the defendant justified under an easement claimed by the *inhabitants* of a parish, it was held that he brought himself within the description of an inhabitant by proof that he rented a stall in the parish, which he used occasionally (*i*).

One who would be benefited by the custom is not a competent witness to establish it, even in an action between the other parties, since the verdict would afterwards be evidence for him (*k*). Competency.

DAMAGES (*l*).

Damages in a legal sense include *costs* (*m*). Damage is either in *law* or in *fact*. In law, where one deprives another of a defined legal right: as in case of slander charging a crime, or affecting a man in his trade or means of livelihood, &c. (*n*); or where a sheriff suffers an escape on mesne process (*o*). In such cases an action is maintainable, though no special damage be proved; for the privation of that to which the plaintiff was legally entitled, is a damage in law (*p*). In covenant by the mesne tenant against his under-lessee for not repairing, he may recover the costs of an action brought by the original lessor (*q*) (A).

(*e*) *Syers* v. *Bridge*, Doug. 509. It was held that the mere opinion of witnesses, that the six weeks might be made up of disjointed intervals, was inadmissible, none of them having known a case so circumstanced.

(*f*) *Noble* v. *Kennoway*, Doug. 492.

(*g*) See tit. Foreign Laws.

(*h*) *Wilson* v. *Page*, 4 Esp. 71.

(*i*) *Fitch* v. *Fitch*, 2 Esp. 543.

(*k*) See Common.—Copyhold.—Interest.

(*l*) The subject of damages is considered under the specific heads of Trespass.—Nuisance.—Disturbance, &c.

(*m*) *Phillips* v. *Bacon*, 1 East, 298; and therefore a writ alleging that 80*s*. were awarded for costs, is satisfied by the proof of a writ reciting that 80*s*. were awarded as well for damages, by reason of detaining the debt, as for costs. *Ibid.* See Tidd. tit. Costs. The 48 Geo. 3, c. 123, extends to damages for an assault.[1] 1 A. & E. 24.

(*n*) See Libel.

(*o*) See Sheriff.

(*p*) A *possibility* of damage is sufficient, per Powell, J., 6 Madd. 49; 11 East, 571. *Barker* v. *Green*,[2] 2 Bingh. 317. *Pindar* v. *Wadsworth*, 2 East, 154. *Hobson* v. *Todd*, 4 T. R. 71. See tit. Watercourse.

(*q*) *Neale* v. *Wyllies*,[3] 3 B. & C. 533. But in an action by a mesne tenant against an under-lessee, for overloading the chamber with meal, Lord Abinger held that the plaintiff was not entitled to recover the damages recovered against him by the original lessor. Liv. Sum. Ass. 1835. There was no distinct evidence of an application by the plaintiff to the under-lessee to defend the action brought by the original lessor.

(1) [See *Dean* v. *Swoop*, 2 Binney, 72, where the former conduct of a common carrier was not permitted to be given in evidence by him to prove that by the custom of the country he was answerable only for losses happening from his own negligence.]

(A) Where the law gives a right and a remedy for the violation of it, such violation imports damages and in the absence of all special damage the law presumes a nominal damage to the party. *Whittemore* v. *Colter*, 1 Gallis. C. C. R. 478. The general policy of the law forbids that a debtor should be subjected to all

[1] Eng. Com. Law Reps. xxviii. 21. [2] *Id.* ix. 149. [3] *Id.* x. 172.

DEATH.

The proofs and presumptions relating to the death of any individual person will be considered more at large under the title Pedigree.

The proof of the death of any person known to be once living, is incumbent on the party who asserts the death (*r*); for it is presumed that he still lives till the contrary be proved (1). But in analogy to the statute of
*365 bigamy (*s*), *and the statute concerning leases for life (*t*), where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years (A). Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*u*) (2). But the presumption is merely as to the fact, not as to the time of the death within the seven years (*x*).

Proof that a person sailed in a ship bound to the West Indies some years ago, which has not since been heard of, is evidence upon which a jury may presume that the individual is dead; but the time of the death, if it become material, must depend upon the particular circumstances of the case (*y*).

In establishing a title upon a pedigree, where it may be necessary to lay a branch of a family out of the case, it is sufficient *primâ facie* to show, that the person has not been heard of for many years (*z*).

Proof by one of the family that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married was held presumptive proof of his death without lawful issue (*a*)

The fact of a tenant for life not having been seen or heard of for 14 years, by a person residing near the estate, although not a member of his family, is *primâ facie* evidence of the death of the tenant for life (*b*).

Letters of administration are not evidence of the death of a party (*c*).

(*r*) *Wilson* v. *Hodges*, 2 East, 312. *Throgmorton* v. *Walton*, 1 Rol. R. 416. Whether proof is to be given of the death at any particular time within seven years, or after the expiration of seven years. *Doe* v. *Nepean*,[1] 5 B. & Ad. 86. See *R.* v. *Harborne*, 2 A. & E. 540.

(*s*) 1 Jac. 1, c. 11, s. 2. The presumption is merely as to the fact, not as to the time of the death within the seven years. *Doe* d. *Knight* v. *Nepean*, 2 M. & W. 894.

(*t*) 19 Car. 2, c. 6. Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death. *Doe* v. *Deakin*,[2] 4 B. & A. 433; see *R.* v. *Twyning*, 2 B. & A. 386.

(*u*) *Hopewell* v. *De Pinna*, 2 Camp. 113. [*Miller* v. *Beates*, 3 Serg. & R. 490.] See also *Doe* v. *Jesson*, 6 East, 80. See also *The Bishop of Salisbury's Case*, 10 Rep. 59, a. *Thorne* v. *Rolfe*, 1 Anders. 20. *Smartle* v. *Penhallow*, 2 Lord Raym. 994. *Benson* v. *Olive*, 2 Stra. 920.

(*x*) *Doe* v. *Nepean*, 2 M. & W. 894.

(*y*) *Watson* v. *King*,[3] 1 Starkie's C. 121. *Paterson* v. *Black*, Park's Ins. 433; 1 Bl. R. 404. *Doe* v. *Griffin*, 15 East, 293. *Doe* v. *Wolley*,[4] 8 B. & C. 22.

(*z*) *Rowe* v. *Hasland*, 1 Bl. 405.

(*a*) *Doe* d. *Banning* v. *Griffin*, 15 East, 293.

(*b*) *Lloyd* v. *Hunt*,[2] 4 B. & Ad. 433.

(*c*) *Thompson* v. *Donaldson*, 3 Esp. C. 63.

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the loss occasioned by his not fulfilling his promise. Interest is generally the compensation which must content the creditor. 1 Brocken. *Short* v. *Skepwith*, C. C. R. 103. Counsel fees in the court below cannot be allowed as damages. *Arcambel* v. *Wiseman*, 3 Dall. 306.)

(1) {*Lessee of Batton* v. *Bigelow*, Peters' C. C. Rep. 452.}

(A) (The rule is adopted in Pennsylvania, that in case of an absent person, of whom no tidings are received, the presumption of continuance of life ceases at the end of seven years, but the presumption of death must be taken from the termination of that period, and that the party lived throughout it, unless it be shown that at some particular date within it, he was in contact with some specific peril. *Burr* v. *Sim*, 4 Whart. 150. See also *Newman* v. *Jenkins*, 10 Pick. 517. (*Innis et al.* v. *Campbell et al.* 1 Rawle, 375.) And where a married man sailed from New York to South America, and neither he nor the vessel were heard of afterwards; in twelve years a plea of coverture was disallowed to his wife. *King* v. *Paddock*, 18 Johns. Rep. 161; see also, *Miller* v. *Beates*, 3 Serg. & R. 490. *Wilkes* v. *Lion*, 2 Cow. 333.)

(2) [*King & al.* v. *Paddock*, 18 Johns. 141. *Crouch & ux.* v. *Eveleth*, 15 Mass. Rep. 305. Peake's Ev. ch. xiv. sect. 1.]

[1] Eng. Com. Law Reps. xxvii. 42. [2] *Id.* vi. 476. [3] *Id.* ii. 322. [4] *Id.* xv. 150.

A remarkable case is mentioned in the Reports, where the question was, whether the son survived the father, so as to entitle the widow of the son to her dower, the father and the son having been hanged at the same instant; and it was found by the jury, that the son, who had been observed to struggle the longest, survived the father (*d*).

DE JURE AND DE FACTO.

As to the distinction between acts done by an officer *de jure* and such as are done by an officer *de facto;* see *R.* v. *Lisle*, Andr. 163; Str. 1090; 2 Barnard, 193, 264. *R.* v. *Hebden*, 2 Str. 1109. *R.* v. *Grimes*, 5 Burr. 2601 (A).

DEATH-BED DECLARATIONS.

These are, as has been seen, evidence in particular cases, on account of the solemn obligation which the situation of the party imposes upon him to declare the truth (*e*); and such a declaration is not the less admissible *because it was made under the additional obligation of an oath extra-judicially administered. *366

Admissibility.

In *Woodcock's Case* (*g*), the wife of the prisoner having been mortally wounded by him, was taken to the poor-house, where she was attended by a magistrate, who, in the absence of the prisoner, administered an oath to her, and took down her statement in writing; and the declaration was afterwards admitted in evidence (*h*).

The presumption in favour of this species of testimony ceases where the party himself would not have been admitted to give evidence upon oath; and therefore the declaration of an attainted felon at the place of execution is inadmissible (*i*); but that of an accomplice is admissible, since the accomplice, if living, might have been examined upon oath (*k*).

Three several declarations had been made by the wounded person in the course of the same day, at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement taken before the magistrate was not produced, and a copy of it was rejected. A question then arose whether the first and third declarations could be received; and Pratt, C. J.

(*d*) Cro. Eliz. 503; 2 Comm. 132. A similar question arose from the circumstance of *General Stanwix* and his daughter being lost in the same vessel. Cited *R.* v. *Dr. Kay*, 1 Bl. R. 640. Fearne's Essays; 2 Salkeld by Evans, 593; Evans's Pothier, vol. ii. p. 346. See tit. Presumption.

(*e*) *Supra*, Vol. I. Ind. tit. Dying Declarations. In general evidence of the declarations of a man since dead, of facts done by others, or even by himself, are not admissible. *Garnons* v. *Barnard*, 1 Anst. 298. The declarations of persons in *articulo mortis* being only admissible when it clearly appears that they are under the impression of a future state and impending death, held that a child under the age of four years, not being supposed capable of such impressions, the declarations were inadmissible. *Rex* v. *Pike*,[1] 3 C. & P. 598.

(*g*) Leach's C. C. L. 563.

(*h*) *Woodcock's Case*, Leach's C. C. L. 3d edit. 563. On an indictment for the murder of *A.* by poison, the dying declarations of *B.*, who died also of the same cause, admissible. *R.* v. *Baker*, 2 M. & R. 53. The dying declarations of a child of ten years of age, were received where the party was shown to be of quick intelligence, and before examination strongly impressed with the nature of an oath, and the danger of immediate death. *Reg.* v. *Perkins*, 2 Moody, 135.

(*i*) *R.* v. *Drummond*, Leach's C. C. L. 378, 3d edit.; 1 East's P. C. 353, S. C.

(*k*) By all the Judges, *Tinkler's Case*, East's P. C. 354, 356. [*Pennsylvania* v. *Stoops*, Addison's Rep. 332, S. P.]

(A) (The acts of an officer *de facto* who comes into office by colour of title, are valid, as it concerns the public or third persons, who have an interest in his acts. *The People* v. *Collins*, 7 Johns. Rep. 549. *M'Instry* v. *Fanner*, 9 Johns. Rep. 349; but not where the proceeding is directed to the vacating of an election conducted by officers not duly appointed. *Ex parte Wilcocks*, 7 Cow. 402. A mere ministerial officer has no right to decide on the acts of such officer *de facto* or adjudge them null. *People* v. *Collins*, *supra*.)

[1] Eng. Com. Law Reps. xiv. 473.

was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof; but the other Judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted (*l*).

How given in evidence.

In order to warrant the admission, it must be shown, in the first place, that the declaration was made under an apprehension of impending death (A); and this may be collected from the nature and circumstances of the case, although the declarant did not express such an apprehension (*m*). And it is not essential that the party should apprehend *immediate* dissolution; it is sufficient if he apprehend it to be impending (1). Whether such evidence

*367 be *admissible is a question for the Court, and not for the jury, to determine, under all the circumstances of the case (*n*).

Force and effect.

In *Tinkler's Case* (*o*), a majority of the Judges were of opinion that the death-bed declaration of a deceased accomplice was alone sufficient to convict the prisoner, because the declarant in that situation could have no interest in excusing herself, or unjustly charging others; but other Judges were of opinion that confirmatory evidence was necessary.

In general, although it is for the Court to decide upon the admissibility of the evidence, it is for the jury, under the circumstances, to judge of the effect of it.

Sir D. Evans has just observed (*p*), that "Much consideration should be given to the state of the mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected that it has often a tendency to obliterate the distinctness of his memory and perceptions; and therefore, whenever the

(*l*) *R.* v. *Reason and Tranter*, Str. 530; 6 St. Tr. 502. According to the latter report of this case, the C. J. and Powis, J. deemed the evidence inadmissible; Eyre and Forteseue, Js., were for admitting it; but it appears that it was admitted.

(*m*) *R.* v. *Woodcock*, Leach's C. C. L. 563, 3d edit. The Court will hear all that a party has said, in order to decide from what he has said whether he had that impression on his mind which would make his declarations admissible. *R.* v. *Van Butchell*,[1] 3 C. & P. 631. Where the deceased, at the time of making a statement as to the cause of her death to a medical person, stated that she hoped he would do what he could for her for the sake of her family, held that the expression of such a hope excluded the declaration; to render it admissible, it must be made under the impression of an almost immediate dissolution. *R.* v. *Crockett*,[2] 4 C. & P. 544.

(*n*) *John's Case*, East's P. C. 357. By all the Judges. *Welborne's Case*, East's P. C. 359. Per Lord Ellenborough, *R.* v. *Hucks*,[3] 1 Starkie's C. 522. In the previous case of *R.* v. *Woodcock*, Leach's C. C. L. 563, Eyre, C. B. left it as a question to the jury, whether the deceased was under the apprehension of death when she made the declaration. In *Mosley's Case*, 1 Ry. & M. C. C. L. 97, upon an indictment for murder, the wounds which occasioned the death were inflicted on the party on the evening of Thursday, the 30th September, and a surgeon attended him the same evening, and until his death, on the 10th October. The surgeon did not consider the case hopeless till the latter day, and always till then held out hopes of recovery, and then told him the case was hopeless. Another witness who attended him daily, stated that the deceased on the evening of the 30th, said that he had been robbed and killed, that he should not get the better of it, and that all along he said he should never get better; and it was held that upon this evidence the declarations of the deceased on the Thursday evening, after he had said that he was robbed and killed, and also on subsequent days, were properly admitted.

(*o*) East's P. C. 354, 356. See also *Westbeer's Case*, Leach, 14. Declarations in *articulo mortis* of the circumstances of robbery, have been held inadmissible. *R.* v. *Lloyd and others*,[4] 4 C. & P. 233.

(*p*) Pothier, by Evans, vol. ii. p. 293.

(A) (*Gibson* v. *Commonwealth*, 2 Virg. Cases, 111. *Voss* v. *Commonwealth*, 3 Leigh, 786.)

(1) {Declarations of a deceased person, made the next day after he had received a wound, but six or seven weeks before his death, were held to be inadmissible. *State* v. *Moody*, 2 Hayw. 31. But the declaration of a deceased person, that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, was admitted as a dying declaration. *State* v. *Poll*, 1 Hawks, 442. See also M'Nally, 174, 381, *& seq.* Swift's Ev. 124.}

[1]Eng. Com. Law Reps. xiv. 493. [2]*Id.* xix. 518. [3]*Id.* ii. 494. [4]*Id.* xix. 360.

accounts received from him are introduced, the degree of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment, of inference, and conclusion, which, however sincere, may be fatally erroneous. The circumstances of confusion and surprise, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related with the other facts established in evidence, is to be examined with peculiar circumspection; and the awful consequences of mistake must add their weight to all the other motives for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of wilful misrepresentation."

It is further to be remarked, that this seems to be the only instance in which evidence is admissible against a prisoner who has not had the power to cross-examine—an anomaly, which in itself calls for great caution and circumspection in the use and application of such evidence. Finally, it has never been received except in cases of murder, where, if the dying person was certain as to the author of the violence, yet in the case of a quarrel and conflict, he might be under a strong temptation to give a partial account of the transaction, although all motives of personal hostility had ceased. In other cases it is far from improbable that he would attribute the fact to some person whom he suspected to be his enemy, when, if his grounds for *supposing so could have been investigated, they might have turned out to be very unsatisfactory. *368

Declarations of this nature have also been admitted in civil cases, where they have been made by attesting witnesses to an instrument. In civil proceedings.

In the case of *Wright* v. *Littler* (*q*), the plaintiff claimed under a will dated 1743; the defendant claimed under a will dated in 1745, and proved the hand-writing of the witnesses by whom it purported to have been attested. To disprove this will, the plaintiff called *Mary Victor*, the sister of *William Medlicott*, one of the attesting witnesses, and upon cross-examination by the defendant's counsel, she stated that *William Medlicott*, in his last illness, acknowledged and declared that the will of 1745 was forged by himself. Lord Mansfield, in delivering the judgment of the Court, upon a motion for a new trial, said, "As the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience, I am of opinion that the evidence was proper to be left to a jury (*r*) (1)."

In a subsequent case (*s*), Mr. J. Heath, on the authority of the above case,

(*q*) 3 Burr. 1244; 1 Black. 346.

(*r*) Lord Mansfield also observed upon the fact, that the evidence came out upon cross-examination by the defendant, and had not been objected to at the trial; and said, that even if it had been upon examination by the plaintiff, it would have been equally admissible, especially since the will was all written and witnessed by him (*William Medlicott*), and gave the premises in question to his wife.

(*s*) 6 East, 195, cited by Lord Ellenborough, C. J.

(1) [In *Wilson* v. *Boerem*, 15 Johns. 286, it was held that declarations *in extremis*, are inadmissible evidence, either in a civil action or a criminal prosecution, with the single exception of cases of homicide, in which the declaration of the deceased, after the mortal blow, as to the fact of the murder, is admitted. Thompson, C. J., says, "No case, either in the English courts or in our own, has fallen under my observation, where such evidence has been admitted in a civil suit. *Wright* v. *Littler* (3 Burr. 1244, 1 Bl. Rep. 345) has been urged. But a recurrence to the facts will show that the circumstances of that case were special and peculiar; and the admission of the declaration of *Medlicott* was not supported under this rule. Lord Mansfield, in pronouncing the opinion of the court, says, the testimony comes out on the cross-examination of the defendant's counsel, and no objection made to it: and after mentioning the special circumstances of the case, he says, no general rule can be drawn from it; thereby expressly excluding the idea that the evidence was admitted merely as the dying declaration of *Medlicott*. See also *Wilson* v. *Boerem*, Anth. N. P. 176, & *note*, (*a*).]

admitted the declaration of a person who had set his name to a forged bond, and who, upon his death-bed, begged pardon of Heaven for having been concerned in the forgery.

The ground, however, upon which such evidence has been admitted, is this:—If the attesting witness had been living, he must have been called, and might have been cross-examined as to the validity of the instrument, the authenticity of which depends upon the credit given to it by his attestation (*t*).

In a late case (*u*), the Court of King's Bench said that as it did not appear that such evidence had ever been received, except in cases of homicide, where the declarations had been made by the deceased, and in civil cases, where the declarations had been made by attesting witnesses, they would not further extend the rule; and therefore the Court held the declaration of a dying person as to the relationship of the lessor of the plaintiff in ejectment to the person last seised (*x*), to be inadmissible (1).

*369 *DEBT.

This action is founded either upon a specialty, or upon a parol contract, or duty (*y*) (A). The proofs in the former class of actions are considered under the titles Bond—Covenant—Deed. Those which belong to the latter are distributed under the titles of Bills of Exchange, Goods Sold and Delivered, &c.: and where the action is for a penalty, under the title Penal Action.

The proofs now requisite in an action of debt, depend on the issues taken, according to the mode of pleading prescribed by the new rules. As the same defence may still be made by means of proper pleas which could formerly have been taken under the plea of *nil debet*, which put the whole of

(*t*)[1] 4 B. & A. 55. Upon the same principle, evidence has been admitted to impeach the character of attesting witnesses who are dead, and whose hand-writing is proved in order to substantiate the instrument. See tit. Witness.

(*u*) *Doe* v. *Ridgway*, Mich. 1 Geo. 4, MS., and 4 B. & A. 53.[2]

(*x*) Ibid. *A.*, having been convicted of perjury, pending a rule for a new trial, shot the prosecutor, and it was held that an affidavit of his dying declarations on the subject of the perjury was not admissible; and it was held that such declarations were admissible in those cases only where the death was the subject of the charge, and where the declarations related to the circumstances of the death. *R.* v. *Meade*,[3] 2 B. & C. 605. In *R* v. *Hutchinson*, *cor.* Bayley, J., Durham Spring Ass. 1822, the prisoner being charged with administering savin to a pregnant woman, it was held that her dying declarations, although they related to the cause of her death, were inadmissible, the death not being the subject of inquiry. 2 B. & C. 608,[4] in the note. Formerly it seems to have been the practice to receive in evidence the declarations of deceased paupers as to their settlements; and in the case of *R.* v. *Bury St. Edmonds*, Cald. 482, where a pauper had on his death-bed told his wife that she and her children would belong to and prove their settlement in the parish of *R.*, the declaration was held to be admissible, and Mr. J. Buller held that it was admissible, on the general principle on which such declarations are receivable on trials for homicide. Such a declaration was also received in the case of *Appotun* v. *Dunswell*, 2 Bott, 80. It is, however, observable, that in addition to the general principles on which mere declarations of deceased persons, though made in *articulo mortis*, are excluded, another objection is applicable to declarations as to settlements, viz. that they involve law as well as fact. The rule seems to be now established that such declarations are inadmissible. See *R.* v. *Ferry Frystone*, 2 East, 54. *R.* v. *Chadderton*, Ibid. 27. *R.* v. *Abergwilly*, Ibid. 63.

(*y*) *A.* is indebted to *B.*, *B.* to *C.*; an agreement that *B.*'s debt and claim shall be extinguished, and that *A.* shall pay the amount to *C.*, is binding. *Fairlie* v. *Denton*,[5] 8 B. & C. 795. Debt lies upon the decree of a colonial court of equity, if duly perfected. *Henley* v. *Soper*,[6] 8 B. & C. 16; and 2 M. & Ry. 153.

(1) [Evidence of the declarations of a grantor with warranty cannot be received to support a title deduced from him, though the declarations be made *in articulo mortis*. *Jackson* v. *Vredenberg*, 1 Johns. 159. Declarations of a testator, though made *in extremis*, are not admissible to show duress at the time he executed his will. *Jackson* v. *Kniffer*, 2 Johns. 31. See also *Gray* v. *Goodrich*, 7 Johns. 95.

In action by a father for the seduction of his daughter, her dying declarations charging the defendant as her seducer, are held to be admissible evidence, in North Carolina. *McFarland* v. *Shaw*, 2 Car. Law Repos. 102.]

(A) (An action of debt will lie for a penalty upon a decree in chancery. *Drakesly* v. *Roots*, 2 Root. 138.)

[1]Eng. Com. Law Reps. vi. 347. [2]*Id.* vi. 348. [3]*Id.* ix. 196. [4]*Id.* ix. 198. [5]*Id.* xv. 246. [6]*Id.* xv. 147.

the plaintiff's material allegations in issue, the proofs will be stated as they stood before the rules, subject, however, to the operation of the new rules, which take away the general issue, and require the defendant to traverse some matter of fact alleged by the plaintiff, or to plead specially in confession and avoidance.

Previously to the new rules, the plaintiff, under the plea of *nil debet*, was bound to prove all the material allegations in his declaration, although the plea were an improper one, to which he might have demurred (*z*). The defendant might, in general, give in evidence such matter as showed that he was not indebted to the plaintiff.

Evidence under Nil debet, before the new rules.

Where, previously to the new rules, the action was immediately founded upon a record or specialty, *nil debet* was an improper plea; for the defendant could not by his plea admit the existence of the record or specialty, and yet deny the debt (*a*) (A) (1). But whenever a specialty or record was but inducement to the action, which was founded upon extrinsic matter of fact, *nil debet* was a good plea; as in debt for rent by indenture (*b*), or for an escape (*c*), or on a *devastavit* (*d*).

In an action of debt for rent, *nil debet* was a good plea, although the demise was by deed, for the deed did not acknowledge the debt, as an obligation to pay money does; the debt accrued by the subsequent enjoyment (*e*), and *non est factum* here would not have been an answer commensurate with the declaration. It might be very true that the deed was the deed of the lessee, and yet that no debt had arisen; for something *ultra* the deed, that is, the enjoyment of the land, was essential to the creation of the debt, which was, *technically speaking, a matter in *pais* to be proved before a jury (*f*). Consequently, the defendant, in an action of debt for rent, might prove under this issue that the lessor had kept possession of the premises, or (as it seems) of any part (*g*); for as the action arises not on the contract merely, but is also founded on the pernancy of the profits according to the contract, this was evidence to show that no debt ever existed (*h*). *370

So the lessee might show an entry, or expulsion from the premises by the lessor, or any suspension of rent by him, under this issue (*i*), or that the

(*z*) See tit. Bail-bond, *supra*, 119, note (*a*).

(*a*) Gilb. L. E. 79, 2d edit.; 1 Will. Saund. 39, n. (3.); Cowp. 589; Hard. 332. *Tyndal* v. *Hutchinson*, 3 Lev. 170. *Warren* v. *Consett*, 2 Lord Raym. 1500; 2 Str. 778; 8 Mod. 107. Although facts be mixed with it, as in an action by the assignee of the sheriff upon a bail-bond. Fort. 363; 2 Lord Raym. 1503; 2 Str. 780; 5 Burr. 2586.

(*b*) Cowp. (*c*) Salk. 565.

(*d*) Ibid. and 1 Saund. 219.

(*e*) B. N. P. 170; Hard. 332; 1 Will. Saund. 39; Gilb. L. E. 239, 2d edit.; Cowp.

(*f*) Gilb. L. E. 280, 2d edit.; B. N. P. 170.

(*g*) See Gilb. L. E. 283, 2d edit.; 1 Inst. 148, a.; Vent. 277; Roll. Ab. 398.

(*h*) 2 Roll. Ab. 667, pl. 21; Gilb. L. E. 283, 2d edit.

(*i*) It is frequently pleaded, but it seems that this is optional on the part of the defendant. 1 Will. Saund. 205, n. (2); B. N. P. 177; 1 Mod. 35; 1 Vent. 258; Ld. Raym. 566; 1 Sid. 151; 2 Keb. 762. *Contra*, 2 Leon. 10; Goulds. 80; Ow. 85.

(A) (*Nil debet* is not a good plea to an action of debt on a recognizance, nor to any action founded on a record or specialty. *Bullis* v. *Giddens*, 8 Johns. R. 82. *White* v. *Converse*, 20 Wend. 266. *Niblo* v. *Clark*, 3 Wend. 24. But where the record or specialty is merely inducement to the action, which is grounded on matter of fact, as in debt for rent, for an escape, or on a devastavit, there *nil debet* may be pleaded. *Minton* v. *Woodworth*, 11 Johns. R. 474.)

(1) {It has been decided in *Pennsylvania*, upon solemn argument, that in an action of debt on a foreign judgment, in which the declaration stated the foundation of the judgment to be a specialty, the Statute of Limitations is not a good plea. *Richards, Adm.* v. *Bickley, Adm.* 13 Serg. & Rawle, 395. The causes of action upon which the original judgments, sued upon in the cases of *Hubbel* v. *Cowdrey*, 5 Johns. Rep. 131, and *Bissell* v. *Hall*, 11 Johns. Rep. 168, were obtained, do not appear by the reports of those cases, in which the plea of the Statute of Limitations was held, without argument, to be a good plea.}

lessor had entered into part of the premises; for since the lessor by his own wrongful act deprives the party of the benefit of the entire contract, no apportionment can be made in his favour (*k*). So he might show an eviction by a third person. In order to prove this, he must have shown that the evictor had a title to enter, and did enter before the rent was due, and show also by what process he was evicted (*l*) (1). This must have been done by the production of the judgment in ejectment, &c. or by proof of an examined copy of it, and by proof of the execution of the writ of possession under the warrant, and an examined copy of the return.

But the defendant could not, where the demise was by deed, give evidence to show that the plaintiff had no interest in the demised tenements; for if he had pleaded it, the plaintiff might have replied the indenture, or might have demurred, for the declaration being on the indenture, the estoppel appeared on record (2). But if the defendant had pleaded *nil habuit in tenementis*, and the plaintiff had joined issue on the plea, instead of relying on the estoppel, the defendant would not have been concluded by the deed, and the jury would have been bound, as has already been seen, to find according to the truth of the fact (*m*). Neither could the defendant, under this issue, give in evidence disbursements for necessary repairs, although the plaintiff was bound to repair; for the proper remedy was by an action of covenant (*n*), unless by the terms of the covenant the repairs were to be paid out of the rent (*o*). It was no defence that the lessee did not actually enter and enjoy, where he might without the hindrance of the lessor, have entered and enjoyed, for he could not defend himself by his own laches (*p*).

The general rule was, that the plaintiff might give in evidence, under this plea, any matter which showed that nothing was due at the time when the action was brought (*q*); as payment (*r*), or a release (*s*) (A). But the Statute of Limitations must have been and must still be pleaded; and on a *qui tam* action to recover penalties, it has been held that the defendant could not give in evidence the record of a recovery against him by another person for the same forfeiture (*t*).

*371 *By the rules of Hilary Term, 4 W. 4, 1, in debt on specialty or covenant,
New rules. the plea of *non est factum* shall operate as a denial of the execution of the

(*k*) 1 Inst. 148, a.; Vent. 277; Roll. Ab. 398; Gilb. L. E. 283. [*Vaughan et al.* v. *Blanchard et al.* 1 Yeates, 176.]

(*l*) Fort. 360; *Cooper* v. *Young*, 8 Geo. 2. *Jordan* v. *Twells*, B. R. H. 171.

(*m*) Salk. 277; B. N. P. 170; *supra*, Vol. I. p. 343. But where the demise is by parol agreement, see 1 Raym. 746; B. N. P. 177.

(*n*) B. N. P. 177; 1 Ray. 370.

(*o*) 1 Lord Ray. 420.

(*p*) Rol. Ab. 605; Gilb. L. E. 284.

(*q*) Com. Dig. Pleader, 2 W. 17.

(*r*) Gilb. L. E. 285. See tit. Bond.—Payment.

(*s*) Per Holt, J., *Hatton* v. *Morse*, 1 Salk. 394, S. C.; 2 Lord Ray. 787. See Co. Litt. 182, b. *contra;* Gilb. L. E. 285.

(*t*) *Bredon* v. *Harman*, Str. 701. *Jackson* v. *Gisling*, B. N. P. 197. Vide *supra*, Vol. I. Ind. tit. Judgments.—Record; and *infra*, tit. Record.

(1) [Where a tenant is dispossessed by a public enemy, he ought to pay rent only for the time he enjoyed peaceably, and not for the time he was prevented by the casualties of war. *Bayley* v. *Lawrence*, 1 Bay, 499. Sed Vide *Pollard* v. *Shaaffer*, 1 Dallas, 210. American Museum, Vol. II. p. 470, where it was held that a lessee, who had been dispossessed by the British army in 1777, was bound to pay rent for the whole term, but that he was excused from keeping and giving up the premises in good repair, according to his covenant, on account of the destruction and waste committed by the army.]

(2) [Where a lessor threatened to turn the tenant off by force if he did not take a lease, it was held that the lessee might contest the lessor's title. *Hamilton* v. *Marsden*, 6 Binney, 45. And the acceptance of a lease of a part of a tract of land does not estop the lessee from contesting the lessor's title to the remainder of the tract. *Pederick* v. *Searle*, 5 Serg. & Rawle, 236.]

(A) (A bond or covenant by the creditor to save harmless and indemnify the debtor against the debt, operates as a release of the debt. *Clark* v. *Bush*, 3 Cow. 151.)

deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of "*nil debet*" shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and all matters in confession and avoidance shall be specially pleaded as above directed in actions of assumpsit.

4. In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession or avoidance.

DECEIT.

General requisites.

To support an action on the case for deceit, the plaintiff must allege, and prove, a *fraud* to have been committed by the defendant, and that a *damage* has resulted from the fraud to the plaintiff (*u*). The *fraud* must consist in depriving the plaintiff, by deceitful means, of some benefit which the law entitled him to demand or expect (*x*) (A).

Deceitful means.

It is a matter of evidence to prove that the deceitful and fraudulent means have been used as alleged, and that the plaintiff has in fact been deceived by them to his detriment; but it is usually a question of law, arising upon the facts, whether an action lies in respect of damage resulting from such means; for it is not a general rule, that wherever fraud and damage concur an action is maintainable. Such means must have been used as were likely to impose on a person of ordinary prudence and circumspection, to throw him off his guard on a point where he might reasonably place confidence in the representation of the defendant, and also such as deprived the party of a benefit which in point of law he had a right to expect (*y*).

(*u*) 12 East, 636.

(*x*) The making a representation which the party knows to be false, and which is intended to induce another to act on it to his damage, is a fraud in law, and sufficient to support an action. *Polhill* v. *Walker*,[1] 3 B. & A. 114. The defendant accepted a bill as per procuration of the drawee, believing that the acceptance would be sanctioned; the holder of the bill was in consequence nonsuited; held that the defendant was liable. Ibid. Where the plaintiff had been induced, through the false representations of the defendant, to employ a servant, and the judge had drawn the attention of the jury to two classes of motive, viz. a false statement knowingly made, with intention to benefit himself; and, secondly, a desire to benefit another person; and directed them, that although he might have no intention to obtain any advantage for himself, yet that it would still be a fraud if he made false representations, productive of injury to another, knowing such representations to be false; and the jury found a verdict and damages for the plaintiff, adding that they considered there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he had done constituted a fraud in the legal acceptation of the term; the Court refused to enter the verdict for the defendant. *Foster* v. *Charles*,[2] 7 Bing. 105.

(*y*) Per Lord Ellenborough, in *Vernon* v. *Keys*, 12 East, 631; B. N. P. 30. In *Bayley* v. *Merrill*, Cro. Jac. 386, on an agreement to carry goods at so much per cwt., it was held that no action lay for falsely affirming that a load of madder contained a less quantity of cwts. than it contained in fact. In 1 Roll. Ab. 801, pl. 16, it was held that one who was induced to buy a term by a false assertion on the part of a seller that a stranger had offered 20*l.* for it, could not recover. Where the plaintiff sold to the defendant certain buildings, trade, and stock, under a false representation by the latter that he was about to enter into partnership with certain

(A) (The deceit may not be on either party to the contract, but on third persons; and if the deceit on third persons will operate as a public mischief, neither law nor equity will support the contract. *Boynton* v. *Hubbard*, 7 Mass. R. 112. Thus a contract by an heir to convey, on the death of his ancestor, if he should survive the ancestor, a certain undivided part of what shall come to the heir by descent, distribution or devise, is a fraud on the ancestor, and productive of public mischief.

[1] Eng. Com. Law Reps. xxiii. 38. [2] *Id.* xx. 64.

Thus no action *is maintainable in respect of a false representation, by a vendor, of the intention or will of another in respect of the goods (*z*).

Proof of fraud.

The plaintiff must, in the first place, prove fraud, *in fact;* he must show that the representation was not only *falsely*, but that it was *fraudulently* made, with intent to deceive the plaintiff, for the fraud or deceit is the foundation of the action (*a*) (A) (1). Thus in all cases of deceit in the sale of personal chattels, in respect of the quality, soundness or goodness of the subject-matter, the plaintiff must prove not only the *falsity* of the representation, but also the *scienter*, the knowledge of the defect, on the part of the defendant (*b*).

If the defendant sell goods as his own, the plaintiff should show that he knew that they were not his own (*c*) (B). For if the defendant had reasonable ground to suppose that they were his own property, as if, for instance, he had bought them *bonâ fide*, this action will not lie against him (*d*). But if the defendant represent them to be the goods of *A. B.*, and that he had authority from *A. B.* the owner, to sell them, it will be sufficient for the plaintiff to show that he had no authority from *A. B.*; and proof that they were the goods of some other person would be *primâ facie* evidence of the want of authority in the defendant, and sufficient to put him upon proving that he had authority (*e*).

So, if a man sell a horse, stating him to be of a certain age, according to

persons in the same trade (whose names he would not disclose), and that they would not consent to his giving the plaintiff more than a certain sum, but in fact they had authorized him to make the best terms he could, and would have given a larger sum, and in fact the defendant charged them with a large sum, it was held that no action was maintainable; for it was either a false representation of the intention of another, or a mere *gratis dictum* of the defendants, on which it was the indiscretion of the plaintiff to rely. *Vernon* v. *Keys*, 12 East, 632, affirmed on error, in the Exchequer Chamber, 4 Taunt. 488.

(*z*) *Vernon* v. *Keys*, 12 East, 632. See the last note.

(*a*) [*Otis* v. *Raymond*, 3 Conn. Rep. 413. *Munroe* v. *Gardner*, 1 Rep. Con. Ct. 328, 475. *Emerson* v. *Brigham*, 10 Mass. Rep. 197. Yelv. 21, *a. note* (1).] Where there has been an *express* warranty, although the action be framed in *tort*, and a *scienter* averred, it need not be proved, *Williamson* v. *Allison*, 2 East, 446; for then the express *warranty* is the gist of the action, and not the deceit. See tit. Assumpsit—Warranty. And where there is a warranty the action is usually laid in *assumpsit*, in order that the declaration may embrace the money counts. The propriety of this practice was established in the case of *Stuart* v. *Wilkins*, Doug. 18. Where the action is framed in *tort*, the plaintiff, if he prove the *scienter*, will be entitled to recover, although the representation made may fall short of a warranty. Where a vendor *knew* of defects in a ship at the time of sale, which it was impossible that the buyer should discover, and did not disclose them at the time of sale, Lord Kenyon held that he was liable to an action for the deceit, as on a warranty that the ship was free from all defects, although by the express terms of the contract the buyer was to take her with all faults. *Mellish* v. *Motteux*, Peake's C. 115. But in the subsequent case of *Baglehole* v. *Walters*, 3 Camp. 154, Lord Ellenborough stated that he could not subscribe to the doctrine of the former case; he said, "Where an article is sold with *all faults*, I think it quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser." There, however, the plaintiff failed in proving *any fraud*. See *Parkinson* v. *Lee*, 2 East, 314.

(*b*) *Supra*, note (*a*).

(*c*) B. N. P. 30; Salk. 210. *B.* sells good to *A.* as his own, but knowing them to be the goods of *P.*, who retakes them, *A.* shall have an action on the case. 42 Ass. 8; 4 Co. 14. On the sale of a personal chattel the law will imply a warranty as to the right to sell, 3 T. R. 57; 2 Bl. Com. 451; 3 Com. 166; Peake's C. 94. But a warranty as to the right to real property will not be implied, 2 B. & P. 13; 3 B. and P. 166; Dougl. 654; 6 T. R. 606. A warranty as to the soundness, goodness, or value of a horse, or other personal chattel, is never implied. 2 East, 314; 2 Com. 451; 3 Com. 165; 2 Roll. R. 5.

(*d*) Ibid.

(*e*) B. N. P. 31; 1 Danv. 176.

(A) (An action on the case will lie for the assertion of a falsehood with a fraudulent intent, as to an existing fact, where a direct, positive, and material injury results from such assertion. *Benton* v. *Pratt*, 2 Wen. 385. *Hart* v. *Tallmadge*, 2 Day, 381.)

(B) (Where the donor of a chattel affirms it to be his, at the time of a gift, and the donee is afterwards evicted by the true owner, he may have an action on the case against the donor. *Barney* v. *Dewey*, 13 John. Rep. 224.)

(1) {An action of deceit will not lie against a purchaser of a chattel who makes false affirmations of his means and property in order to postpone the day of payment. *Fisher* v. *Brown*, 1 Tyler, 387.}

*a pedigree delivered to him when he bought the horse, and shown to the purchaser (*f*) (A); or sell a picture as the production of an ancient master (*g*), or as having formed part of a particular cabinet of paintings, and such representations be made according to the honest belief of the owner at the time, no action is maintainable, although the representation be incorrect; but it is otherwise if the vendor *knew* at the time that he was representing a falsehood (B).

In an action for giving a false representation of the credit and circumstances of a third person, to the detriment of the plaintiff, it is not necessary to show that the defendant expected to derive any benefit from the deceit, or that he colluded with the other (*h*). The ground of the action is the intention to deceive and injure the plaintiff (*i*), and of this, as on all other questions of *mala fides*, the jury are to judge (*k*) (C). Though the defendant inform the plaintiff that a party may safely be credited, and that he spoke from his own *knowledge*, and not from hearsay, he will not be liable to damages although the representation be false, and the plaintiff in consequence receive an injury, if the representation was in fact made by the defendant *bonâ fide*, and under the belief that it was true (*l*). It is not sufficient to show that the defendant intended to deceive when he made the representation, without proof that he intended to defraud *the plaintiff* (*m*). The mere suppression of the fact that the party concerning whom the representation is made, had recently been discharged under the Insolvent Act, is not conclusive evidence of fraud (*n*). Character.

It is enacted by the statute 9 G. 4, c. 14, s. 6, that no action shall be brought whereby to charge any person upon or by reason of any represen-

(*f*) *Dunlop* v. *Waugh*, Peake's C. 123. (*g*) *Jendwine* v. *Slade*, 3 Esp. C. 572.

(*h*) *Pasley* v. *Freeman*, 3 T. R. 51: Falsehood *and* fraud are essential; falsehood without fraud is not sufficient. *Ashlin* v. *White*,[1] Holt's C. 387.

(*i*) *Tapp* v. *Lee*, 3 B. & P. 367; 3 T. R. 51.

(*k*) *Eyre* v. *Dunsford*, 1 East, 318. The defendants having credit lodged with them in favour of *T.* to a certain amount, but upon an express stipulation that goods should previously be lodged with them to treble the amount, informed the plaintiff, who applied to them for information as to *T.*'s responsibility, that they might safely execute *T.*'s order for goods upon credit, and stated the fact that such credit had been lodged with them, but wholly omitted the previous condition; and it was held that this was a *suppressio veri*, which warranted the jury in finding fraud. [*Ward* v. *Center*, 3 Johns. 271. *Upton* v. *Vail*, 6 Johns. 181.]

(*l*) *Haycraft* v. *Creasy*, 2 East, 92.

(*m*) *Scott* v. *Lara*, Peake's C. 226; and *infra*, 375. [*Young* v. *Covell*, 8 Johns. 23.]

(*n*) *Gainsford* v. *Blackford*, 6 Price, 36. The representation was, that *L. H.* then owed him, the defendant, 50*l.*; that he the defendant was ready to give *L. H.* credit for anything he wanted. See *Wood* v. *Wain*, 1 Esp. C. 442.

(A) (If one person exchanges horses with another and gives money to boot, he may not only maintain that action for his money, but also trover for the horse he parts with in exchange. *Kimball* v. *Cunningham*, 4 Mass. R. 502. But, if he commence an action of deceit to recover damages for the fraud, it will be a waver of his right to consider the contract as void, he having thereby made his election to consider it as subsisting. *Ibid.*)

(B) (An action lies for fraudulently selling land which has no real existence, notwithstanding the covenants contained in the deed of the vendor, which the vendee may treat as a nullity. *Wardell* v. *Fosdick*, 13 John. R. 325. One falsely supposing his estate in danger, conveys it to his sons, who know that it is not in danger, but neglect to set the grantor right: this concealment is a sufficient ground for avoiding the conveyance. *Whelan* v. *Whelan*, 3 Cow. 537.)

(C) (An action on the case for a false affirmation lies, when a certificate is given to an individual that he is honest, industrious, respectable, and otherwise a good citizen of good morals and habits, and that in the opinion of the person giving the certificate, the individual recommended would honourably endeavour faithfully to perform every engagement he should make in any matter of business or credit, and when the person recommended, on the strength of such certificate, obtains goods on credit, on its being shown that the certificate was false, and the falsity known to the person giving it. *Williams* v. *Wood*, 14 Wend. 126. In cases of this kind it is not necessary to show an intent to defraud any particular individual; any one defrauded may maintain an action for the false representation. *Ib.* See also *Gallager* v. *Brunel*, 6 Cow. 346. *Allen* v. *Addington*, 7 Wend. 1. *Bulkley* v. *Storer*, 2 Day, 531. *Gardner* v. *Preston*, 2 Day, 205.)

[1]Eng. Com. Law Reps. iii. 136.

tation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person (*o*), to the intent or purpose that such other person may obtain credit, money or goods upon *such representation or assurance* (*p*), unless such representation or assurance be made in writing, signed by the party to be charged therewith.

The party whose solvency is misrepresented is a competent witness (*q*). Similar misrepresentations made by the defendant to other persons are, it has been held, admissible in evidence to prove a fraudulent connection between the defendant and the customer (*r*).

*374 Proof of deception.

*The gist of the action is, that the plaintiff was *imposed* upon by the *fraud* of the defendant (A). If, therefore, it appear that the plaintiff was aware of the falsity of the representation, or made the contract, to use a common phrase, with his eyes open to the defect, he is remediless, for he was not *deceived.* Nay, further, if he had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it when he might easily have done so, or even if he placed a blind and wilful confidence in a representation which was not calculated to impose upon a man of ordinary prudence and circumspection, it seems that an action of deceit cannot be supported (B). For although the plaintiff in these cases may, in point of fact, have been deceived, yet it was a conseqence of his own folly that he was so defrauded, and *vigilantibus non dormientibus jura subveniunt.*

Where a false representation was made on the sale of goods, but the plaintiff had full opportunity to inspect them, and a *a written contract* was entered into, the terms of which had no reference to the representation, it was held that the plaintiff was not entitled to recover (*s*).

If the vendor of a horse affirm that he is sound wind and limb, when it is apparent that he has but one eye (*t*), or warrant a house to be in perfect repair, which wants a roof (*u*), the buyer must abide by the consequence of his own laches.

In the sale of goods.

The possession of goods by a vendor, induces a reasonable presumption of ownership and title (*x*). But it is laid down, that if the seller was out of possession at the time of the sale, no action will lie against him, though they be not his own, without an express warranty, for there was not room to question his title (*y*).

If the vendor of a house affirm that the rent of the house was more than it really was, whereby the vendee was induced to give more for it than it was worth, an action, it is said, will lie; for the value of the rent is within

(*o*) In *Lyde* v. *Barnard*, 1 M. & W. 101, the Judges of the Court of Exchequer were divided in opinion whether the clause applied to a case where the defendant had falsely represented the interest of *A. B.* in certain funds charged only with three incumbrances, whereby the plaintiff was induced to give him credit.

(*p*) The words in italics are omitted in the printed copy of the statute.

(*q*) *Smith* v. *Harris*,[1] 2 Starkie's C. 47. *Richardson* v. *Smith*, 1 Camp. 277, for the witness in an action for the goods cannot avail himself of the verdict.

(*r*) *Beal* v. *Thatcher*, 3 Esp. C. 194.

(*s*) *Pickering* v. *Dowson*, 4 Taunt. 779.

(*t*) Unless, as is quaintly remarked in the year-books, the purchaser be also blind.

(*u*) *Bayley* v. *Merrel*, Cro. Jac. 387; and per Grose, J., 3 T. R. 55. *Dyer* v. *Hargrave*, 10 Ves. 507. Where the defect is so obvious and visible, it is presumed that the parties did not intend the warranty to apply to it.

(*x*) B. N. P. 30. *Medina* v. *Stoughton*, Salk. 210; 1 Ray. 593. *Dobell* v. *Stevens*, 3 Roll. 623.

(*y*) Salk. 210; B. N. P. 31.

(A) (No action lies for representing the plaintiff's ferry not to be so good as a rival's ferry, and persuading travellers to cross in the latter and not in the plaintiff's ferry. *Johnson* v. *Hitchcock*, 15 John. R. 185.)

(B) (*Brittain* v. *Israel*, 3 Hawk, 222. *Farrar* v. *Alston*, 1 Dev. 89.)

[1]Eng. Com. Law Reps. iii. 238.

the private knowledge of the landlord (*z*); but if the seller merely affirm that the thing sold is worth so much, or that one would have given so much for it, although the affirmation be false, yet if the buyer might inform himself as to value, no action lies. And this principle, it is said, applies to all cases where the purchaser may easily ascertain the true value (*a*). But where the value of the article is not perfectly obvious upon mere inspection, but requires a particular degree of skill for the ascertainment, or depends upon collateral circumstances, the action may be maintained.

Although the goods have been sold by a written contract, yet the plaintiff is at liberty to give parol evidence of antecedent misrepresentations, for the purpose of proving fraud: as that the seller, by fraud, prevented him from *375
discovering a defect, which he, the seller knew to exist (*b*). It has been held that in an action for fraudulently misrepresenting the profits of a business as amounting to a specific sum, a variance from that amount in the representation proved will be fatal (*c*).

If a merchant sell one kind of silk for another, whereby the purchaser is imposed upon in the value, the action lies (A), although it turn out that the deceit was not in the merchant, but in his factor; for he is responsible, *civiliter*, although not *criminaliter*, for the deceit of his factor (*d*), and it is more reasonable that he who trusted the factor should suffer than that a stranger should.

It must be proved that the damage in fact resulted from the fraudulent act of the defendant (B). Where the plaintiff's agent applied to *A.* for the character of an intended vendee, and *A.* made a fraudulent representation on the subject, and afterwards the defendant, who was the brother of *A.*, to whom the agent also applied, but did not say at whose request, confirmed his account, and the agent communicated *A.*'s representation to the plaintiff, but did not communicate the defendant's representation; it was held

Proof of damage.

(*z*) *Risney* v. *Selby*, Salk. 211; Ray. 1118; Sid. 146; B. N. P. 31. So where the vendor of a public-house, pending his treaty, made false representations concerning the amount of the business done, and the rent received for a part of the premises. *Dobell* v. *Stevens*,[1] 3 B. & C. 625.

(*a*) B. N. P. 31; 1 Sid. 146. Where the plaintiff brought an action against the defendant, alleging that the defendant, having skill in jewels, sold him a stone which he affirmed to be a Bezoar-stone, and sold it as such, judgment was arrested, because the declaration did not allege that the defendant knew that it was not Bezoar-stone, or warranted it. See also *Pickering* v. *Dowson*, 4 Taunt. 779.

(*b*) *Pickering* v. *Dowson*, 4 Taunt. 779; and P. G. in *Kain* v. *Old*,[2] 2 B. & C. 634. And see *Dobell* v. *Stevens*,[1] 3 B. & C. 625.

(*c*) *Gilbert* v. *Stanislaus*, 3 Price, 54. Even although the sum was laid under a *videlicet*. The declaration stated that the defendant, a publican, represented that in his public-house the returns averaged 300*l.* a month; held to be proved by evidence that he said that he was doing 300*l.* a month in his house. *Bowring* v. *Stevens*,[3] 2 C. & P. 337.

(*d*) *Hern* v. *Nicholls*, Salk. 289; B. N. P. 31. [See *Connor* v. *Henderson*, 15 Mass. Rep. 319. *Henderson* v. *Sevey*, 2 Greenleaf, 139.]

(A) (See *Vanvalkenburgh* v. *Evertson*, 13 Wend. 76. *Irvin* v. *Sherril*, 1 Tay. 1. *Inge* v. *Bond*, 3 Hawks. 101. *Thompson* v. *Tate*, 1 Mur. 97. *McFarlane* v. *Moore*, 1 Penn. R. 174. *McGarvock* v. *Ward*, Cooke's R. 404. So an action of deceit lies when a victualler sells meat as fresh, to his customers, at a sound price, which, at the time, was stale and defective, or unwholesome from the state in which the animal died; for, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressed; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade. *Emerson et al.* v. *Brigham et al.* 10 Mass. R. 197. *Kendall* v. *Cunningham*, 4 Mass. R. 502. *Hemenway et al.* v. *Woods*, 18 Mass. R. 524. Where a person has accepted articles manufactured for him, he may maintain an action on the case against the manufacturer, for any deceit and fraud in the workmanship. *Everett* v. *Gray et al.* 1 Mass. R. 101.)

(B) (Where fraud occasions an injury to another, an action will lie. But fraud without damage, or damage without fraud constitutes no ground of action. *Sherwood* v. *Salmon*, 5 Day. 445. In a declaration in an action on the case, for a fraudulent representation, it must be averred that the representation was made with intent to deceive and defraud, or the declaration will be held bad, even after verdict. *Addington* v. *Allen*, 11 Wend. 374.)

[1]Eng. Com. Law Reps. x. 201. [2]*Id.* ix. 205. [3]*Id.* xii. 157.

that the action was not maintainable, for the damage did not result from the defendant's representation, but from *A.*'s (*e*). So no action will lie for any misrepresentation where the plaintiff or his agent knew that the party whose circumstances were misrepresented was insolvent (*f*) (C).

If *A.* falsely represent to *B.* the circumstances of *C.*, in consequence of which *B.* sells to *C.* goods upon credit from time to time, *A.* is liable to *B.* although *C.* pays for the goods first supplied, on the purchasing of which the representation is made (*g*). He continues, it is said, to be liable within a reasonable time, and to a reasonable amount (*h*); in other words the liability depends so much on the peculiar circumstances of each case, that the law cannot define generally the limits either as to time or as to amount. Where *B.* had sold goods to *C.* on the representation of *A.*, and then told *C.* that he would sell him no more without further references, it was held that *A.*'s liability did not extend beyond the time of such declaration (*i*). For this is strong, if not conclusive, evidence to show that the plaintiff was longer deceived by *A.*'s misrepresentation (D).

Evidence in defence.

It is no defence to an action of this nature, that the plaintiff agreed to take the article with *all faults*.

Where the vendor of a ship represented her to have been built in 1816, and in fact she had been built a year earlier, it was held that the plaintiff

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*was entitled to recover, although he was to take her on those conditions (*k*).

So if a watch be warranted which turns out to be worthless, the plaintiff is entitled to recover, notwithstanding a stipulation that if he disliked the watch the vendee would exchange it (*l*). So where *A.* fraudulently misrepresented the circumstances of *B.* to *C.* it was held that he was liable, although he had promised to pay *C.* if *B.* did not (*m*).

Evidence of the actual value of the premises or chattel sold is admissible in reduction of damages, though not in bar of the action (*n*). Where the action was for a misrepresentation of a publican's profits, and in fact he named his brewer, and stated that a pass-book was kept of the beer and spirits, but the plaintiff made no inquiry of the brewer nor asked for the pass-book; it was held that the omissions did not bar the action, but were proper for the consideration of the jury, on the question whether any fraud

(*e*) *Scott* v. *Lara*, Peake's C. 226. Neither did the defendant intend to impose upon the *plaintiff*.

(*f*) *Cowen* v. *Simpson*, 1 Esp. C. 290.

(*g*) *Hutchinson* v. *Bell*, 1 Taunt. 558. But there *B.* stated to *A.* that he proposed to open an account with *C.* as a *general customer*. In the case of *De Graves* v. *Smith*, 2 Camp. 533, *cor.* Ellenborough, C. J., where the interrogation was general, and the false information given without reference to any proposed mode of dealing, it was held that the defendant was responsible for the first parcel of goods only, although the party became insolvent within a few months, and after the delivery of a second parcel on credit.

(*h*) *Ibid.* [See *Rogers et al.* v. *Warner et al.* 8 Johns. 119.]

(*i*) See above, note (*g*).

(*k*) *Fletcher* v. *Bowsher*,[1] 2 Starkie's C. 561, *cor.* Abbott, L. C. J.

(*l*) *Wallace* v. *Jarman*,[2] 2 Starkie's C. 162, *cor.* Ellenborough, L. C. J.

(*m*) *Hamer* v. *Alexander*, 2 N. R. 241.

(*n*) *Pearson* v. *Wheeler*,[3] 1 R. & M. 303.

(C) (Case lies in the name of the principal for a false representation made to the agent. *Raymond* v. *Howland*, 12 Wend. 176.)

(D) (In action on the case for deceit, in selling a vessel as a British vessel, she not being in fact such, it was held that the plaintiff was entitled to damages to the extent of the difference of value of the vessel as sold, and her value if her real character had been known; and also to such damages as the value of repairs made on her on the faith of the representation of her British character, which had not been remunerated by her earnings, or in any other way. *Sherwood* v. *Sutton*, 5 Mason's C. C. R. 1. If the vendor of goods affirm, or warrant them to be of a certain kind or quality, when they are of a different kind or inferior quality, he will be liable to pay the difference to the purchaser, or receive the goods back and rescind the bargain, if it be offered him. *Bradford* v. *Manly*, 13 Mass. R. 139.)

[1] Eng. Com. Law Reps. iii. 475. [2] *Id.* iii. 295. [3] *Id.* xxi. 446.

had been practised (*o*). It is no defence that the plaintiff on a bill filed paid the price of the goods deceitfully sold (*p*) (A).

DEED.

1. As to the Production of the deed, and proof under the plea of *non est factum*.
2. — Evidence by the defendant under the same plea.
3. — Evidence under special pleas.
4. — Admissibility and effect of a deed in evidence.

Non est factum.

THE plea of *non est factam* (*q*) puts in issue the execution of the deed, and its continuance as a deed at the time of the plea. Where the plaintiff has not the possession of the deed, he may aver that it has been lost or destroyed, or that it is in the possession of the adversary (*r*); but the deed if pleaded with a profert must be produced, or the plaintiff will be non-suited (*s*). Where the deed has been improperly pleaded with a profert on *non est factum*, he should move to amend the record; but an application at *Nisi Prius* for that purpose comes too late (*t*). If a deed be alleged to be lost through time and accident, but be found before the trial, it may be given in evidence (*u*) (B).

Proof of execution.

Proof of the execution consists in evidence of the sealing and delivery of the deed by the testimony of the attesting witness (*x*), in the manner already stated (*y*) (1). The deed may be admissible in evidence although when produced at the trial it appear that the seal has been torn off. As, where it *was sealed when pleaded, and the seal was afterwards torn off; *377

(*o*) *Bowring* v. *Stevens*,[1] 2 C. & P. 337.

(*p*) *Jendwine* v. *Slade*, 2 Esp. C. 573.

(*q*) It seems that if issue be taken on the improper plea of *nil debet* to a declaration on a bond, the execution of the deed stands admitted. On such an issue taken in an action by executors on a bond to the testator, evidence was admitted of an admission of the amount of the debt by the defendant, and the plaintiffs recovered without proof of the bond. York Summer Assizes, 1827, *cor.* Bayley, J. Where the defendant, *W. F. B.*, executed the bond in the name of *W. B.*, and appeared at the time to be known by the latter name, and the declaration was against *W. F. B.*, sued by the name of *W. B.*; upon the plea *non est factum*, held, that the bond was not void, and that the objection, if valid, could not be available under that plea. *Williams* v. *Bryant*, 7 Dowl. 502.

(*r*) *Reed* v. *Brookman*, 3 T. R. 151; *Totty* v. *Nesbitt*, Ibid. in note. *Bolton* v. *Bishop of Carlisle*, 2 H. B. 259.

(*s*) *Smith* v. *Woodward*, 4 East, 585.

(*t*) *Paine* v. *Bustin*,[2] 1 Starkie's C. 74.

(*u*) *Hawley* v. *Peacock*, 2 Camp. 557.

(*x*) Bac. Ab. Ev. 647.

(*y*) Vide Vol. I. Ind. tit. DEED.

(A) (Where a certificate was given that a party is honest and of good character, and the party certifying believes he would honourably endeavour to perform faithfully every engagement; in an action of deceit—evidence that the person recommended was insolvent and worthless when the certificate was given, is admissible. *Williams* v. *Wood*, 14 Wend. 126. And a defendant in such case is not at liberty to show that the certificate was given for a specific purpose, *e. g.* to enable the person recommended to buy a garden spot at a particular place, and thus rebut the intent to enable him to obtain goods at another place. But the defendant might have shown that he believed the representation made, and was himself the dupe of the artifices of the person obtaining the certificate. Ib. No action will lie for obtaining a decree by false and forged evidence, while such decree remains in force. *Monroe* v. *Maples*, 1 Root, 553. *Beck* v. *Woodridge*, 3 Day, 30.)

(B) (*Non est factum* puts in issue the execution of the deed only. Every material averment, beside that of execution, is admitted. *Dale* v. *Roosevelt*, 9 Cow. 307. And this though the plaintiff stipulate that, under the plea the defendant may give any special matter in evidence, as if pleaded. Ib.)

(1) [On the plea of *non est factum*, proof that the defendant acknowledged in court that he had *subscribed his name* to the instrument and delivered it *as a form* by which to draw such an instrument, without proof that he ever acknowledged the same or delivered it as *obligatory upon him*, is not sufficient to charge him. *Asberry*, &c. v. *Colloway*, 1 Wash. 73. On the same plea to an action against executors, evidence that the obligor (the testator) was an illiterate German—that the subscribing witnesses, at the time of its alleged execution, lived sixty miles off, in another state,—that they and the obligee were persons of general bad character—and that many respectable persons, who spoke both German and English, lived in the obligor's neighbourhood, at the time when the instrument was alleged to be executed—was admitted as circumstances from which the jury might infer that the testator did not execute it. *Sides* v. *Schnebly*, 3 Har. & M'Hen. 243.]

[1] Eng. Com. Law Reps. xii. 157. [2] *Id.* ii. 302.

for, as has been already observed, the issue is upon its continuance as a deed at the time of pleading (*z*). And after the plea with a profert, it is in the custody of the law, and if the seal be broken off in court the law will not allow the innocent party to be prejudiced (*a*). So it may be shown that the seal has been torn off by accident after the execution of the deed (*b*); and before the time of pleading (*c*); or that it has been cancelled through the practice of the obligor (*d*) (A) (1).

If the deed be altered by the party (the obligee) himself, although but in an immaterial point, he thereby avoids the deed (*e*); for the law takes every man's act most strongly against himself. An alteration by a stranger, in an immaterial point, will not avoid the deed; but it is said to be otherwise if a stranger alter it in a material point, for the witnesses cannot prove it to be the deed of the party where there is any material difference (*f*) (2). And an alteration in any covenant will avoid the whole deed, for the deed cannot be the same unless every covenant be the same (*g*).

If an interlineation appear in a deed, and there be no evidence to show how it was done, it will be presumed to have been done before the execution (*h*).

Where a deed operated differently as to different parties, and after execution by some, and before the execution by others, was altered in parts, which did not affect the former, but only the latter, it was held to be binding on all (*i*).

(*z*) Besides this, the deed, after it has been pleaded with a profert, is in the custody of the law. Cro. Eliz. 120; 5 Co. 119, b.; 2 Bulst. 247; Dy. 59, pl. 12, 13; Doc. Pl. 262; Roll. R. 39, 40; 2 Roll. Ab. 29; [2 Pick. Rep. 458.]

(*a*) *Smith* v. *Woodward*, 4 East, 585. If the seal be broken off in court, the deed shall be enrolled for the benefit of the parties; for where anything is impaired whilst in the custody of the law, it is restored by the benignity of the law as far as possible. 1 Inst. 676.

(*b*) And this is a question for the jury. In Palm. 403, it was holden that a deed leading the uses of a recovery was good evidence of such uses, although the seals were torn off, it being proved to have been done so by a young boy. B. N. P. 268. It is there suggested that such evidence would not be sufficient under the plea of *non est factum*, although it might where the deed was used as evidence collaterally.

(*c*) Pal. 403; 1 Mod. 211. (*d*) 1 Vent. 297.

(*e*) B. N. P. 267; 10 Co. 92; 11 Co. 27, a.

(*f*) B. N. P. 267; 11 Co. 27. *Qu.* therefore, whether the deed is avoided by the act of a stranger, where the contents of the original deed can be satisfactorily proved. As the act of a stranger in tearing off the seals does not vitiate the deed, it is difficult to say why his alteration of it should avoid it; the reason above assigned for considering it to be *wholly void* assumes that which may or may not be true, according to circumstances. See Com. Dig. tit. Fait, (1); Roll. 41 Cro. Eliz. 626; Mo. 10 (3).

(*g*) 11 Co. 28, b.; B. N. P. 267.

(*h*) Vin. Ab. vol. 12, p. 58. But see below, 377 (*a*).

(*i*) *Doe* d. *Lewis* v. *Bingham*,[1] 4 B. & A. 672.

(A) (Whether an instrument of writing be under seal or not, is a question of law to be determined by the Court, from the inspection of the instrument; and ought not to be submitted to the jury. *Duncan* v. *Duncan*, 1 Watts, 322. Several persons may bind themselves by one seal. *Ludlow* v. *Simonds*, 2 Caine's C. *Mackay* v. *Bloodgood*, 9 John. R. 285.)

(1) [See *Cutts* v. *United States*, 1 Gallison, 69, where it was decided that a deed is not avoided by the seal's being torn off fradulently or innocently by *the obligor*, but may be declared on as a subsisting deed.] {But an instrument so mutilated should not be declared on as a deed, without a profert, but the fact should be stated as an excuse for not making a profert. *Powers* v. *Ware*, 2 Pick. Rep. 451.}

(2) [As to the effect of the alteration of deeds, see *Chesley* v. *Frost*, 1 N. Hamp. Rep. 145. *Penny* v. *Carwithe*, 18 Johns. 499. *Hatch* v. *Hatch*, 9 Mass. Rep. 307. *Barrett* v. *Thorndike*, 1 Greenleaf, 73. The effect of an alteration in a deed conveying land is different from an alteration of a bond, &c. A grantee's title is not impaired by a voluntary destruction of his title deed, or by an immaterial alteration thereof fraudulently made by himself. *Hatch* v. *Hatch*, and *Barrett* v. *Thorndike*, *ubi sup.* See also *Doe* d. *Beanland* v. *Hirst*, note (*p*) on this page.]

(3) [In *Prevost* v. *Gratz & al.* 1 Peters' Rep. 369, and *Morris's Lessee* v. *Vanderen*, 1 Dallas, 67, it was held that a material erasure, or interlineation, shall be presumed to have been made *before* the execution of the deed unless the contrary be shown.] {Attesting witnesses are not necessary to a deed, and where their names are erased, it is incumbent on the party wishing on that account to avoid the deed, to prove that the erasure was made *after* its execution and delivery, and by the grantee, or those claiming under him, for if done by a stranger, it would not avoid the deed. *Wickes's Lessee* v. *Caulk*, 5 Har. & Johns. Rep. 36.}

[1] Eng. Com. Law Reps. vi. 560.

Where the lessor of the plaintiff in ejectment claimed under a deed proved to have been mutilated after execution, it was held that the deed was void, but that the avoidance did not devest the estate, which had passed under the deed (*k*).

The proof of the execution of a deed has already been considered (*l*). No particular form of delivery is essential. Mere delivery without words is sufficient (*m*); as if the obligor throw it down on a table, with *intent* that *the party shall take it, and he takes it accordingly (*n*); or deliver it *as his deed* into the hands of a stranger (*o*). But it is otherwise if he deliver it to a stranger as an *escrow*, to be his deed upon performance of *conditions* (*p*) (A); and it cannot be delivered to the obligee as an *escrow* (*q*). A delivery by a stranger with the assent of the maker is sufficient (*r*). Proof of delivery. *378

A delivery may also be by words, without an actual delivery; as where the deed lies on the table, and the obligor says to the obligee, "take it up as my deed" (*s*) (1).

If the obligor once deliver it as his deed, with intent that it shall be so,

(*k*) *Doe* v. *Hirst*,[1] 3 Starkie's C. 60.

(*l*) *Supra*, Vol. I. Ind. tit. DEED. A party may be bound by a covenant in an indenture of lease, although he does not seal it, if he agree to the lease (Co. Litt. 231, a.; Com. Dig. tit. Fait, A. 2). As where *A.* demises to *B.* and *C.*, who covenant with *A.*, and *B.* seals the counterpart, and *C.* agrees to the lease, but does not seal it.

(*m*) Co. Litt. 36, a.; 2 Roll. 24, l. 28, 45.

(*n*) Ow. 95. But it is no delivery, unless the intent be found. Ibid. and 1 Lev. 140.

(*o*) 2 Roll. 24, l. 42. Although it was not to be delivered till after the performance of a condition. 2 Roll. 25, l. 30; 1 Lev. 152.

(*p*) Co. Litt. 36, a.; 2 Roll. 25, l. 25. (*q*) 2 Cro. 85, 6.

(*r*) Perkins's Fait. 137; and Com. Dig. Fait. A. 3.

(*s*) Co. Litt. 36, a.

(A) (It is not necessary that the term escrow should be used, when an instrument is delivered to a third person to prevent its taking immediate effect. *Clark* v. *Giffard*, 10 Wend. 310. But an agreement to deliver a deed as an *escrow*, to the person, in whose favour it is made, and who is likewise a party to it, will not make the delivery conditional; the delivery will be deemed absolute, and a consummation of the execution of the deed. Simonton's Estate, 4 Watts, 180.)

(1) [The delivery of every deed must be proved, as well as the execution of it, being an essential requisite to its validity (*Jackson* v. *Dunlap*, 1 Johns. Cas. 114); but the possession of a bond being with the obligee is sufficient evidence of a delivery. *Clark* v. *Ray*, 1 Har. & J. 323. S. P. *Mallory* v. *Aspinwall*, 2 Day, 280, in case of an ancient deed. A formal delivery is not essential, if there be acts evincing an intention to deliver. *Goodrich* v. *Walker*, 1 Johns. Cas. 250. A deed may be delivered by words, or by acts without words—and may be good even if delivered to a stranger without special authority, if intended for the use of the grantee. *Verplank* v. *Sterry & ux.* 12 Johns. 536. If a deed has once been delivered, so as to take effect, a second delivery can be of no avail. *Ibid.* Where one, after executing a deed, left it on the table where it remained all night, and in the morning took it up and put it away; it was held there was no evidence of a delivery. *Ward's Ex'rs* v. *Ward*, 2 Hayw. 226. Where *A.* living in New York, agreed with *B.* of Massachusetts, to give him a deed of his farm, as security for a debt, and accordingly executed a deed to *C.* in 1808, and left it at the clerk's office to be recorded—neither the grantee nor any person on his behalf being present to receive it—and the grantee died in 1809, and in 1810, *A.* sent the deed to his heir; it was held that there was no delivery. *Jackson* v. *Phipps*, 12 Johns. 418. See also *Maynard* v. *Maynard & al.* 10 Mass. Rep. 456. But a delivery of a deed to a third person, for the use of the grantee, and without his knowledge, becomes a valid delivery on the subsequent *assent* of the grantee, which relates back to the original time of delivery. *Ruggles* v. *Lawson & al.* 13 Johns. 285. *Belden* v. *Carter*, 4 Day, 66. *Hatch* v. *Hatch*, 9 Mass. Rep. 307. *Commonwealth* v. *Seldon & al.* 5 Munf. 160. *Harrison & al.* v. *Trustees of Phillips Academy*, 12 Mass. Rep. 456. See also *Beckman* v. *Frost*, 18 Johns. 544. 1 Johns. Ch. Rep. 288. *Souverbye* v. *Arden*, 1 Johns. Ch. Rep. 240. *The Trustees of the Methodist Church* v. *Jaques*, ibid. 450. *Bickford* v. *Daniels*, 2 N. Hamp. Rep. 71.] {Where it was proved by the subscribing witness to a deed, that the grantors signed and sealed it, but that the grantee was not present at the execution thereof, nor any one on his behalf, to the witnesses' knowledge, and that the deed when executed was delivered to one of the grantors, and by the direction of another, who had a power of attorney appointing him the grantee's general agent, of a date anterior to the execution of the deed, was put upon record, and remained in the Register's Office until called for by the counsel of the grantee, it was held,—the question as to its due execution and delivery being raised, not by any party to the deed, but by a stranger—that the jury might, from the facts above stated, presume a delivery. *Gardner* v. *Collins*, 3 Mason's Rep. 398.}

[1]Eng. Com. Law Reps. xiv. 162.

he cannot by any subsequent words explain his intent to be otherwise (*t*) (A).

One who executes a deed for another, under a power of attorney, must execute it in the name of the principal; but no particular form of words is essential (*u*) (1).

The due execution of a deed may be presumed from circumstances (*v*).

Variance. In general, where an action is brought against one of several covenantors or obligors, the defendant cannot take advantage of it, except by plea in abatement (*x*).

If the plaintiff declare on a bond made by two, it is no variance under the plea of *non est factum* that the bond was made by three (*y*). But if one of several covenantees or obligees bring an action without averring that the rest are dead, the defendant may take advantage of it at the trial, as a variance under the plea of *non est factum* (*z*).

If the deed appear to be razed or interlined, it is a question for the jury, whether it was the individual contract delivered by the party (*a*).

A variance between the real name of the defendant from that which is given him in the deed, and by which he is sued, is immaterial (*b*).

*379 *If the deed read vary from that described in the declaration, in legal effect, the variance will be fatal (*c*). As, if it describe the consideration for

(*t*) Com. Dig. Fait. A. 3. [See *Johnson et al.* v. *Baker*,[1] 1 B. & A. 440.] But *qu.* whether the delivery is absolute where the deed is delivered to the obligee as an *escrow* to be his deed on performance of a condition. Ibid.; and see Vol. I. Ind. tit. DEED.

(*u*) *Wilks* v. *Back*, 2 East, 142.

(*v*) Where, on the execution of a composition-deed with creditors, a dispute arising as to the exact amount of the debt of one, the deed was executed with a blank as to that sum, and the amount was inserted the following day, upon the vouchers being produced, but the attesting witness was not present, and the deed was not proved to have been re-executed or re-delivered, but there was evidence of its being subsequently recognized and acted upon by the defendant; held that the Judge properly referred it to the jury to say whether they would not presume an execution after such insertion, or that it was not to be considered as delivered as a perfect deed until the sum was so inserted: held also (per Holroyd, J., on the trial), that the attorney who prepared the deed on the retainer, and on behalf of the trustees, was a competent witness in an issue directed by the Court to try its validity, notwithstanding one of the trusts was for the payment, in the first instance, of the costs attending the preparing it, and he was also a defendant in another action, the result of which depended on that validity of the deed; the Court not questioning the decision of that learned Judge, and being satisfied that the justice of the case had been obtained by the verdict. *Hudson* v. *Revett*,[2] 5 Bing. 368.

(*x*) See the case, 1 Will. Saund. 154, n. 1. *Whelpdale's Case*, Rep. 199; *Gilbert* v. *Bath*, 1 Str. 503.

(*y*) *South* v. *Tanner*, 2 Taunt. 254.

(*z*) 1 Will. Saund. 154, and the cases there cited.

(*a*) B. N. P. 267; 10 Co. 92. Formerly the Judges decided upon the profert, or view of the deed, whether it was void by reason of erasure or interlineation; but when deeds grew to be voluminous, they found it inconvenient to decide upon demurrer, and referred it to a jury. B. N. P. 267.

(*b*) A party ought to be sued by the name given him in the bond, &c. A declaration against him by his right name, stating that in another name he executed the bond, has been held to be bad. *Gould* v. *Barnes*, 3 Taunt. 504. See above, 376, note (*q*).

(*c*) See *Swallow* v. *Beagmont*, *supra*, 343; *Sands* v. *Ledger*, 2 Ld. Raym. 792; *Howell* v. *Richards*, 11 East, 633; *Browning* v. *Wright*, 2 B. & P. 19.

(A) (If a grantor place a deed on record, it is not an absolute delivery, but only evidence of it, of which the jury may judge. *Chess* v. *Chess*, 1 Penn. R. 32. Where a deed of lands was delivered as an escrow, and an absolute delivery subsequently made, but previously to the second delivery a judgment was obtained against the grantor, under which the lands were sold; it was held, that the purchaser under the judgment was entitled to the land. *Jackson* v. *Rowland*, 6 Wend. 666. A deed requiring the approbation of a third person to render it valid, although executed before, becomes operative from the time that such approbation is in fact given. *Jackson* v. *Hill*, 5 Wend. 532.)

(1) [It is indifferent whether an attorney sign a deed "B. W. attorney for R. C." or "R. C. by B. W. his attorney." *Jones's Devisees* v. *Carter*, 4 Hen. & Mun. 184. But where an attorney signed *his own name*, without adding any reference to his constituent, it was held that the deed was inoperative, although it recited a proper letter of attorney, and although the concluding words of the deed were—"In testimony whereof, I have hereunto set the name and seal of the said J."—who had executed the letter of attorney. *Elwell* v. *Shaw*, 16 Mass. Rep. 42. 1 Greenleaf, 339, S. C.]

[1]Eng. Com. Law Reps. vi. 479. [2]*Id.* xv. 467.

the defendant's covenant improperly (*d*); or allege that as absolute which is merely qualified and conditional (*e*).

Where the declaration, in setting out one of the several covenants in a lease, on which breaches were assigned, described it to be the Cellar Beer Field, by mistake for the Aller Beer Field, the variance was held to be fatal, as amounting to a misdescription of the deed declared on (*f*).

The defendant prayed *oyer* of the condition of a bond, which was for the payment of 100*l.* by instalments, till the said sum be paid; the defendant then pleaded *non est factum;* and it appeared that the word *hundred*, where it should have occurred the second time in the condition of the bond, had been omitted, but had afterwards been inserted without the defendant's knowledge; it was held, that although the alteration did not avoid the instrument, yet, that it caused such a variance between the condition set out on the record on *oyer* and the condition on the bond produced, that the plaintiff could not recover (*g*) (1).

Evidence for the defendant.

2. The defendant may give in evidence any matter which shows either 1st, that the deed was originally void, or, 2dly, that it was avoided by matter subsequent before the plea; for the plea is in the present tense, and if it has been avoided, it was not the defendant's deed at the time of pleading (*h*).

Proof by defendant.

1st. That it was originally void. As where a bail-bond is taken after the return of the writ (*i*). That it is a forgery; that he was made to sign it when he was so drunk that he did not know what he did (*k*); that he was a lunatic (*l*) (A); that it was obtained by fraud, and without any real assent of the mind, having been falsely read over to him, being a blind man, or unable to read (*m*) (2); that she was a feme covert (*n*); that the deed was delivered as an *escrow*, upon a condition not yet performed (*o*) (a); that it was delivered to a stranger for the use of the plaintiff, who refused it, for the refusal deraigns the bond (*p*); that it was made to a feme covert, and that the husband disagreed, and refused to accept it (*q*); that the deed was cancelled before the plea; that a material erasure was made in the deed, or that the seal was torn off before the plea (*r*) (B); but this, it seems, is but

(*d*) *Swallow* v. *Beaumont*, *supra*, 247.

(*e*) See *Brown* v. *Knill*,[1] 2 B. & B. 395. *Tempany* v. *Burnand*, 4 Camp. 20. See also 1 Camp. 195; 14 East, 568; 7 Taunt. 305;[2] 1 B. & A. 57; and Vol. I. tit. VARIANCE.

(*f*) *Pitt* v. *Green*, 9 East, 188. (*g*) *Waugh* v. *Bussell*,[3] 1 March. 214.

(*h*) Gilb. L. Ev. 173, 2d edit. [In *Manwood* v. *Harris*, Savile, 71, it was held that matter *subsequent* to the execution of the deed, which avoids it, must be *pleaded*, and cannot be given in evidence under the issue of *non est factum*. That case, however, is not law.]

(*i*) *Supra*, tit. BAIL-BOND.

(*k*) *Cole* v. *Robins*, B. N. P. 172. See tit. DRUNKENNESS.

(*l*) B. N. P. 172. *Yates* v. *Boen*, Str. 1104. [*Wigglesworth* v. *Steers & al.* 1 Hen. & Munf. 69. *King's Ex'rs* v. *Bayant's Ex'rs*, 2 Hayw. 394. *Curtis* v. *Hall*, 1 Southard's Rep. 361.]

(*m*) B. N. P. 172. {*Armstrong et al.* v. *Hall*, 1 Coxe's Rep. 178; *Jackson* v. *Haynes*, 12 Johns. 469.}

(*n*) Ibid.; 2 Wils. 352; Burr. 1805; Lord Ray. 363.

(*o*) B. N. P. 172; 2 Roll. Ab. 683; 5 Co. 19.

(*p*) 5 Co. 119, b. (*q*) Ibid.

(*r*) Formerly the Court decided on view of the deed, upon profert made, whether it was void or not from

(1) {A variance in date, between the bond declared upon and that produced on oyer, is matter of substance, and fatal upon the plaintiff's special demurrer to the defendant's bad rejoinder. *Cooke* v. *Graham's Adm'r*, 3 Cranch, 229.}

(A) (Imbecility of mind not amounting to lunacy or idiocy in the grantor of land, is not sufficient to avoid his deed, where in the obtaining it, there is no fraud. *Odell* v. *Buck*, 21 Wend. 142.)

(2) {Or that a different instrument was substituted for that which the defendant supposed he was executing, *Moore* v. *Carpenter*, Cam. and Nor. 553. *Van Valkenburg* v. *Rouk*, 12 Johns. 337.}

(a) Or that it was *not* delivered. *Roberts* v. *Jackson*, 1 Wendall, 478. *Jackson* v. *Perkins*, 2 Wendall, 308.

(B) (Where the seals of an agreement were torn off by one with whom it had been left for safe keeping

[1]Eng. Com. Law Reps. vi. 167. [2]*Id.* ii. 114. [3]*Id.* i. 241.

presumptive evidence of such an act on the part of the obligee as will cancel the deed, for the latter may show that the seal was torn off by accident (*s*); or that the alteration was made by a stranger in a point not ma-
*380 terial, and without his *privity (*t*) (A). But an alteration by the obligee himself, even in an immaterial point, will, it is said, avoid the deed (*u*). An alteration in any one covenant will avoid the whole deed, for the deed is not the same, unless all the covenants be the same (*x*) (B).

Where the deed is a joint one (*y*), or both joint and several (*z*), the defendant who is sued may show that the seal of one of the obligors has been torn off, for the manner of the obligation becomes different, and a presumption arises that the obligee has been satisfied. But it is otherwise where the obligation is entirely several (*a*).

Where *A.*, with a blank left after his name, is bound to *B.*, and afterwards the name of *C.* is added as a joint obligor, the bond is not avoided, for the addition does not alter the contract of *A.*, who was bound to pay the money independently of any addition (*b*) (1).

Where a bond was made to *C.*, with blanks left for the christian name and addition, which were filled up afterward with the assent of the parties, it was held that the bond was void (*c*). And in general, if blanks be left at the time of execution, and be afterwards filled up, the deed will be avoided, for it is no longer the same contract that was sealed and delivered (*d*); but an immaterial addition will not avoid the deed (*e*) (C). The

rasure (10 Co. 92); and they held that a raised or interlined deed was void, because they could not sufficiently collect the intention of the obligor. 10 Co. 92; Bac. Ab. Ev. F. 649. See above, 378, note (*a*), and 377, note (*h*).

(*s*) B. N. P. 172.

(*t*) B. N. P. 171. But see 11 Co. 27, and Str. 1160; where it is laid down, that an alteration by a stranger in a material point will avoid the deed, because the witnesses cannot then say that it is the deed of the party. Vide *supra*, 377.

(*u*) *Pigott's Case*, 11 Co. 27, B. N. P. 267; vide *supra*, 377.

(*x*) 11 Co. 27, 28, b.; B. N. P. 267.

(*y*) Noy, 172; B. N. P. 268: 11 Co. 28; 2 Show. 28, 29; 2 Roll. Rep. 39, 40; 5 Co. 23, a.; Cro. Eliz. 546; Doc. Pl. 260, 262, 263; Poph. 161; 2 Roll. R. 30.

(*z*) March. 125; 2 Show. 29; Bac. Ab. Ev. 652; B. N. P. 268.

(*a*) Ibid.

(*b*) 2 Lev. 35; 2 Keb. 872, 881; Moor. 547, 619; Cro. Eliz. 627; B. N. P. 281. [2 Ch. Rep. 187.]

(*c*) Roll. R. 39, 40.

(*d*) Ibid.; 2 Roll. Ab. 29; B. N. P. 281.

(*e*) Vent. 185.

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by both parties; held, that this did not destroy the deed. *Rees* v. *Overbaugh*, 6 Cow. 746. *Cutts* v. *U. S.*, 1 Gallis, C. C. R. 69.)

(A) (An alteration in a bond made by one of the clerks of the custom house, after its execution, for the purpose of rectifying it; but which did not affect its construction; was held to be the act of a stranger, and immaterial, and not to avoid the bond. *The U. S.* v. *Hatch*, 1 Paine's C. C. R. 336.)

(B) (*A.* being in custody under an execution, applied to a Judge of the Common Pleas, to give bond and receive a discharge, and for that purpose, he and *B.*, his surety, wrote their names on a blank paper, and affixed their seals, and left it with the judge, desiring him to fill it up; the judge gave the discharge and took away the bond, and afterwards filled it up accordingly; *held*, that the bond was valid and binding. *Wiley* v. *Moor*, 17 Serg. & Rawle, 438. A bond executed in blank as to a material part, with parol authority to an agent to fill up the blank, and deliver it is valid. *Ex parte Kerwin*, 8 Cow. 118.)

(1) [*Texira* v. *Evans*, cited by Wilson, J. 1 Anst. 228. *Matson* v. *Booth*, 5 M. & S. 223. *Hunt* v. *Adams*, 6 Mass. Rep. 519. *Smith* v. *Crooker & al.* 5 Mass. Rep. 538. *Speaks & al.* v. *U. States*, 9 Cranch, 28. *Whiting* v. *Daniel*, 1 Hen. & Mun. 391. *Wooley & al.* v. *Constant*, 4 Johns. 55—where it is held that by consent of parties, alterations may be made in a deed by adding, or by erasing and substituting obligors' names, &c., and that parol evidence of such consent is admissible, and that it is immaterial whether the consent be given before or after the execution of the deed—and that consent may in some cases be implied from the nature of the alteration, as well as expressed. {*Barrington* v. *The Bank of Washington*, 14 Serg. & Rawle, 405.} Sed vide *Moore & al.* v. *Lessee of Bickham & al.* 4 Binney, 1. See also *Oneale* v. *Long*, 4 Cranch, 60.]

(C) (If a deed be altered after delivery, the alteration destroys the deed as to the party who altered it, but does not destroy the estate. *Withers* v. *Atkinson*, 1 Watts, R. 236. *Jackson* v. *Gould*, 7 Wend. 364. Whether interlineations and erasures have been made in a deed before or after its execution, is a question for the jury to decide. *Heffelfinger* v. *Shutz*, 16 Serg. & Rawle, 44.)

defendant may also show that the deed after execution was altered, and without any new stamp (*f*).

The defendant cannot, under this plea, give any matter in evidence which avoids the deed either at common law or by statute, unless it impeach the execution or continuance of the deed (*g*); and therefore cannot give in evidence that the deed is void for usury (*h*); or that the bond was delivered to the plaintiff himself upon a condition not performed (*i*); or to a stranger but not an *escrow* (*k*). So, in all cases where the deed is merely voidable, but not void, the matter must be specially pleaded, and is not evidence under this plea (*l*); as for infancy (*m*), duress, or where it was obtained by threats (*n*); nor can he read the condition of the bond to show that it is void, as being in restraint of marriage, or for any other illegality (*o*).

Where the plea is *non est factum* generally, the proof lies upon the plaintiff; but where the plea shows that the deed is void for special matter, the issue is on the defendant (*p*).

3. The usual pleas in avoidance of a deed are, that it was obtained by duress, *which will be supported by proof that he was forced to give the bond by a wrongful imprisonment (*q*); by threats, and then proof of a menace of life, member, mayhem, or imprisonment, is sufficient, it is said, to avoid a deed (*r*); but a threat of battery, or of injury to the party's house or goods, is, it is said, insufficient, because the party may recover damages for the injury (*s*); this, however, is clearly a very inadequate reason for the distinction, and may be frequently false in fact. Under the plea of duress, it is a question for the jury whether the act of the party was voluntary, or was the result of terror and apprehension (A). Special plea in avoidance. *381

So the defendant, in avoidance of the deed, may plead coverture (*t*), infancy (*u*), or that the deed was void under the statute of usury, or against gaming (B), or for other illegal matter (*x*), fraud or covin, and in some instances mistake (*y*) (C).

Other pleas in answer are, of a tender; *solvit ad*, or *post diem* (*z*); or a release (*a*), which must be produced and proved as a deed; performance

(*f*) 1 Ford. 84. See tit. Stamp.
(*g*) *Cotton* v. *Goodright*, Bl. 1008; 5 Co. 119, a.; Com. Dig. Pleader, 2 W. 18;[1] 2 Starkie's C. 35.
(*h*) 5 Co. 119, a.; Com. Dig. Pleader, 2 W. 18. (*i*) 9 Co. 37, a.
(*k*) Dyer, 167, b. (*l*) Com. Dig. Pleader, 2 W. 18.
(*m*) B. N. P. 172; Ca. K. B. 609. Per Lord Mansfield, Burr. 1805; Lord Raym. 315. But where infancy actually avoids the deed, it is evidence on the plea of *non est factum*. Per Eyre, J., 2 H. B. 515.
(*n*) 5 Co. 119, a.; Com. Dig. Pleader, 2 W. 18. (*o*) Bl. 1008.
(*p*) Mod. Ca. 218; Com. Dig. Pleader, 2 W. 18.
(*q*) 2 Ins. 482; Com. Dig. Pleader, 2 W. 19. But this is no plea, if the deed be acknowledged by the defendant to be enrolled of record. 2 Roll. 862.
(*r*) 2 Ins. 483; Cl. Ass. 72; Com. Dig. Pleader, 2 W. 20.
(*s*) 2 Ins. 483. (*t*) See tit. Husband & Wife.
(*u*) See tit. Infant. (*x*) See tit. Tender.
(*y*) See tit. Parol Evidence. In some instances the mere *suppressio veri* will avoid a deed. *Gordon* v. *Gordon*, 3 Swanst. 400.
(*z*) See tit. Payment. (*a*) See tit. Release.

(A) (But one obligor cannot plead that the bond was obtained from a co-obligor by duress. *Thompson* v. *Lockwood*, 15 John. R. 256. *Simms* v. *Barfoot's Ex'rs*, 2 Hay. 402. And a deed obtained by sureties for their indemnity, under a threat of legal process in case of refusal, cannot be set aside by the bargainor for duress in its execution. *Hart* v. *Bass*, 2 Dev. Eq. 292.)

(B) (*Lessee of Burd* v. *Swearingen*, 1 Ohio R. 403.)

(C) (*Gibson* v. *Porter*, 2 Dev. & Bat. 530. But the want or failure of consideration cannot be set up at law to impeach a specialty. *Vrooman* v. *Phelps*, 2 Johns. R. 177. *Dorlan* v. *Sammis*, Ib. 179, n. *Parker* v. *Parmele*, 20 John. R. 130. And no person but the party to a deed, who alleges fraud to have been practised upon him, or those claiming title under him, will be allowed to impeach or avoid the deed on the ground of such fraud. *Jackson ex dem. Hungerford* v. *Edson*, 20 John. R. 478.)

[1] Eng. Com. Law Reps. iii. 232.

of the condition; a defeazance, which must be proved as a deed, if denied by the replication (*b*); eviction (*c*); expulsion (*d*).

Proof by, when necessary.

4. It is a general rule, that parties to a deed and those who are privy in estate can found no claim upon the deed without showing it to the Court (*e*). and where the contract creates the obligation, it can neither be pleaded nor given in evidence unless it be under seal, but it is otherwise where the interest vests, although the deed has no continuance (*f*).

Where an estate is claimed by act of law, the party may make his claim without showing the deeds; as where the party is tenant in dower, or by elegit, or guardian in chivalry; for where the law creates an estate, but does not give custody of the deeds, it must allow the estate to be defended without them (*g*). But a tenant by the curtesy cannot claim an estate lying in grant, without deed, because he has the custody of the deeds in right of his wife (*h*).

Where the plea is, that *J. S.* was enfeoffed by deed, it seems that a parol feoffment cannot be proved; for if the jury were to find the issue for the defendant, the plaintiff would be for ever after estopped, although there was no such deed (*i*). So a demise may be proved by parol, for it may be by livery; but if it be alleged to have been by deed, it must be proved by deed (*k*). The delivery will be *estopped* by the livery, unless he produce the indenture to show that it was merely conditional.

A deed of feoffment is evidence to prove livery, where the party has had possession (*l*), but if possession has not gone along with the deed, livery must be proved under a plea of feoffment (*m*). Upon a plea that *J. S.*

*382 *enfeoffed the defendant without saying *per indenturam*, the indenture is evidence of the feoffment (*n*). A deed of feoffment may be given in evidence as a release; for where the party is already in possession, the deed alone will be a sufficient contract to transfer a right (*o*). Where a thing lies in livery, a deed is evidence, although the seal be torn off, for the deed is only the evidence of transferring the possession, which being once transferred by livery does not return (*p*); but it is otherwise where the thing to which the title is claimed (as a watercourse) lies in grant, for a man cannot claim a thing lying in solemn agreement but by solemn agreement (*q*).

The production of an original lease for a long term of years, coupled with a possession for seventy years, was held to be presumptive evidence of the execution of all mesne assignments (*r*). A deed takes effect from the delivery. A condition to pay for goods, then and afterwards to be delivered does not bind as to goods delivered between the date and execution (*s*).

(*b*) Com. Dig. Pleader, 2 W. 35; Mo. 573.
(*c*) Vide *supra*, tit. COVENANT.
(*d*) Ibid.
(*e*) Co. Litt. 267; 10 Co. 92.
(*f*) Roll. R. 39, 40; 2 Buls. 246.
(*g*) 10 Co. 93, 94.
(*h*) 10 Co. 94; Co. Litt. 226, a.
(*i*) 2 Roll. Ab. 682.
(*k*) Ibid.
(*l*) Roll. R. 192, 227; Tri. per Pais, 290; Cro. Jac. 423; Bac. Ab. F. 648.
(*m*) Bl. Comm. 67.
(*n*) 2 Roll. Ab. 682.
(*o*) Tri. per Pais, 209; Bac. Ab. Ev. F. 649.
(*p*) Pal. 403; Mod. 11; Vent. 14; 2 Keb. 556; 2 Lev. 220; 2 Show. 28. The livery being indorsed. Roll. Ab. 29. The cancelling of a deed does not revest the property conveyed. *Bolton* v. *Bishop of Carlisle*, 2 H. B. 263. *Roe* d. *Lord Berkely* v. *Archbishop of York*, 6 East, 86, per Holroyd, J., in *Doe* d. *Lewis* v. *Bingham*,[1] 4 B. & A. 677; and per Bayley and Holroyd, Judges, in *Doe* v. *Hirst*,[2] 3 Starkie's C. 60. A lease on a dispute between a lessor and lessee, was ordered by a Court of Equity to be deposited with the attorney of the lessor, and in an action by the lessee against the tenant in possession, was produced, having the names of the parties torn off; it was held that it was still evidence of the lessee's title, and that the facts did not show a surrender in law, or by deed or note in writing. *Doe* v. *Thomas*,[3] 9 B. & C. 288.
(*q*) 3 Bull. 79; Roll. R. 188.
(*r*) 2 Bl. R. 1228.
(*s*) Com. Dig. Fait, G.; 2 Cro. 264.

[1]Eng. Com. Law Reps. vi. 560. [2]*Id.* xiv. 162. [3]*Id.* xvii. 380.

DEPOSITIONS.

THE admissibility and effect of depositions in civil cases have already been considered (*t*); it remains to notice those which are made according to the statutes in criminal proceedings.

Depositions under the statute 7 Geo. 4, c. 65.

The stat. 7 Geo. 4, c. 65, s. 2, enacts that "two justices, before they admit to bail, and the justice or justices, before he or they shall commit to prison any person arrested for felony or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know and declare anything material touching any such felony or suspicion of felony, to appear at the next court, &c. at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments and recogizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court (*u*).

Sect. 3. provides for such examination and depositions in cases of misdemeanor.

*The object of the Legislature in framing the statutes, for which the above provisions have been substituted (*x*), was to enable the Court to see whether a prisoner had been properly admitted to bail, and whether the witnesses were consistent or contradictory in the evidence which they gave, without manifesting any intention to alter the law of evidence (*y*). But such depositions, in being warranted by the former and present statutes, became evidence in particular cases, upon general principles of evidence; that objection having been removed by the statutes which would otherwise have operated to their exclusion, namely, that they were extra-judicial. *383

Previous proof.

To warrant such evidence, it is essential to prove by the justice, coroner, or his clerk, &c., that the depositions contain the substance of the information on oath (*z*). It is not necessary to prove that the depositions were signed by the witnesses (*a*).

Death of the witness.

It must also be previously proved that the witness is dead (*b*); or that he has been kept away by the practices of the prisoner (*c*); or, as *has been said* (*d*), that he is unable to travel. It seems, however, to be very doubtful whether the mere casual and temporary inability of the witness to attend in a criminal case, be a sufficient ground for admitting his deposition, which affords evidence of a nature much less satisfactory than the testimony of a

(*t*) *Supra*, Vol. I. Ind. same title.

(*u*) If the prisoner be taken before a magistrate of a different county from that in which the offence was committed, the informations, &c. should be transmitted to the latter county, and will, it is said, be evidence, although the magistrate had no original cognizance of the offence. Cro. Car. 213; 2 Hale, 285; Dalton's Just. c. 111, p. 299.

(*x*) 1 & 2 Phil. & M. c. 113; 2 & 3 Phil. & M. c. 10.

(*y*) Per Grose, J., *Lambe's Case*, Leach's C. C. L. 3d edit. 625; 3 T. R. 710, 722.

(*z*) 2 Hale's P. C. 284. It seems that they may be proved by any one who was present, and able to swear to the due taking. Where, on a capital charge, the magistrate himself, not having any clerk, took down the depositions, it was held that, although not absolutely necessary, it was desirable that he should be present to prove the correctness; but having returned that the prisoner was sworn, the Judge rejected evidence to prove that he was not so in fact. *Reg.* v. *Pikesley*, 9 C. & P. 124.

(*a*) *R.* v. *Fleming and Windham*, 2 Leach, 96.

(*b*) *Westbeer's Case*, Leach, 14. And see *Bromwich's Case*, 1 Lev. 180; 1 Salk. 281; B. N. P. 42.

(*c*) *Harrison's Case*, 4 St. Tr. 492; Fost. 337; Keb. 55.

(*d*) 2 Hale, 52; Phil. on Ev. 371. But this has been held, even in a civil case, to be insufficient.

witness examined *vivâ voce* in court, and which might be procured at another time if the trial were to be postponed. It is true that the prisoner has had the power to cross-examine the witness, but this was at a time and under circumstances very disadvantageous to the prisoner. There are indeed many old cases in which great abuse has been practised in the reading of depositions against prisoners, although the deponents might have been produced; but these instances occurred in bad times, when little regard was paid to the rules of evidence, or indeed to any other laws (*e*). In *Lord Morley's Case* (*f*) it was held that it was not sufficient to show that endeavours had been used to find the witness, and that he could not be found. It must also be proved that the depositions were taken conformably with the statute, since any other would be extra-judicial; that they were taken on oath (*g*); that they were taken in the presence of the prisoner; for where the informations are taken before a magistrate, the words of the statutes strongly imply that the prisoner is supposed to be *present*, for the justice is to take the examination of the prisoner, and the informations of those who bring the *prisoner; and if they were to be taken in the prisoner's absence he would lose the benefit of cross-examination, and consequently the evidence, in principle, would not be admissible: the effect of the statute seems to be not to alter any rule of evidence, but only to make a particular proceeding regular which otherwise would have been irregular, and so to leave it subject to the ordinary rules of evidence (*h*). The same inference is to be drawn from the terms of the late statute.

In the presence of the prisoner.

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In *Woodcock's Case* (*i*), the magistrate visited *Silvia Woodcock* (who had received a mortal blow) at the poor-house, and took her deposition there in the absence of the prisoner, and C. B. Eyre was of opinion that the deposition was not admissible, since it had not been taken, as the statute directs, in a case where the prisoner was brought before the magistrate in custody; the prisoner therefore had no opportunity of contradicting the facts it contained.

In *Dingler's Case* (*k*), the deposition had been taken by the magistrate at the infirmary where the wounded person lay, and the Court acceded to the objection that the prisoner was not present, or on his defence. Where part of the examination in a case of murder was taken in the absence of the prisoner, but that which had been so taken was read over to him, and the rest of the deposition taken in the ordinary way, and the deponent was resworn in the presence of the prisoner, who was asked whether he chose to put any questions, it was held that the depositon was admissible, the witness being dead at the time of the trial; and a great majority of the Judges were of opinion that the evidence had been properly received (*l*).

It has been said, that depositions taken by the coroner are evidence,

(*e*) See Mr. J. Foster's observations, Fost. Dis. p. 234; and see the cases of *Sir W. Raleigh*, *Udal*, *the Earl of Essex*, *the Duke of Norfolk*, *Lord Strafford*, &c., in the State Trials. (*f*) Kel. 55.

(*g*) 2 Hale, 284. Note, the former statutes did not in terms require that the informations should be taken on oath, but this is necessarily incident to the duty of the magistrate or coroner. Dalton, Just. c. 111; B. N. P. 242.

(*h*) According to the case of *The King* v. *Eriswell*, 3 T. R. 707. Buller, J., was of opinion that depositions taken in the *absence* of the prisoner might, after the death of the witness, be read; and refers to *Radbourne's Case*, where it had been so held by all the Judges; but in that case (Leach, C. C. L. 3d edit. 512), the deposition was taken in the *presence* of the prisoner, and of course the question did not arise. It seems to have been the opinion of Lord Kenyon, in the case of *The King* v. *Eriswell*, that depositions so taken were not admissible; and he refers to *Paine's Case*, (as reported 5 Mod. 163), and terms the objection there taken to admitting the deposition in evidence, namely, the loss of cross-examination, a *weighty objection*.

(*i*) Leach's C. C. L. 3d edit. 563. (*k*) Ibid. 638, *cor.* Rose, Recorder, and Gould, J.

(*l*) *R.* v. *Smith*, *cor.* Richards, C. B, and afterwards by the Judges,[1] 2 Starkie's C. 208; Russ. & Ry. C. C. L. 339. In the previous case of *R.* v. *Forbes*,[2] Holt's C. 599, Chambre, J., held that the prisoner ought to be present whilst the witness actually delivers the whole of his testimony.

[1]Eng. Com. Law Reps. iii. 316. [2]*Id.* iii. 193.

although the prisoner was not present, because the coroner is a public officer appointed to inquire of such matters (*m*), and therefore it is to be presumed that such depositions were fairly and impartially taken. Yet, it seems that the admissibility of these depositions stands altogether upon the statutes (*n*), and therefore it is difficult to conceive why a greater degree of credit should be given to depositions before the coroner than to those before justices, both being invested with equal authority.

The objection is not a want of authority in the case of the magistrate, for the statutes invest him with authority, but upon the principle that the accused has lost the benefit of a cross-examination, a defect which cannot be remedied by any care or attention on the part of the coroner, for he is not *privy to the facts to which the cross-examination might be directed, and *385 which may be known to the prisoner alone.

In *Bromwich's Case* (*o*), (one of the authorities referred to in Buller's Nisi Prius, in support of this distinction), it does not appear whether the prisoner was or was not before the coroner at the time when the evidence was given, and it does not appear that either in that case, or in *Lord Morley's Case* (*p*), the question was raised.

In the case of *Thatcher* v. *Waller* (*q*), the other authority cited in support of the position in Buller, the only question was, whether the deposition of a witness taken before the coroner could be read, the witness being abroad, and it was held that it might; and it is stated, that the Court (with the exception of the Chief Justice) were of opinion that if the deposition had been taken before a magistrate it could not have been read; and the only reason assigned for the distinction is, that the coroner was an officer of *greater authority*. In neither, therefore, of these cases was the question considered upon plain and broad principles.

In the case of *The King* v. *Eriswell* (*r*), Mr. J. Buller states it to have been long settled, that a deposition taken before a coroner in the absence of the accused is good evidence (*s*); but that learned Judge did not, it seems, intend to make a distinction between depositions taken before coroners and those taken before justices, for he stated that the latter would be admissible in evidence, although taken in the absence of the party charged; and also stated that it had been so determined in *Radbourn's Case* by all the Judges. It is however remarkable, that in *Radbourn's Case* (*t*) the information was taken in the *presence* of the prisoner. It is also to be observed, that in the same case of *The King* v. *Eriswell*, Lord Kenyon, although he assumed that depositions before coroners and informations before magistrates were excepted cases, placed their admissibility upon the same footing, viz. the statutes of Philip & Mary, and made no distinction whatsoever between the two cases. He added, indeed, that the examination before a coroner is an inquest of office, a transaction of notoriety to which every one has a right of access (*u*); but he immediately afterwards laid great stress upon the case of *The King* v. *Paine* (*x*) as one which had been decided by the Courts of King's Bench and Common Pleas on great consideration; and cited, what he termed a weighty reason, given by the Chief Justice according to the report in 5 Mod. 163, for rejecting such evidence; viz. "the defendant not being *present* when they were taken before the

(*m*) B. N. P. 242, cites 1 Lev. 180; 2 Jon. 53.
(*n*) Per Lord Kenyon, 3 T. R. 727. *Lambe's Case*, Leach's C. C. L. 3d edit. 625.
(*o*) 1 Lev. 180.
(*p*) 7 St. Tr. 422.
(*q*) 2 Jon. 53.
(*r*) 3 T. R. 707.
(*s*) And he cited 1 Lev. 180; Kel. 55; also Salk. 555.
(*t*) Leach, 3d edit. 512.
(*u*) See 4 Comm. 274; 1 Hale, 60. *R.* v. *Scorey*, Leach, 50.
(*x*) 1 Salk. 281; 5 Mod. 163.

mayor, and so had lost the benefit of a cross examination." His Lordship also observed, that the case as reported in 5th Modern, had been adopted in 2 Hawk. c. 46, s. 24, which he approved of. It cannot therefore be inferred that Lord Kenyon fully acceded to the admissibility of such evidence, although in the course of his argument, assuming them to be exceptions, he denied the consequences attempted to be deduced from them. The only plausible ground upon which such a distinction can be supported, seems to be this, that a proceeding before the coroner is a matter so notorious, that every one may be presumed to have notice of it, and consequently to have
*386 had an opportunity of *cross-examining the witness. This however is a reason far from satisfactory. Upon the whole, the distinction is not warranted by the Legislature; and as it is unfounded in principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be supported.

When admissible to impeach the testimony of a witness.

A deposition judicially and regularly taken may be read to contradict the testimony of a witness at the trial; for it is to be recollected, that one reason for requiring such informations to be taken, is in order to try the consistency of the witnesses (*y*).

In *Oldroyd's Case* (*z*), it was held that where a witness for the prosecution gave evidence in favour of the prisoner, in contradiction of the deposition taken before the coroner, it was competent to the Judge to direct the deposition to be read, in order to impeach the witness's testimony. Here the deposition was read by direction of the Judge, but Lord Ellenborough, C. J., and Mansfield, C. J., were of opinion that it would be competent to the prosecutor to do the same.

When admissible to impeach the credit of a witness.

It was admitted in *Lord Stafford's Case* (*a*), that the depositions of a witness taken before a justice of the peace, might by the prisoner's desire be read at the trial, in order to discredit the witness, by showing a variance between his evidence at the trial and his deposition (*b*).

In cases of misdemeanor.

Such depositions formerly were not admissible, except in case of felony; and therefore, upon an information for a libel, a deposition taken by a magistrate in the defendant's absence could not be read (*c*): but now depositions are taken in cases of misdemeanor, as well as of felony (*d*). They cannot be read on an indictment for petit treason, where the party is still living, although the witness has been kept out of the way by the defendant's procurement (*e*), since the 5th & 6th Edw. 6, c. 11, requires that two lawful accusers shall be brought *in person* before the accused, and prove him guilty, &c. But upon an indictment for petit treason and murder, it seems that such depositions are evidence to prove the charge of murder (*f*).

(*y*) Vide *supra*, 383. It seems to be a general rule, that where a witness at one trial varies from his evidence at another in relation to the same matter, such variance may be given in evidence to discredit his testimony. Haw. b. 2, c. 46, s. 23.

(*z*) Russ. & Ry. C. C. L. 88. Note, that the counsel for the prosecution did not mean to call the witness, who was mother to the prisoner, but the learned Judge, in compliance with the ordinary rule, her name being on the back of the indictment, directed that she should be called. The learned Judge, in summing up to the jury, stated that the evidence of the witness was not to be relied on, and left the case to them entirely on the other evidence. All the Judges afterwards held that there was sufficient evidence to go to the jury, and no sufficient circumstances to raise a doubt as to the propriety of the conviction. They agreed, that where some of the evidence is inadmissible, yet, that if the case appear to be clear without that evidence, execution ought not to be stayed. *Tinckler's Case*, East's P. C. 354; but that this rule would not have been applicable in the principal case, had the deposition been inadmissible. As to the competency of a party to impeach his own witness, see tit. WITNESS.

(*a*) 3 St. Tr. 152.

(*b*) 2 Haw. c. 46, s. 22. But it seems that the deposition must be proved to be the genuine one of the witness. In *Lord Stafford's Case*, *Oates*, the witness, proved that the paper produced contained his deposition. 3 St. Tr. 153.

(*c*) *R.* v. *Paine*, 1 Salk. 281; 5 Mod. 163.

(*d*) By the late stat. 7 Geo. 4, c. 64.

(*e*) Fost. 236, 337.

(*f*) Fost. 106. *Radbourn's Case*, Leach, 512.

Where depositions have been taken and lost, a witness may be cross-examined from copies (*g*).

Analogous to these depositions are the examinations which are judicially made under the direction of Acts of Parliament, which it seems to be now settled are not evidence where they are taken *ex parte* against one who had not the benefit of cross-examination. Therefore an *ex parte* examination of a pauper, although taken upon oath, is not admissible evidence against the appellant parish. For although the stat. 13 & 14 Car. 2, c. 12, s. 1, gives magistrates authority to remove upon complaint made, and incidentally to examine upon oath, yet the proceeding is *ex parte*, and the parties to be affected have no opportunity to cross-examine (*h*). In the case of *The King* v. *Ravenstone* (*i*) it was held that the examination of a woman pregnant of a bastard was admissible evidence, after her death, against the person whom she charged as the putative father, although the proceeding before the magistrate was *ex parte*, and the party charged was not present; the authority of this case may well be doubted (*k*). Examinations before justices. *387

DETINUE.

In *detinue* the plaintiff must prove, 1st, his property in the goods (1); and 2dly, the *detainer* by the defendant.

1. Property in the goods (A). This may be either absolute or special (*l*). But a present right of possession is essential (*m*); a mere reversionary interest is not sufficient. And the right must exist at the time of bringing the action. If *A.* deposit the title deeds of his estate with *B.*, and before action convey the estate, he cannot recover, for the title deeds go with the estate (*n*).

2dly. The detainer by the defendant. Under the plea of *non detinet*, it is sufficient for the plaintiff to prove that the goods came wrongfully into the defendant's possession, though the declaration allege a possession by finding (*o*).

If a man detain the goods of a feme covert which came into his hands

(*g*) *R.* v. *Shellard*, 9 C. & P. 277. Where it is said also, that the witness ought to be asked only, whether he has always said the same thing, except before the magistrates.

(*h*) *R.* v. *Ferry Frystone*, 2 East, 54. *R.* v. *Nuneham Courtenay*, 1 East, 373. *R.* v. *Eriswell*, 3 T. R. 721.

(*i*) 5 T. R. 373. [See *M'Farland* v. *Shaw*, 2 Car. Law Repos. 102.] See also *R.* v. *Clayton*, 3 East, 58. *supra*, 201, n (*g*), and the observations upon it.

(*k*) The Court assumed that depositions under the stat. of Phil. & Mary, taken in the *absence* of the prisoner, would be evidence against him. Vide *infra*, tit. Examination.

(*l*) B. N. P. 50. The proof as to property seems to be the same as in an action of trover. Ibid. But greater certainty is necessary in the description of the property in the declaration.

(*m*) *Gordon* v. *Harper*, 7 T. R. 9. *Pain* v. *Whitaker*,[1] 1 R. & M. 100.

(*n*) *Phillips* v. *Robinson*,[2] 4 Bingh. 106. If *A.*, tenant in fee-simple, enfeoff *B.* without warranty, *B.* shall have all charters and evidences, for *B.* is to defend the land at his peril; but if *A.* enfeoff *B.* with warranty, *B.* shall not have any charters or evidences which comprehend the warranty without express grant. If *A.* enfeoff *B.* with warranty to him, his heirs, and assigns, and *B.* by deed enfeoff *C.* without warranty, who enfeoffeth *D. with* warranty, *C.* shall have the first and second charter. *Lord Buckhurst's Case*, 1 Co. 1.

(*o*) *Mills* v. *Graham*, 1 N. R. 140; and *semble*, where the detention is wrongful, the declaration may always be supported on an allegation of finding, as in trover; per Sir J. Mansfield, C. J. *Ibid.* In cases of special bailments it may be fit to declare specially; but even there it seems to be unnecessary. *Ibid.* And see Co. Litt. 286, b.; tit. 2, N. B. 138 (E). *Kettle* v. *Bromsall*, Willes, 118; Mod. Ent. vol. 2, p. 422.

(1) [*Actual* possession by the plaintiff is not necessary to maintain detinue. *Tunstall* v. *M'Clelland*, 1 Bibb. 186. The plaintiff must prove property in himself and possession in the defendant; but proof of such possession anterior to the bringing of the action is sufficient, unless the defendant has been legally dispossessed—and this it is for him to show. *Burnley* v. *Lambert*, 1 Wash. 308.]

(A) (Where an appointment has been made by the President of the United States, but the commission withheld afterwards, an action of detinue will not lie for the commission. *Marberry* v. *Madison*, 1 Cranch, 137.)

[1]Eng. Com. Law Reps. xxi. 390. [2]*Id.* xiii. 362.

before the marriage, the husband alone may bring *detinue*, for the *detention* is the gist of the action (*p*); proof of possession is unnecessary (*q*); and if *A.* deliver goods to *B.* to deliver them to *C.*, the latter may bring *detinue* against *B.*, for the property is vested in him by the delivery to *B.* for his use (*r*).

*388 *If *A.* deliver goods to *B.* who loses them, and *D.* finds them, and delivers them to *J. S.* who has a right to them, *A.* cannot maintain *detinue* against *D.*, for he is not privy to the delivery by *A.* (*s*) (1).

If a statute prohibit goods under pain of forfeiture, one part to the King, and another to him who will inform, seize, or sue for the same, any person may bring *detinue* for the goods, for the bringing the action vests a propety in him (*t*) (A). An heir may maintain *detinue* for an heir-loom (*u*).

The plaintiff must prove an actual possession of the goods by the defendant (*x*); hence *detinue* does not lie against the executor of a bailee who has destroyed the chattel (*y*). And if there be several executors, and one only has the possession, the action must be brought against him alone (*z*).

If goods be delivered to husband and wife, the *detinue* must be against the husband only (*a*); but if goods come to a feme covert before marriage, the action must be brought against the husband and wife (*b*) (B). In *detinue* for a bond, a variance as to the sum will be material (*c*). The detention of goods seized by excise officers, after payment of the penalty on a conviction by justices, is not unlawful if no *demand* has been made (*d*).

Under the plea of *non detinet*, the defendant may give in evidence any matter which shows that he does not detain the plaintiff's goods (*e*) (2); as for instance, a gift by the plaintiff; but he cannot give in evidence that the goods were delivered by way of pledge, as he may in trover (*f*).

(*p*) B. N. P. 50. *Secus* in *detinue* of charters of the wife's inheritance. 1 Rol. 347.
(*q*) Ibid.; and 1 Roll. Ab. 606. (*r*) 1 Roll. Ab. 606.
(*s*) 2 Danv. 511; B. N. P. 51.
(*t*) Salk. 223; B. N. P. 51. It has been said, that *detinue* does not lie where the property has been taken by trespass (Sel. N. P. tit. Detinue, 6 Hen. 7, 9, a; Bro. Ab. Detinue, pl. 53), because, as is said, the property is devested by the trespass, *tam. qu.*
(*u*) Bro. Ab. Detinue, pl. 30.
(*x*) 2 Roll. Ab. 703. *Wilkins* v. *Despard*, 5 T. R. 112.
(*y*) B. N. P. 50. [Or detained it. *Walker* v. *Hawkins*, 1 Hayw.]
(*z*) Bro. Ab. Detinue, pl. 19. (*a*) Roll R. 128; B. N. P. 51.
(*b*) Co. Litt. 351; B. N. P. 51; *i. e. semble*, for the detention before the marriage. [*Johnson* v. *Pastern*, 2 Hayw. 306.]
(*c*) 2 Roll. Ab. 703; B. N. P. 51. (*d*) *Hutchings* v. *Morris*,[1] 6 B. & C. 464.
(*e*) Co. Litt. 283; B. N. P. 51.
(*f*) B. N. P. 51. Under the plea of *non detinet* of a note, the defendant cannot show a justifiable detention. *Richards* v. *Frankum*, 6 M. & W. 420; and 8 Dowl. 346. And on the note being produced at the trial, there appearing to be a memorandum at the back, assigning it to *G.*, a third party, and directing the

(1) [In North Carolina, detinue lies in every case in which the property is detained, without regard to the manner in which the defendant acquired possession. *Johnson* v. *Pasteur*, Cam. & Nor. 464. Even though the defendant has parted with the possession before the suit. *Merrit* v. *Warmouth*, 1 Hayw. 12. The plaintiff may have judgment for damages and costs, though the article detained has been restored to him. *Merrit* v. *Merrit*, Martin's Rep. 18. So he may have judgment, though the slave, for which the action is brought, died after the demand. *Skipper* v. *Hargrove*, Martin's Rep. 74.

In Kentucky, detinue is the proper action to recover property won at gaming contracts. *Bess* v. *Shepherd*, 2 Bibb, 225. The plaintiff must prove that the defendant was in possession before the date of the writ. *Burton* v. *Brashear*, 3 Marsh. 278. The death of a slave, pending in an action of detinue for him, does not abate or affect the suit. *Carroll* v. *Early*, 4 Bibb, 270.]

(A) (*Bolland* v. *Bell*, 1 Mason's R. 243.)

(B) (Detinue will lie against an infant for goods delivered upon a special contract for a specific purpose, after the contract is avoided. *Penrose* v. *Curren*, 3 Rawle. 453.)

(2) [In detinue for slaves, parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of *non detinet*, *Stratton* v. *Minnis*, 2 Munf. 329. See also *Elam* v. *Bass's Ex'rs*, 4 Munf. 301.]

[1] Eng. Com. Law Reps. xiii. 238.

And by the rule of H. T. 4 W. 4, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence but such denial shall be admissible under that plea.

The jury must find the value of every particular thing demanded; for the judgment is to recover the thing itself, or the value of it, and if the jury find damages and costs, and no value, the defect cannot, it is said, be supplied by a writ of inquiry (*g*) (1).

DEVISE, PROOF OF TITLE BY. *See* EJECTMENT.

DIRECTORY.

STATUTE when directory as to Time. *See* TIME.
As to Mode of Sale (*h*), *see* INDEX.

*DISTRESS (*i*). *389

AN action of *trespass* is a proper form in all cases where the distress is either wholly illegal (*k*) or irregular (2), unless it be otherwise provided by a statute.

Where a distress has been irregularly made for rent, or for poor's rates, the action is in case or trespass (*l*), according to the nature of the irregu-

maker to pay the assignee the amount and all interest in respect thereof, it was held, that as amounting to a mere indorsement, it did not require a stamp; but that on the issues, "not the property of the plaintiff, and that the defendant held it as the servant of *G.*" the verdict must be found for the defendant. *Ibid.* S. C. 9 C. & P. 221.

(*g*) *Ibid.*; 10 Co. 119. But they may find the aggregate value of that which consists of a number of particulars; as a flock of sheep, &c. *Ibid.*

(*h*) *Doe* v. *Evans*, 1 C. & M. 450. As to writs, *Miller* v. *Bowden*, 1 Cr. & J. 563. And see *Davidson* v. *Gill*, 1 East, 72. *Clarke* v. *Palmer*, 4 M. & Ry. 141. A statute is never directory when in the negative.

(*i*) As to justification under a distress for rent, see REPLEVIN.—TRESPASS. A Canal Act authorizing the company to distrain goods in boats for non-payment of toll, does not warrant a distress except on the canal. *Fraser* v. *Swansea*,[1] 1 Ad. & Ell. 354. As to distresses for small rents, see the stat. 57 G. 3, c. 93; 7 & 8 G. 4, c. 17. Distress warrants by justices of the peace, 27 G. 2, c. 20. As to notice of action, see NOTICE.—TIME. Goods were seized (under a warrant of distress, for church rates, admitted to be irregular) on the 27th October, but not sold until the 1st and 2d November, and the action was brought on the 30th January; it was held, that as the seizure was only conditional, if the amount were not paid, and the subsequent sale was the real grievance, the action was in time; and where the demand of perusal and copy of the warrant required it to be within three days, although by 24 Geo. 2, c. 44, no action can be brought until after refusal of such copy, and in six days after demand, held that the right of action was not affected thereby. *Collins* v. *Rose*, 5 M. & W. 194.

(*k*) If the landlord turn the plaintiff's family out of possession, and continue in possession after the rent is paid, he is a trespasser. *Etherton* v. *Popplewell*, 1 East, 139. As to what may be taken in execution under a distringas, see 3 B. & P. 256; 4 East, 467. Implements of trade are distrainable where there is no other subject of distress. *Simpson* v. *Hartop*, Willes, 512. Utensils in use are not distrainable. *Secus*, if not in use, and no other distress on the premises. *Fenton* v. *Logan*,[2] 9 Bing. 676. *Wood* v. *Clarke*, 1 Cr. & J. 484. See Appendix. Beasts distrained damage feasant must be fed whilst impounded. Cruelty to Animals Act. The collector of land-tax cannot break open a house, without the presence of a constable, to make a distress, the provision overruling the whole of sect. 17 of 38 Geo. 3, c. 5. *Foss* v. *Racine*, 4 M. & W. 419; 7 Dowl. 53; and 8 C. & P. 699.[3]

(*l*) *Ib.* By stat. 17 Geo. 2, c. 38, s. 8, "Where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of overseers, or in the rate of assessment, or in the warrant of distress thereupon; nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, with full costs, unless tender of

(1) [If on a declaration for several slaves (separate value being laid) the jury find a joint value, it is error. *Higginbotham* v. *Rucker*, 2 Call. 313. A writ of inquiry to ascertain their respective values should be awarded. *Cornwall* v. *Truss*, 2 Munf. 195. Failing to lay a separate value, as to each slave demanded, is fatal on demurrer, but is cured by a verdict severing the values. *Holliday & ux.* v. *Littlepage*, 2 Munf. 539. It is not error, if the jury find general damages for detaining several slaves; but the alternative value of each ought to be separately found. *Ibid.*]

(2) {*Kerr et al.* v. *Sharpe*, 14 Serg. & Rawle, 399.}

[1]Eng. Com. Law Reps. xxviii. 105. [2]*Id.* xxiii. 416. [3]*Id.* xxxiv. 591.

larity complained of. But the plaintiff may waive the trespass and bring case (*m*).

In an action on the case for an illegal or irregular distress, the particular *gravamen* is specified in the declaration, which governs the nature of the proof.

*390 Causes of action.

*The most usual causes of action are for distraining where no rent was due (*n*); or for more than was due (*o*); or for an excessive distress (*p*); or for distraining beasts of the plough, and sheep, where there is other sufficient distress (*q*); or driving a distress above three miles out of the hundred (*r*); impounding goods distrained off the premises, and not giving due notice (*s*); refusing to restore the goods distrained for rent, after tender of the rent and costs (*t*); selling the distress within five days after notice (*u*);

amends be made before action brought."—By stat. 11 Geo. 2, c. 19, s. 19, "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*,* but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at the election of the plaintiff; and if he recover, he shall have full costs." But by sec. 20 of the same stat. it is provided "that no tenant or lessee shall recover in such action, if tender or amends has been made before action brought."

(*m*) Distress made after tender of the rent, the plaintiff may waive the trespass and bring case. *Branscombe* v. *Bridges*,[1] 1 B. & C. 145; 3 Starkie's C. 171.

(*n*) By 2 Will. & Mary, sess. 1, c. 5, s. 5, the owner may, in action of trespass or *case*, recover double the value of the goods, and full costs.

(*o*) This is either at common law, or under the stat. of Marl. 52, Hen. 3, c. 4.

(*p*) Trespass does not lie for taking an excessive distress for rent (*Lynn* v. *Moody*, Fitzg. 85; 2 Str. 851. *Hutchins* v. *Chambers*, 1 Burr. 590), unless gold and silver be taken to excess, for they are of known value. Ibid.; and per Lord Kenyon, *Crowther* v. *Ramsbottom*, 7 T. R. 658. The proper remedy for taking an extensive distress is case upon the statute of Marlbridge, 52 H. 3, c. 4. *Hutchins* v. *Whitaker*, 2 Ld. Kenyon, 204. Trover will not lie. *Whitworth* v. *Smith*, 1 M. & R. 193. *Bachelor* v. *Vyse*, 4 M. & S. 552.

(*q*) *Unquore est purveu que null homme de religion n'autre soit distreinte per bestes que gaignent sa terre, ne per ses brebis, taunt come lem trove autre destresce et autres chateux suffisaunt.* 51 H. 3, st. 4. But such a distress is not illegal if at the time of making it there was reasonable ground for supposing, from the appraisement of competent persons, that without taking beasts of the plough there would not have been sufficient. *Jenner* v. *Yolland*, 6 Price, 3. The law does not compel the previous sale of such other goods. *Ibid.*; and see 2 Willes R. 167. An action is not maintainable for distraining beasts of the plough where there is no other sufficient subject of distress on the premises. *Piggott* v. *Birtle*, 1 M. & W. 441. Implements of trade are distrainable where there is no other subject of distress. *Simpson* v. *Hartop*, Willes, 512. Utensils in use are not distrainable. *Secus*, if they be not in use, and there be no other distress on the premises. *Fenton* v. *Logan*,[2] 9 Bing. 676. *Wood* v. *Clarke*, 1 Cr. & J. 484. Crops taken in execution under the statute, and left a considerable time upon the premises in order to be reaped, are not distrainable for rent becoming due after they were taken in execution; *see* Vol. I. 514; and where crops are so taken, sold, and left on the premises, and arrears of rent have been paid, under the statute of Anne, the landlord cannot distrain for subsequent rent on the ground that the purchaser has not entered into the agreement prescribed by the stat. 56 Geo. 3, c. 50, s. 3. Nor can it be presumed from the absence of such an agreement that the straw was sold to be carried off contrary to the 1st section. *Wright* v. *Dewes*,[3] 1 Ad. & Ell. 641. As to the general position that growing crops seized under a *fi. fa.* are not liable to the landlord's distress, see *Peacock* v. *Purvis*,[4] 2 B. & B. 362; 5 B Moore, 79. *Eaton* v. *Southby*, Willes, 131, and the dictum of Thompson, B. in *Gwilliam* v. *Burke*, 1 Price, 277, *contra*. Distrainers of cattle damage feasant are bound to provide a proper pound, and are liable for injury caused by the state of it; where the replication alleged that the pound was *then* wet, and wholly unfit, and whereby, &c., it was held, that the issue raised expressly its state at the time of impounding, and not whether generally sufficient. *Wilder* v. *Speer*, 3 N. & P. 536.

(*r*) 1 & 2 Phil. & Mary, c. 12, which entitles the party aggrieved to 5*l.* and treble damages.

(*s*) 2 Will. & Mary, c. 5, s. 2; 11 Geo. 2, c. 19, s. 10.

(*t*) A tender of the rent upon the land before the distress makes the distress tortious; a tender after the distress, and before the impounding, makes the subsequent detainer, but not the taking, wrongful; a tender after the taking and impounding does not make either the one or the other wrongful; but in the case of a distress for rent, a sale after tender of the rent and costs, is illegal, under the equity of the stat. 2 Will. & Mary, c. 5. An action on the case will not lie for detaining the plaintiff's cattle, which have been distrained damage feasant, in the pound after tender of amends made subsequent to the impounding. *Anscomb* v. *Shore*, 1 Camp. 285; 1 Taunt. 261; nor where the tender is made after the distress, but before the impounding; for the proper action is replevin or trespass. *Lindon* v. *Hooper*, Cowp. 414; and see 6 T. R. 299; *Sheriff* v. *James*,[5] 1 Bing. 341.

(*u*) See the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2. Where the landlord sold an unripe crop of corn

* An irregularity in the distress does not avoid the sale. *Lyon* v. *Weldon*,[6] 2 Bing. 334.

[1]Eng. Com. Law Reps. viii. 43. [2]*Id.* xxiii. 416. [3]*Id.* xxviii. 172. [4]*Id.* vi. 154. [5]*Id.* viii. 338. [6]*Id.* ix. 424.

not removing *the goods distrained within a reasonable time after the lapse of five days (*x*); for not selling for the best price (*y*); for not leaving the overplus arising from the sale of a distress with the sheriff (*z*) or constable.

The omission of the bailiff to deliver a copy of his charges, under the stat. 57 G. 3, c. 93, s. 6, does not render the landlord liable (*a*).

The law does not prescribe any priority in the sale of goods; no action lies for selling beasts of the plough before other goods, where the distress is legal (*b*).

A count in trover is usually added to the special count; and therefore, mere proof of the defendant's seizure and sale of the plaintiff's goods will usually be sufficient to throw upon the defendant the necessity of justifying the act (*c*). Proof by the sheriff.

The more correct course seems to be, that the plaintiff should enter at once upon the whole of his case. If he alleges a distress for rent, and complains of an irregularity committed in the course of that distress, he should prove the defendant's hand-writing to the notice of distress, if such a notice has been served; this will usually be evidence of the tenancy, the *quantum* of rent, and the sum in arrear, if it be correct as to such particulars; if it be not correct, and the fact should be material, the defendant may prove the amount of the rent by evidence of the original contract, or by evidence of receipts given by the defendant, or of payments to him.

In an action for an excessive distress (*d*) the plaintiff should prove the tenancy (*e*), the rent due as alleged, and the distress. The tenancy may be *proved as already stated, or by the production and proof of the lease. A variance between the *quantum* of rent alleged, and that appearing to be due, will not be material (*f*). Excessive distress. *392

within the five days, the plaintiff cannot recover on a declaration for the seizure, per *quod* he would not replevy, for such a sale is wholly void, and the tenant might at any time before the corn was ripe have tendered the rent due, and if after that the landlord had taken the corn, he would have been a trespasser. *Owen* v. *Legh*,[1] 3 B. & A. 470. The five days appointed by the statute are inclusive of the day of sale. *Wallace* v. *King*, 1 H. B. 13. The act of appraisement at the end of five days does not take away the right to replevy. *Jacob* v. *King*,[2] 5 Taunt. 451. An arrangement between the landlord and tenant that the goods distrained shall remain on the premises after the five days, is not *per se* evidence of collusion between the landlord and tenant. *Harrison* v. *Barry*, 7 Price, 690.

(*x*) Although there are precedents of declarations in case for not removing a distress from the premises after the expiration of five days (see Chitty on Pleadings), yet it seems to be clear that the remedy is in trespass, and not case. As the stat. 2 Will. & Mary, sess. 2, c. 5, s. 2, and the stat. 11 Geo. 2, c. 19, s. 10, authorize an appraisement and sale of the goods upon the premises after the expiration of the five days, it follows that the landlord is to be allowed a reasonable time for doing this, the statutes having fixed no particular time, and it being impossible, where each case must depend so much on its own circumstances, for the Legislature to prescribe any. What shall be a reasonable time, under the circumstances of the particular case, is a question for the jury. In the late case of *Pitt* v. *Adams*, Abbott, L. C. J., left it so to the jury, and the Court of K. B. afterwards held the direction to be right. If the party remain in possession beyond a reasonable time, he is a trespasser. *Ibid.* After the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, which gives the power of sale after the expiration of five days, and previous to the stat. 11 Geo. 2, c. 19, s. 10, which authorized a sale on the premises, the landlord was considered to be a trespasser if he did not remove the distress at the end of five days. *Griffin* v. *Scott*, Str. 717. See also *Winterborne* v. *Morgan*, 11 East, 595. *Wallace* v. *King*, 1 H. B. 13. *Etherton* v. *Popplewell*, 1 East, 139. But the defendant in trespass may disprove the trespass by evidence of consent on the part of the tenant. See *Harrison* v. *Bray*, 7 Price, 610.

(*y*) According to the stat. 2 Will. & Mary, c. 5, s. 2, *infra*, note (*p*). But the price at which the goods were appraised will be presumed to be the best, until the contrary appear; 4 Mod. 390; Com. Dig. Distress, D. 8.

(*z*) According to the stat. 2 Will. & Mary, c. 5, s. 2, where the action is against overseers for the surplus under a distress for poor's rates, under the stat. 27 Geo. 2, c. 20, a demand must be proved to have been made previous to the commencement of the action. *Simpson* v. *Routh*,[3] 2 B. & C. 682.

(*a*) *Hart* v. *Leach*, 1 M. & W. 560.

(*b*) *Jenner* v. *Yolland*, 6 Price, 5.

(*c*) But trover will not lie for an irregularity in the sale where the defendant was entitled to distrain, although he sells before the expiration of the five days. *Wallace* v. *King*, 1 H. B. 13.

(*d*) Under the stat. 52 H. 3, c. 4, "*et qui districtiones fecerint irrationabiles et indebitas graviter amercientur proptum excessum districtionum ipsarum.*"

(*e*) A local description of the premises must be proved as laid. *Harris* v. *Cooke*,[4] 2 Moore, 587. See Vol. I. tit. VARIANCE.

(*f*) *Sells* v. *Hoare*,[5] Bing. 401.

[1]Eng. Com. Law Reps. v. 346. [2]*Id.* i. 154. [3]*Id.* ix. 219. [4]*Id.* iv. 204. [5]*Id.* xv. 479.

The taking of the distress by the defendant may be proved by the testimony of the person employed to distrain, if he can prove his authority from the defendant; or such authority may be proved by giving secondary evidence of the warrant to distrain, after giving notice to produce the warrant. Proof of the seizure of the distress is sufficient, without showing that the goods were sold or removed; and although no person be left in possession of the goods (*g*). So if the plaintiff pay the expenses of the levy under protest before any seizure is made or inventory taken (*h*).

It is not necessary to prove express malice; it should, however, appear that the excess was considerable (*i*). Neither is it necessary to prove the precise amount of rent alleged to be due (*k*) (A).

The proper test of value is the amount which the goods would have sold for at a broker's sale (*l*).

The action does not lie against the keeper of a pound merely for receiving a distress, though the original taking was tortious, unless he exceed his duty and assent to the trespass (*m*).

Proof by the defendant.

In an action on the case the defendant may, under the general issue, give any evidence in justification of his act (*n*). If the distress were for rent he should prove the tenancy, either by means of the contract, or evidence of the payment of rent by the plaintiff, or some other admission by him of the tenancy (*o*); the authority to the broker or other agent to distrain, for the particular cause; notice of distress according to the statute (*p*),

(*g*) *Swan* v. *Earl of Falmouth*,[1] 8 B. & C. 456. (*h*) *Hutchins* v. *Scott*, 2 M. & W. 809.

(*i*) *Field* v. *Mitchell*, 6 Esp. C. 71. As if a man distrain oxen for a small sum, where a sheep or pig might have been distrained. *Secus*, where the distress cannot be made on an article of inferior value. *Ibid.* According to an ancient case, a cart and horse may be distrained for a small demand, because, as is said, *they are not severable*. *Clarke* v. *Tucker*, 2 Vent. 183. *Proudlove* v. *Twemlow*, 1 Cr. & M. 326. A landlord is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that and the amount due. Per Bayley, J., *Willoughby* v. *Backhouse*,[2] 2 B. & C. 823. To maintain the action there must be a disproportion to excess. Per Lord Ellenborough, *Field* v. *Mitchell*, 6 Esp. C. 71. A landlord is liable for excess in seizing growing crops, the probable produce of which is capable of estimation at the time of seizure, but the measure of damages is the inconvenience and expense sustained by the tenant in being deprived of their management, or which he is put to in providing sureties on replevying. *Piggott* v. *Birtle*, 1 M. & W. 441.

(*k*) *Sells* v. *Hoare*, 1 Bing. 401.

(*l*) *Wells* v. *Moody*,[3] 7 C. & P. 59: and therefore a witness ought not to be asked what might have been obtained for the goods from an incoming tenant. *Ibid.* Per Parke, B.

(*m*) *Badkin* v. *Powell*, Cowp. 476.

(*n*) Under the stat. 11 Geo. 2, c. 19, s. 21, a previous recovery in replevin is a bar. *Phillips* v. *Berryman*, 3 Doug. 386.

(*o*) And for this purpose notice should be given to him to produce the lease or agreement under which he holds, the receipts for rent, &c.

(*p*) By the stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, it is enacted, "That where any goods or chattels shall be distrained for any rent reserved, and due upon any contract, and the tenant or owner of the goods shall not within five days* next after such distress, and notice thereof,† with the cause of such taking, left at the chief mansion-house, or other most notorious place on the premises‡ charged with the rent, replevy the same, the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish or place, where the distress is taken, cause the distress to be appraised by two sworn appraisers,§

* See note (*x*) *supra*, 391.

† As to the form of notice, see *Moss* v. *Gallimore*, Doug. 180. It need not state at what time the rent became due. *Ibid.*

‡ But notice delivered to the party himself is sufficient (*Walter* v. *Rumbal*, Lord Ray. 53), for it is the most effectual way of giving notice.

§ It is irregular for the party distraining to act as broker,[4] 2 Bing. 334. *Westwood* v. *Cowne*,[5] 1 Starkie's C. 172. *Andrews* v. *Russell*, B. & P. 81. The measure of damages, in an action for selling without an appraisement, is the value of the goods, and special damage sustained, *minus* the amount of rent due. *Buggins* v. *Good*, 2 Tyrr. 447. *Nott* v. *Curtis*, cited Ib. 449.

(A) (In an action on the case against the landlord for distraining for more than was due for rent, the plaintiff can only recover nominal damages, where he has given his landlord a negotiable note as collateral security for the rent, which note is unpaid and not negotiated by the landlord. *Lewis* v. *Lozee*, 3 Wend. 70.)

[1]Eng. Com. Law Reps. xv. 264. [2]*Id.* ix. 254. [3]*Id.* xxxii. 435. [4]*Id.* ix. 424. [5]*Id.* ii. 342.

by means *of an examined copy, after proof of notice to produce the original; a regular appraisement by two sworn appraisers (*q*) at the expiration of five days after the notice (*r*); the sale of the goods for the best price that could be got (*s*); the amount of the costs (*t*); the leaving the overplus, after payment of the rent and costs, with the sheriff or constable.

He cannot justify a joint distress for parcels distinctly let, though in the same lease (*u*); nor can he split his distress, and first distrain for part, and afterwards for the residue (*x*). A distress warrant for seven rates, one of which has been quashed, is void as to all (*y*). An arrangement after an illegal distress as to the sale does not devest the plaintiff's right of action (*z*); neither does payment or tender of rent, in order to obtain re-deliverance of the goods, bar an action for irregularity. An agreement to take interest on rent does not take away the right of distress (*a*) (A).

In an action for an excessive distress, the defendant may show that more rent was due than is stated in the notice (*b*). Previously to the late statute the broker who made the distress was held to be an incompetent witness for the defendant, to disprove an irregularity (*c*).

In an action under the stat. 11 Geo. 2, c. 19 (*d*), for a fraudulent and *clandestine removal of goods, to prevent a distress, the plaintiff must *394

whom such sheriff, &c. shall swear to appraise them truly; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent, and the charges of the distress and appraisement, leaving the overplus (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner's use." It seems that at all events reasonable care and diligence ought to be used to obtain the *best* price. Where a sheriff sells under a *venditioni exponas*, the meaning of the writ is, sell for the best price you can obtain; and the sheriff ought not to part with the goods for a price manifestly inadequate to their value. See *Keightly* v. *Birch*, 3 Camp. 521. *Barnard* v. *Leigh*,[1] 1 Starkie's C. 43. But where a sheriff cannot sell but under too great a sacrifice, under a writ of *fi. fa.*, he ought to make a special return. *Ib.* The party is not bound by the notice of distress given at the time of the distress; he may distrain for one thing and justify for another. *Crowther* v. *Ramsbottom*, 7 T. R. 658.

(*q*) See the stat. *supra*, note (*p*). An appraisement by a party who makes the distress is irregular. *Westwood* v. *Cowne*,[2] 1 Starkie's C. 172. In case for wrongfully refusing to permit the plaintiff to appraise goods distrained, a plea that the goods were taken for arrears of rent, is an issuable plea, as going to the merits. *Sealey* v. *Harris*, 7 Dowl. 197.

(*r*) The five days are reckoned inclusive of the day of sale. *Wallace* v. *King*, 1 H. B. 13.

(*s*) *Supra*, note (*p*).

(*t*) The stat. 57 Geo. 3, c. 93, which regulates the costs of distresses for rents not exceeding 20*l.* directs (sec. 5) that evidence of the justice's signature shall be proof of the judgment.

(*u*) *Rogers* v. *Birkmire*, Str. 1040; Cas. T. H. 245.

(*x*) *Wallis* v. *Saville*, Lutw. 1532. *Secus*, if he seize *for the whole*, but mistaking the value of the goods, seize too little. *Hutchins* v. *Chambers*, 1 Burr. 589.

(*y*) *Hurdy* v. *Wink*,[3] 2 Moore, 417.

(*z*) *Willoughby* v. *Backhouse*,[4] 2 B. & C. 821.

(*a*) *Skerry* v. *Preston*,[5] 2 Chitty's R. 245.

(*b*) *Gwinnett* v. *Phillips*, 3 T. R. 645. *Crowther* v. *Ramsbottom*, 7 T. R. 658.

(*c*) *Field* v. *Mitchell*, 6 Esp. C. 73.

(*d*) By 11 Geo. 2, c. 19, s. 1, "In case any tenant or lessee of lands or tenements, upon the demise whereof any rent is payable, shall fraudulently or clandestinely carry off his goods, to prevent the landlord from distraining, it shall be lawful for every landlord, or any person by him empowered, within thirty days next ensuing such carrying off, to seize such goods wherever the same shall be found, as a distress for the rent, and the same to sell or dispose of, as if the said goods had been distrained upon such premises." (1) Sec. 2: "Provided that no landlord shall seize goods sold *bona fide*, and for a valuable consideration, before

(A) (Nor is the right to distrain extinguished by an unsatisfied judgment for the rent. *Chipman* v. *Martin*, 13 John. Rep. 240.)

(1) {In *Pennsylvania* it has been decided that under the provisions of the act of the 21st of *March*, 1772, which is in substance the same as the statute 11 Geo. 2, c. 19, s. 1, from which it was copied nearly *verbatim*, a removal of his goods by the tenant *in the night time*, is, in itself, clandestine, and sufficient evidence of fraud; but if the goods of the tenant be removed from the demised premises in *the day time*, without the knowledge of the landlord, to secure them from a distress for rent becoming due, such removal is not, independently of other circumstances, a clandestine and fraudulent removal, which will authorize the landlord to follow the goods and distrain upon them, within thirty days after their removal. *Grace* v. *Shively*. *Hoops* v. *Crowley*, 14 Serg. & Rawle, 217, 219.}

[1]Eng. Com. Law Reps. ii. 287. [2]*Id.* ii. 342. [3]*Id.* iv. 136. [4]*Id.* ix. 254. [5]*Id.* xviii. 322.

Proof in an action for a fraudulent removal, &c.

prove, 1st, that the rent was in arrear (*e*); 2dly, the fact of the removal of the goods, and their value. It is sufficient to show that the removal was with the privity of the tenant; 3dly, that the removal was fraudulent or clandestine, and made (*f*) with intent to prevent the landlord or lessor from distraining for the rent so due. It has been said, that it is necessary to prove that the removal was *secret and clandestine*, as well as that it was *fraudulent* (*g*); but this may well be doubted, the words of the statute being in the disjunctive. The statute, it seems, contemplates a removal by the tenant for his own benefit, and does not extend to a delivery to a creditor who presses for payment of a debt (*h*). Nor to the removal of the goods of a stranger (*i*). The fraudulent intention, which is a question of fact for the jury, is usually evidenced by the season and circumstances of the removal; as from its having been effected in the night-time, or at an unseasonable hour, with suddenness and precipitation after a threat of distraining, or with knowledge that a distress was intended.

Intention.

In an action against one for aiding and assisting a tenant in a fraudulent removal, it is essential to prove knowledge of the fraudulent intent (*k*).

In an action of trespass against the landlord, who has followed goods thus removed, he cannot give the fraudulent removal in evidence under the general issue (*l*); he must, on issue taken on the special justification, be prepared with the proofs already stated, and also show that he distrained the goods within thirty days after the removal (*m*).

DISTURBANCE.

Proof by the plaintiff.

In an action on the case for the disturbance of the plaintiff in the enjoyment of incorporeal rights, such as of common (*n*), way (*n*), watercourse (*n*), office, seat at church, or other possession, the plaintiff must prove, under the plea of the general issue, not guilty; 1st, his right, as alleged
*395 in the *declaration; 2dly, the defendant's interruption of that right (A); and 3dly, the damage sustained.

1st. The usual allegation in the declaration against a wrong-doer, is *habere debet*, without alleging a grant or prescription (*o*); and although he

such seizure made, to any person not privy to such fraud." Sec. 3. "If any such tenant shall fraudulently remove his goods, and any person shall knowingly assist such tenant in fraudulently conveying away his goods, or in concealing the same, all persons so offending shall forfeit to the landlord from whose estate such goods were carried off, double the value of the goods, to be recovered by action of debt in any of His Majesty's courts at Westminster, or in the courts of session in the counties palatine, or in the courts of grand sessions in Wales." The landlord may elect which remedy he will pursue, in case of fraudulently removing goods to prevent a distress, by action or by complaint to two magistrates, although the goods do not exceed the value of 50*l*. *Bromley* v. *Holden*,[1] 1 M. & M. 175.

(*e*) Unless rent be actually in arrear, the case is not within the stat. 2 Will. Saund. 284, a. n. (2). *Watson* v. *Main*, 3 Esp. C. 15.

(*f*) *Lister* v. *Brown*,[2] 3 D. & R. 501; 1 C. & P. 121.

(*g*) *Watson* v. *Main*, 3 Esp. C. 15, *cor.* Eyre, C. J. The point was doubted in *Furneaux* v. *Fotherby*, 4 Camp. 136; but in the case of *Opperman* v. *Smith*,[3] 4 D. & R. 33. subsequently decided, it was held, that an open removal, if fraudulent, of which the jury were to judge, would justify the landlord in following and distraining the goods. A withdrawing of cattle to a place where they were not likely to be found, is a concealment, although they were turned into an open field. *Stanley* v. *Wharton*, 8 Price, 301. An *action* lies, although the value does not exceed 50*l*. *Ib.*

(*h*) *Bach* v. *Meats*, 5 M. & S. 200.

(*i*) *Thornton* v. *Adams*, 5 M. & S. 38.

(*k*) *Brooke* v. *Noakes*,[4] 8 B. & C. 539.

(*l*) 2 Will. Saund. 284, a; 3 Esp. C. 15. *Furneaux* v. *Fotherby*, 4 Camp. 136. As to the justification by the landlord in an action of trespass, see TRESPASS.

(*m*) According to the stat. 11 Geo. 2, c. 19, s. 1, 2.

(*n*) See these titles respectively.

(*o*) Com. Dig. Action on the Case, B. 1.

(A) (But a bare refusal of permission to exercise a right, does not amount to a legal disturbance of that right. *Downing* v. *Baldwin*, 1 Serg. & R. 298.)

[1] Eng. Com. Law Reps. xxii. 282. [2] *Id.* xi. 338. [3] *Id.* xvi. 187. [4] *Id.* xv. 289.

should allege a prescription, yet as it is but inducement, a variance from the prescription in evidence would not be material, provided the plaintiff proved himself to be really entitled to the right claimed (*p*); but the plaintiff must prove *his right as claimed;* as, if he claim a right as appurtenant to particular lands, by proof that it has been used by the occupiers of that land; and it would be insufficient to prove that the right was enjoyed as appurtenant to other lands, or by the tenants of the other manor (*q*) (A). Proof of the plaintiff's right.

The title to a right of this nature is proved, either, 1st, by direct, or 2dly, more usually by presumptive evidence; by direct evidence, as by proof of a grant of a right of way, as appurtenant to a house or land, or of a right to a pew, as appurtenant to a house, by proof of a faculty (*r*).

2dly, Prescriptive rights can seldom be proved except by presumptions resulting from constant usage and enjoyment, where the right is of a private nature; and from such evidence, and also from reputation and traditionary declarations, where it is of a public nature (*s*). Presumptive evidence.

An uninterrupted enjoyment of land for twenty years, in the claimant's own right, is *primâ facie* evidence of title to the land itself (*t*); and an enjoyment of a privilege or easement in the lands of another, affords also a presumption of a legal title by grant or prescription (*u*); this, however, is merely presumptive evidence of the right, which is liable to be rebutted by circumstances (*x*); and on the other hand, the presumption of legal title may be inferred from a shorter period of possession (*y*).

In an action for the disturbance of the plaintiff in his enjoyment of a pew in a church, proof of *possession* is sufficient against a wrong-doer, without *proof of repairs done by the plaintiff (*z*); but as against the ordinary, who by the common law has the disposal of all the seats in the church, a special title or consideration must be alleged and proved; as by proof of the building and repairing of the seat (*a*). The defendant may adduce evidence to rebut *396

(*p*) As against a stranger for a wrongful disturbance of a right, the mode by which he acquired the right is, it seems, no more material to be stated, than it would be if the plaintiff in an action of trover should aver that he was lawfully possessed of goods bought at a fair. *Secus* in trespass or replevin, where, if a plaintiff allege a particular estate, he would be bound to prove it on issue taken. *Sir Francis Leake's Case*, Dyer, 365. *Gorman* v. *Sweeting*, 2 Will. Saund. 206, note (22); 2 Cro. 630; Com. Dig. Action on the Case, B. 1; 1 Will. Saund. 346. *Ricketts* v. *Salway*, 2 B. & A. 360.

(*q*) *Wilson* v. *Page*, 4 Esp. C. 71. But where the plaintiff declared upon a right of common, in respect of a messuage and 150 acres of land, with the appurtenances, it was held that the declaration was divisible, and that proof of common right in respect of the *land* was sufficient to entitle the plaintiff to a verdict *pro tanto*. *Ricketts* v. *Salway*, 2 B. & A. 360. The allegation of a right of common for all the plaintiff's cattle, *levant* and *couchant*, &c. may be supported, although the common be not sufficient to feed all the cattle for a length of time. *Willis* v. *Ward*,[1] 2 Chitty, 297. So it was held that an allegation that the plaintiff was entitled to common of pasture for all cattle, *levant* and *couchant*, upon the land, was supported by evidence that the plaintiff was a part owner with defendant and others of a common field, upon which, after the corn was reaped, and the field cleared, the custom was for the different occupiers to turn out cattle in proportion to the extent of their respective lands within the common field; and although such cattle were not maintained upon such land in winter, and although the custom was to turn out according to the extent, and not the produce, of the land in respect of which the right was claimed; and that the right was well laid to extend over the whole common, without excepting his own land. *Cheesman* v. *Hardham*, 1 B. & A. 706.

(*r*) See *Stocks* v. *Booth*, 1 T. R. 428.

(*s*) Vid. Vol. I. and *infra*, tit. Prescription.

(*t*) See tit. Ejectment.

(*u*) See the cases, 2 Will. Saund. 175, a.; and also tit. Prescription.—Presumption.

(*x*) See tit. Presumption.—Length of Time.

(*y*) Ibid.; and see *Bealey* v. *Shaw*, 6 East, 208.

(*z*) *Kenrick* v. *Taylor*, 1 Wils. 326. [Sayer, 31, s. c.] The pew was there claimed by prescription, as appurtenant to a messuage. *Burton* v. *Bateman*, 1. Sid. 203. See tit. Pew.—Prescription.

(*a*) Ibid.; and 3 Lev. 73; 2 Lev. 241; Salk. 551; 1 Buls. 150; Godb. 200.

(A) (Where an action for a disturbance in the enjoyment of a fishery, was brought by several persons, some of whom had an absolute title to the fishery, and the others were in possession under a parol agreement, it was held, the plaintiffs had properly joined in the suit. *Russel* v. *Stocking*, 8 Conn. R. 236.)

[1] Eng. Com. Law Reps. xi. 289.

the presumption of right arising from such continued enjoyment, by evidence tending to explain it, and to show that the enjoyment was founded not on right, but on leave and permission (*b*); or to destroy the prescription by proving the origin of the enjoyment, or showing that it has been interrupted, or that the prescription has been extinguished (*c*).

Proof of the disturbance.

2dly. The disturbance may be alleged generally, and the particular manner of the disturbance be given in evidence (*d*).

Of damage.

3dly. Proof of damage done, to the smallest amount, will be sufficient to support the action, although the plaintiff cannot prove damages to any specific and determinate amount; for if that were required where the plaintiff's right has been infringed, the wrong-doer might gain a title by length of possession (*e*); as, if a stranger turn cattle on the land where the plaintiff has a right of common (*f*): for it is a damage to the plaintiff that he cannot enjoy the right of common in so ample and beneficial a manner as, but for the defendant's act, he might have done (*g*). So, if the defendant take from the common any manure dropped there by the cattle (*h*).

DRUNKENNESS.

A DEFENDANT may avoid even a deed on *non est factum* pleaded, by evidence that he was made to sign it when he was so drunk that he did not know what he did (*i*), in which case it is entirely void (A). So *à fortiori* may he avoid an alleged agreement, not under seal, by such evidence (*k*). It has indeed been said that a Court of Equity will not relieve in such a case, unless the inability were occasioned by the management and contrivance of him who gained the deed (*l*). But at common law no such distinction seems to obtain: the law regards the contracts of one who for the time is bereaved of reason, though by his own folly, as void, and does not punish his moral delinquency by subjecting him to obligations to which assent is essential, when he was incapable of assent (*m*).

(*b*) See tit. PRESUMPTION.—LENGTH OF TIME. *Bradbury* v. *Grinsell*, 2 Will. Saund. 175, d. *Daniel* v. *North*, 11 East, 372. *Campbell* v. *Wilson*, 2 East, 294.

(*c*) See tit. PRESCRIPTION.

(*d*) 2 Cro. 606; Bridg. 4; Com. Dig. Action on Case, B. 1.

(*e*) See the observations of Buller and Grose, J^s^, *Hobson* v. *Todd*, 4 T. R. 71. [Angell on Watercourses, 50, 53.]

(*f*) *Hobson* v. *Todd*, 4 T. R. 71. (*g*) *Ibid.*

(*h*) *Pindar* v. *Wadsworth*, 2 East, 154. In case for a surcharge it is not necessary for the plaintiff to show that he put on any cattle of his own at the time of the surcharge, but only that he could not enjoy so beneficially. *Wells* v. *Watling*, 2 W. Bl. 1233.

(*i*) B. N. P. 172, cites *Cole* v. *Robins*, Hil. 2, Ann. per Holt, C. J., and per Ld. Ellenborough in *Pitt* v. *Smith*, 3 Camp. 33. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise. Per Lord Hardwicke, in *Cory* v. *Cory*, 1 Ves. 19, drunkenness is not sufficient to set aside an agreement to settle family disputes, unless an unfair advantage be taken.

(*k*) *Pitt* v. *Smith*, 3 Camp. 33. *Fenton* v. *Holloway*,[1] 1 Starkie's C. 126.

(*l*) *Johnson* v. *Medlicott*, 3 P. W. 130; 1 V. & B. 30.

(*m*) See the observations of Bayley, J., in *Baxter* v. *Earl of Portsmouth*,[2] 7 D. & R. 614. It would be singular that the law should merely inflict a fine of 5*s.* on a man for getting drunk, but afterwards mulct him to the amount of 1,000*l.* by holding him to performance of a contract made when he was drunk. Sir E. Coke, 2 Inst. 747, a., says, that one who by his own vicious act for a time deprived himself of reason and memory, though a kind of *non compos*, shall gain no benefit or privilege thereby. And this is, no doubt, true, that a voluntary drunkard can never avail himself of his incapacity as an excuse, either civilly or criminally, for not doing that which he otherwise ought to have done; and it is also true, that a drunkard, *voluntarius dæmon*, as he is styled by Sir E. Coke, is liable both civilly and criminally in respect of every offence which he commits, whether it be against an individual or against the public. But if a party be made drunk by the stratagem of another, or by fraud, he is not responsible. Per Park, J., in *R.* v. *Pearson*,

(A) (*Wigglesworth* v. *Steers*, 1 Hen. & Munf. 70; but a contract under seal for a valuable consideration, will not be avoided on the ground of intoxication at the time it was executed, if his assent has been afterwards given when not disabled by intoxication or otherwise. *Arnold* v. *Hickman*, 6 Munf. 15.)

[1]Eng. Com. Law Reps. ii. 234. [2]*Id.* xvi. 304.

*It is an established rule of criminal law, that voluntary drunkenness is no excuse for any injury or offence to the public or to individuals, either criminally or civilly; but that the circumstance, where a crime has been committed, is regarded rather as an aggravation than an extenuation of guilt (*n*).

DURESS.

According to Bracton, to constitute a duress in law it must not be *suspicio cujuslibet vani et meticulosi hominis sed tallis quæ possit cadere in virum constantem talis enim debet esse metus qui in se contineat vitæ periculum aut corporis cruciatum* (*o*) (A). Lord Coke enumerates four instances in which a man may avoid his own act by reason of menaces: 1st, for fear of loss of life; 2dly, of member; 3dly, of mayhem; 4thly, of imprisonment (*p*) (1).

In the case of duress by imprisonment proof should be given that it is an unlawful imprisonment, for where the imprisonment is in due course of law the maxim applies, *executio juris non habet injuriam* (*q*) (2); and therefore, where a defendant after judgment against him without any legal cause of action, procured the plaintiff to be arrested on legal process, and threatened that he should lie and perish in gaol unless he executed a release, upon which the plaintiff sealed one, and was discharged, it was held that the release could not be avoided by duress (*r*). But even in the case of a lawful imprisonment, the use of illegal force, constraint, or the practising unnecessary privations or hardships, will constitute duress (*s*). But where one caused another to be arrested on a charge of felony, under a warrant from a justice of the peace, and discharged him upon his sealing a bond for 10*l*., it was held that the deed might be avoided, the proceedings being a mere pretext to cover the deceit (*t*) (B). Where the duress is by threats

2 Lewin's C. 145. See also the observations of the same learned Judge in *Marshall's Case*, 1 Lewin's C. 76; and of Holroyd, J., in *Burrough's Case*, Ib. 75; and *Rennie's Case*, Ib. 76. In *Pearson's Case*, Park, J., is also stated to have said, that drunkenness may be taken into consideration to explain the probability of a party's intention, in the case of violence committed on sudden provocation. *See* Appendix.

(*n*) *Supra*, note (*m*). (*o*) Brac. l. 2, c. 5.

(*p*) 2 Inst. 483; 2 Roll. Ab. 124; Bac. Ab. Ev. Duress. A threat to beat, or burn the house of the party, or to spoil his goods, it is said, is no duress (3), because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages (2 Inst. 481; 1 Comm. 131); but no suitable atonement can be made for loss of life or limb. Ibid. *Qu.* and vide *supra*, tit. Deed.

(*q*) Bac. Ab. Ev. Duress, 402. 2 Lev. 239.

(*r*) *Cor.* Bridgman, C. J., Guildhall Lev. 69. [See 6 Mass. Rep. 512; 1 Hen. & Mun. 350. *Nelson* v. *Luddwith et al.*]

(*s*) The effect of duress by imprisonment, in the avoidance of a deed or feoffment, is very analogous to the case of infancy. The act of the prisoner or of the infant is not *void* but *voidable* only, by entry or action, and can be avoided by privies in blood only; but a feoffment in either case made by letter of attorney is *void*. A bond, executed by an impressed man for securing his return in case of non-payment of the money, is illegal and void. *Pole* v. *Harrobin*, 9 East, 416.

(*t*) Allen, 92. So ruled by Rolle, upon the trial of an issue on the duress. See Bac. Ab. Ev. tit. Duress, 405. See tit. Deed.

(A) (A party who violates a penal statute must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence. Circumstances will sometimes outweigh positive testimony. *Brig Struggle* v. *The U. S.*, 9 Cranch, 71; 3 Conn. Rep. 276. See also, *The Argo*, *Hughes claimant*, 1 Gallis, C. C. R. 150.)

(1) [One obligor cannot plead that the bond was obtained of his co-obligor by duress—but this rule does not apply to a bond taken by a sheriff from a defendant whom he has no right to detain in custody; and the co-obligor, or surety, may avail himself of the offence of duress, in a several action against him. *Thompson* v. *Lockwood*, 15 Johns. 256.]

(2) [If a defendant, under arrest, agree to submit the matter in controversy to arbitration, the agreement is not void on the ground of duress—nor would a final settlement be void. *Shepherd* v. *Watrous*, 3 Caines' Rep. 168. See also *Watkins* v. *Baird*, 6 Mass. Rep 511.]

(3) [In South Carolina, duress of goods, under some circumstances, will avoid a contract. *Sasportas* v. *Jennings*, 1 Bay, 47. *Collins* v. *Westbury*, 2 Bay, 211.]

(B) (Duress arising from threats to destroy vessel and cargo cannot be admitted to avoid a contract of

they must be of such a nature as are sufficient to overcome a man of mode-
*398 rate *firmness (*u*). Duress to avoid a deed must be pleaded specially (*x*) (A). And the question of duress *per minas* in case of treason (*y*), and, as it seems, in other cases, is a question of fact for the jury, subject, however, to the rules of law, where the law defines.

Upon an indictment for extorting money by duress, it must be shown that such means were used as common prudence and firmness cannot guard against (*z*).

EJECTMENT.

I. Proof of the title to enter.
II. Of the Plaintiff's title in general.
III. Of the title of an administrator or executor.
- Assignee of bankrupt (*a*).
- Conusee of statute-merchant, &c.
- Devisee, or tenant by.
- Elegit.
- Guardian.
- Heir at Law.
- Husband, &c.
- Landlord.
- Mortgage.
- Rector.
- Tenant in common, joint tenant, &c.

IV. Variance.
V. Defendant's possession.
VI. Competency of Witnesses.
VII. Trespass for mesne profits.
VIII. Effect of judgment in evidence.

(*u*) Br. l. 2, c. 5. *R.* v. *Southerton*, 6 East, 140; Com. Dig. Pleader, 2 W. 19.

(*x*) And the special manner must be set forth. 5 Co. 119; 2 Inst. 483. In *assumpsit* or debt on simple contract, duress is evidence under the general issue. Ib.

(*y*) Forster, 14; 3 B. & P. 73. The threat in such case must affect the life, and not merely the property.

(*z*) In *R.* v. *Southerton*, 6 East, 144, where the question was, whether it be an offence at common law to threaten another that he will procure a public officer to prosecute him unless he give him money, Lawrence, J., observed, it has been decided in many cases that even where money has been fraudulently obtained, yet it is not indictable; as in *R.* v. *Jones*, 1 Salk. 379, where the defendant obtained money of another by pretending that he was sent by a third person for it. One of the Judges in that case said, that one man cannot be indicted because another has been a fool. The case of *The Queen* v. *Hannon*, 6 Mod. 311, is to the same purpose. It is otherwise where money is obtained by such means as common prudence and firmness cannot guard against. The same distinction was adopted by the old law with respect to such as were deterred by threats from making entries into lands which they claimed. The threats must be such as will deter *virum fortem et constantem* from entering on the land, in order to render it sufficient for him to go as near to it as he possibly may, for the purpose of asserting his claim. But there must be a fear of personal violence. Co. Litt. 253, b. And it is there said "that it seemeth that fear of imprisonment is also sufficient, for such a fear sufficeth to avoid a bond or a deed." And that shows the ground of the decision in *The Queen* v. *Woodward and others*. That was not a case of mere threat, but the man was in actual duress at the time, and was threatened to be taken to Newgate; and one cannot say that that might not be such a threat as a man of ordinary firmness could not resist. But here, when the defendant threatened to prosecute the party for the penalties, a man of ordinary firmness might well have said to him, that he was not guilty of the offence charged, and therefore he might prosecute him at his peril if he pleased.

(*a*) These proofs have already been considered; see tit. Bankrupt.

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ransom, where the captain was justified by probable cause. *Maiponaire* v. *Keating*, 2 Gallis, C. C. R. 337. Where a party discharged under the insolvent law of one state, is arrested for a debt due before his discharge, in another state, a plea of duress to an instrument given for the debt, while in confinement, will not be received. *Secus*, if the arrest had been in the state where he was discharged. *Satopee* v. *Pecholier*, 2 Wash. C. C. R. 180. See *Watkins* v. *Baird*, 6 Mass. Rep. 506, &c.)

(A) (A voluntary and free acknowledgement of a deed after its execution before a magistrate, especially some considerable time after, would be strong evidence against a plea of duress. *The Inhabitants of Worcester* v. *Eaton*, 13 Mass. R. 371.)

THE declaration in ejectment comprises four allegations,—the title of the *lessor of the plaintiff; a lease by him to the plaintiff; an entry by the latter; *399
and an ouster by the defendant. By the consent-rule the proof is usually confined to the title of the lessor.

Title to enter.

The lease, entry, and ouster being admitted, no proof of the plaintiff's entry under the supposed lease is requisite, although proof of an actual entry by the lessor is sometimes rendered necessary, as constituting his title to possession. So, except in some particular instances, the ouster by the defendant is also admitted (*b*). The plaintiff's proof usually consists, therefore, in proving *the lessor's title to enter and possess* (for the nature of the action is merely possessory) the identical lands in dispute (*c*).

Proof of a legal title to the lands is not always sufficient, for notwithstanding a legal title the party may not have a right to enter and possess. But in general, except where the right of entry is taken away by the statute of limitations (*d*), or of fines (*e*), and in some instances, where the right of entry is devested at common law (*f*), it is sufficient to prove, simply, the legal title to the lands.

Proof of, within twenty years.

The statute 3 & 4 Will. 4, c. 27, s. 2, enacts, that no person shall make an entry (*g*), or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which such title shall have first accrued (*h*) according to the statute. Where, therefore, the title has actually accrued within twenty years next before the commencement of the action, it is usually sufficient to prove the legal title (A). Where the

(*b*) *Infra*, 429.

(*c*) As to the latter point, see Possession by the Defendant, *infra*, 431. The plaintiff is not bound to produce the consent-rule as part of his case. *Doe* v. *Raby*,[1] 2 B. & Ad. 948. Contra *Doe* v. *Lamble*, M. & M. 237. It may be necessary to produce it where the plaintiff applies his evidence to premises which the defendant asserts he does not defend, for it may then be necessary to show what he does defend for. Per Ld. Tenterden,[1] 2 B. & Ad. 949.

(*d*) 21 Jac. 1, c. 16, and now by the st. 3 & 4 W. 4, c. 27.

(*e*) 4 Hen. 7, c. 24; and *infra*, tit. FINE. (*f*) *Infra*, 403.

(*g*) It seems that this statute like the stat. 21 J. 1, c. 16, takes away the right of entry after twenty years have accrued subsequently to possession under a legal title, or such receipt of rent, or acknowledgment, as is provided for by the statute. Where a jointress for life married again and joined her second husband in levying a fine, and he survived her, and held the land for twenty years, it was held that the reversioner was bound although the fine was void, *Doe* v. *Gregory*,[2] 2 Ad. & Ell. 14.

(*h*) This statute has superseded the former limitation of twenty years prescribed by the stat. 21 J. 1, and made numerous provisions for defining in particular cases the time when the right shall be deemed to have accrued. As this statute extends to distresses and other actions besides ejectment, its provisions are considered under the title LIMITATIONS and APPENDIX.

(A) (Where an adverse possession has continued for twenty years, it constitutes a complete bar in equity; an ejectment would be barred if the plaintiff possessed a legal title. *Elmendorf* v. *Taylor*, 10 Wheat. 157; 6 Cond. Rep. 47. *Gordon* v. *Hobart*, 2 Sumner C. C. R. 401. *Ewing* v. *Bunet*, 8 Peters, 41. But a man cannot object his own possession for twenty years against his deed given within that time. *Duane* v. *Bibb*, 3 Call. 362. In Pennsylvania, ejectment is almost the only action for trying title to land. Per M'Kean, C. J. *Morris* v. *Vanderen*, 1 Dall. 67. In that state it supplies to a great extent the place of a bill in equity. Thus a *cestui que trust* may maintain ejectment in his own name. *Kennedy* v. *Fury*, 1 Dall. 72. See also *Crunkelton* v. *Evert*, 3 Yeates, 510; *Simpson* v. *Ammons et al.* 1 Binn. 177; *Moody et al.* v. *Vandyke et al.* 4 Binn. 41. *Lessee of Savage* v. *Burke*, 12 Peters, 11. Whenever Chancery would execute a trust or decree a conveyance, the courts of that state, by the instrumentality of a jury would direct a recovery in ejectment. *Peebles* v. *Reading*, 8 Serg. & Rawle, 491. But in the Courts of the United States, whatever may be the practice of the State Courts, an equitable estate is not sufficient to support an ejectment. *Carson* v. *Boudinot*, 2 Wash. C. C. R. 35. *Robinson* v. *Campbell*, 3 Wheat. 212. The statute of limitations of Pennsylvania is substantially the same as that of 21st James I, ch. 16. The limitation begins to run from the time of actual adverse possession and not before. *Lessee of Potts* v. *Gilbert*, 3 Wash. C. C. R. 475. In Pennsylvania the same length of possession in the plaintiff in ejectment, which in the defendant would amount to a bar, is in

[1]Eng. Com. Law Reps. xxii. 219. [2]*Id.* xxix. 14.

title has accrued at a greater distance of time than twenty years, the plaintiff must prove that he laboured under one of the disabilities (*i*) within the statute.

Under the stat. 21 J. 1, c. 16, the plaintiff might show that he had *virtually* been in possession, although another had been in the actual possession; as by proof that the party in actual possession was his tenant under a lease, although no rent had been paid (*k*), and even although a forfeiture had been committed by the tenant (*l*), by non-payment of rent, for he was not bound to enter till the determination of the lease.

*400 *The mere receipt of rent by a stranger, without colour of title, was not evidence of adverse possession against one who had the legal title, for it was no disseisin but at the option of the latter, even although the stranger made a lease to the tenant by indenture, reserving rent, unless he made an actual entry (*m*).

Where the lord of a manor brought ejectment against a cottager, twenty years possession was a good title where the cottage had been built in defiance of, or without the consent of the lord, but this was liable to be rebutted by proof that it was built by the permission of the lord, or by any subsequent acknowledgement of his title; and in such cases it has been said, that it was rather to be presumed, in the absence of any evidence to the contrary, that the lord of the manor had assented (*n*). The question, whether the possession was adverse or permissive in such cases, was for the consideration of the jury.

The 2d and 3d clauses of the stat. 3 & 4 Will. 4, c. 27, have superseded the doctrine of non-adverse possession, except in cases within the 15th

(*i*) See the stat. 3 & 4 W. 4, c. 27, ss. 15 to 18 inclusive. (*k*) Runn. 457.

(*l*) 7 East, 299; where the devisee entered within twenty years after the expiration of the lease, but not until after twenty years from the death of the testatrix. See also *Jayne* v. *Price*,[1] 5 Taunt. 326; 1 Marsh, 68. It lies on the lessor of the plaintiff to show possession, &c. under a legal title within the last twenty years. See B. N. P. 102. Where a pauper had, thirty years ago, inclosed a piece of waste in an adjoining parish, and cultivated it until 1827, when he sold and conveyed it to a purchaser; he had shortly before erected a hut thereon, and resided in it a year and a half; the parishioners and commoners had, upon several perambulations, prostrated part of the fence, and rode through the enclosure, but the pauper was never present, and he had never paid any acknowledgement to the lord or other person during his occupation; held that it was to be deemed an adverse possession for twenty years, and that a settlement by estate was gained in the parish. *R.* v. *Woburn*,[2] 10 B. & C. 846.

(*m*) B. N. P. 104; 1 Roll. Ab. 659. And see *Smith* v. *Parkhurst*, Andr. 315. But it is said (B. N. P. 404), that if the tenant declare that he is in possession for the stranger, it may be evidence to go to a jury, especially if he has any colour of title. *Damer* v. *Fortescue*, B. N. P. 104.

(*n*) B. N. P. 104. *Infra*, tit. Manor. Where the defendant had enclosed a small piece of waste adjoining to the highway, and occupied it for thirty years, but afterwards the owner of the adjoining land demanded sixpence for rent, which the defendant paid on three several occasions; the evidence was held to be conclusive to show that the original occupation was permissive. *Doe* v. *Wilkinson*,[3] 3 B. & C. 413; and see *Doe* v. *Clarke*,[4] 8 B. & C. 717.

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the plaintiff a sufficient title for him to recover on. To avoid the force of it, the other side must prove that he brought suit, or made an actual entry on the land within the time the law prescribes. *Lessee of Holtzapple and wife* v. *Phillebaum*, 4 Wash. C C. R. 356. But proof that the party claiming the land "attended every year on the land, prosecuting and claiming his title to it; that the witness was with him every year on the land, but could not remember what he said when he was there," is not sufficient evidence of a legal entry to avoid the statute of limitations. *Ibid.* Evidence of the mere silence of the plaintiff and the improvement of his property by others, will not deprive him of his title; yet aid and encouragement to keep up and repair the property, and the expenditure of money in consequence thereof, would in equity give a title to the defendant. *Folk* v. *Bridelman*, 6 Watts, 339. In South Carolina it is settled law, that an entry on land by one having the right, has the same effect in arresting the progress of limitation as a suit, but it cannot be sustained as a legal proposition, that an entry by one having no right, is of any avail. *Henderson* v. *Griffin*, 5 Peters, 151. Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession for seven years. But such a possession cannot exist, if the party having the better right takes actual possession in pursuance of his right. *McClung* v. *Ross*, 5 Wheat. 116.)

[1] Eng. Com. Law Reps. i. 121. [2] *Id.* xxi. 180. [3] *Id.* x. 135. [4] *Id.* xv. 331.

clause; the question being, whether twenty years have elapsed since the right accrued, without regard to the nature of the possession (*o*).

The plaintiff might also show that he was joint tenant, or tenant in common with the party in actual possession; for the possession of one joint tenant or tenant in common is the possession of the other, unless there has been an actual ouster (*p*).

Possession within 20 years.

On proof that the sister of the plaintiff occupied the estate for twenty years, and that the defendant entered as heir to her, her possession would before the late statute have been construed to be by courtesy and by license, *to preserve the possession of the brother; but the presumption would have ceased if it had appeared that the brother had been in the actual possession, and that he had been ousted by the sister (*q*). *401

But now by the stat. 3 & 4 Will. 4, c. 27, s. 13, it is enacted, that where a younger brother or other relation of the person entitled as heir to the possession, or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of, or by the person entitled as heir.

The mere perception of profits by a joint tenant or tenant in common would not constitute an ouster, but when long continued was evidence of an actual ouster (*r*). Neither will a refusal to pay rent, coupled with a denial of the title, amount to an actual ouster (*s*).

It has been held that declarations made by a person in the actual possession of premises, that she was entitled to them for life, and that after her death they would go to the heir of her deceased husband, were, after her death, admissible in evidence to rebut the inference of an adverse possession (*t*).

In order to prove possession, in an ejectment for mines, it is not sufficient to show that the lessor of the plaintiff was the lord of the manor; an actual possession must be proved (*u*). Nor will a verdict for the plaintiff in trover for lead dug out of a mine prove possession of the mine, for the action may have been brought by the heir-at-law, who had property in the mine, but had no possession (*x*).

Where the husband was tenant by the curtesy of a copyhold estate which descended to the wife, who had never been admitted, and was also admitted after the death of the wife to hold, pursuant to a settlement of the

(*o*) *Nepean* v. *Doe* d. *Knight*, on error, 2 M. & W. 894. *A.* mortgages in fee to *B.* subject to cesser upon payment on a day named (more than twenty years before the stat.); within twenty years *A.* admitted that the money was unpaid. *B.*'s heir brought ejectment (within five years after the passing of the Act). The jury found that the money was unpaid; and it was held that the possession not being adverse at the passing of the Act, the action was not barred under sect. 2, although the lessor was not shown to have been in possession or received rents or interest. *Doe* v. *Williams*,[1] 5 Ad. & Ell. 291; and see *Doe* v. *Thompson*,[2] ib. 532. A feme sole seised in fee having married, she and her husband quitted possession, and both died at times neither of which was shown to be within forty years after ceasing to occupy. The wife's heir brought ejectment within twenty years after the husband's death and within five years after the passing of the statute. It was held that the heir was barred under the 17th section, although it did not appear how the defendant had come into possession, or that any fine had been levied by the wife. *Doe* v. *Bramston*,[3] 3 Ad. & Ell. 63.

(*p*) Salk. 421; Peake's L. E. 333. [*Giddings* v. *Canfield*, 4 Com. Rep. 482.] As to what shall amount to an actual ouster, see Ld. Raym. 312, 829; 5 Burr. 2604. But now see the late stat. 3 & 4 Will. 4, c. 27, s. 12. *Infra*, tit. LIMITATIONS.

(*q*) *Page* v. *Selfby*, per Weston, J. Sussex, 1680, B. N. P. 102. In that case it would amount to a disseisin. Vide *infra*.

(*r*) *Doe* v. *Prosser*, Cowp. 217; 2 Bl. 690.

(*s*) *Doe* v. *Prosser*, Cowp. 217. But now see the late stat. s. 12.

(*t*) *Doe* d. *Humon* v. *Pettit*, 3 B. & A. *Vide* Vol. I. and Ind. tit. HEARSAY.

(*u*) *Lord Cullen* v. *Rich*, 14 Geo. 2; Runn. 292; B. N. P. 102; *Rich* v. *Johnson*, Str. 1142.

(*x*) *Ibid.*; Runn. 292.

[1]Eng. Com. Law Reps. xxxi. 340. [2]*Id.* xxxi. 390. [3]*Id.* xxx. 30.

estate of the wife, by which it was limited to the survivor in fee, it was held that his possession was not adverse to the heir-at-law of the wife (*y*), and that the heir might maintain ejectment within twenty years of the husband's death.

Where *A.*, a copyholder for life, with remainder to *B.*, surrendered his own estate for life, and thereby let in *B.* and took a new copy for the successive lives of himself, *B.* and *C.*; and on *A.*'s death after twenty years had run against *B.*, *B.* got into possession, it was held that he might defend upon his legal title coupled with possession, against *C.* who had no title, whatever the effect of *A.*'s possession was (*z*).

Actual entry.

2dly. Where the ejectment is brought within the twenty years, the confession by the defendant, of a lease, entry, and ouster, includes all the essential formalities, and it is unnecessary to prove an *actual* entry (*a*).(A). Before the late statute, where the ejectment was brought by one under no disability, after the expiration of twenty years he might have availed himself of an *actual* entry within the twenty years (*b*), by himself, or by some person by his command, or with his assent (*c*), on part of the lands, in the name of the whole (*d*).

*402 *A ratification by the claimant, of the entry of another on his behalf before the time of the demise, was sufficient (*e*). It seems that the subsequent bringing of the action was sufficient evidence of assent (*f*), for *omnis ratihabitio retro trahitur & mandato priori æquiparatur.* The lessor of the plaintiff was also bound to prove, under the stat. 4 Anne, c. 16, that he commenced his action within one year next after such entry (*g*).

It is now expressly provided by the stat. 3 & 4 W. 4, c. 27, 10, that no person shall be deemed to have been in possession of any land within the meaning of the Act, merely by reason of having made an entry thereon.

Where the declaration in ejectment was delivered within the twenty years, and the plaintiff was nonsuited, and afterwards brought another action after the expiration of the twenty years, it was held that the confession of the lease in the former action was not evidence of an entry to bar the statute (*h*).

So, in some instances, where a fine has been levied with proclamations (*i*), unless the plaintiff can show that he is within one of the exceptions in the statute (*k*), he must prove an actual entry by himself, or an authorized agent, for the purpose of avoiding the fine (*l*). The claim must be made

(*y*) *Doe* v. *Brightwen*, 10 East, 583.
(*z*) *Doe* v. *Reade*, 8 East, 353.
(*a*) 1 Doug. 484. And now see the provisions of the late stat. as to ENTRIES.
(*b*) 1 Will. Saund. 319, c.; 7 T. R. 433; 9 East, 17.
(*c*) 9 Rep. 106; Popham, 108.
(*d*) 1 Will. Saund. 319, c.; 6 Modd. 44. If the entry be made for the purpose of avoiding a fine, a declaration should be made to that effect on entry.
(*e*) See *Podger's Case*, 9 Co. 106.
(*f*) Str. 1128; B. N. P. 103; *infra*, note (*s*).
(*g*) As to the mode of proof, see TIME. Before the stat. 4 Ann. c. 16, the stat. of 21 Jac. 1, c. 16, was avoidable by continued entries made successively within the space of twenty years from each other. Co. Litt. 15; 3 Bl. Comm. 175; Salk. 285. *Ford* v. *Gray*, 6 Mod. 44.
(*h*) Runn. 62.
(*i*) For the cases in which an actual entry is necessary to avoid a fine levied with proclamations, see B. N. P. 99; Runn. 45; 2 Doug. 484; 2 Str. 1086; 3 Burr. 1895; 9 Rep. 106; Poph. 108; 2 Str. 1128; 1 Will. Saund. 319; 4 Hen. 7, c. 24. It seems that an actual entry is never necessary, except for the purpose of avoiding a fine. *Doe* d. *Davenport* v. *Duncannon*, Lofft, 360. *Goodright* d. *Hone* v. *Cator*, Doug. 477. Where a younger son, living with his father previous to his death, continued in possession, and afterwards levied a fine with proclamations; held, that the heir might maintain ejectment without actual entry, the original possession being permissive, and the continuance after the death of the father not founded on a new wrongful entry when the freehold was vacant, so as to constitute a disseisin or sufficient interest to give operation to the fine. *Doe* v. *Davis*, 12 Pri. 756. And see *Doe* v. *Perkins*, 2 M. & S. 271. Fines and recoveries are now abolished by the stat. 3 & 4 Will. 4, c. 74.
(*k*) 4 Hen. 7, c. 24.
(*l*) Vide *supra*, note (*i*).

(A) (*Sigler* v. *Van Riper*, 10 Wend. 414. *Fry et al.* v. *Smith*, 2 Dana, 38.)

on the land. Where the proof was, that the claim was made at the gate of the house, it was held to be insufficient, but where it was shown that there was a court before the house which belonged to it, and that though the claim was made at the gate it was upon the land, it was held to be sufficient (*m*).

An actual entry need not be proved where the fine has been levied at common law without proclamations (*n*); nor where it has been levied by a bare tenant for years (*o*); nor where the son of a tenant by sufferance holds *over (*p*); nor where the defendants had no possession of the estate *403 when the fine was levied (*q*). And the receipt of rents previous to the time of levying a fine, is not evidence of possession without proof of title (*r*).

An entry by a stranger without authority is sufficient to take advantage of a condition, provided it be assented to before the day of the demise (*s*).

Proof of disability.

3dly. If there has been no possession or actual entry within twenty years next after the time when the title accrued, the lessor of the plaintiff must show in excuse of the want of entry, that he laboured under one of the disabilities specified in the stat. 21 Jac. 1, c. 16, *i. e.* infancy, coverture, insanity, imprisonment, the being beyond seas (*t*). And also, that he entered or made distress within ten years next after the time when the party shall have ceased to be under such disability (*u*). But it is a rule, that when the statute has once begun to run no subsequent disability will affect its progress (*x*).

Proof that the right is devested.

A right of possession and a right of entry are convertable terms (*y*). Hence, if the right of entry be taken away the plaintiff cannot recover in ejectment. If *A.* disseise *B.* by wrongfully ousting him from his possession of land, *B.* may regain the possession by mere entry, and therefore may maintain ejectment. But where the disseisor died seised, the common law presumed a rightful seisin in favour of the heir, and the disseisee's right of entry was taken away or tolled. The common law annexed exceptions to this rule, where the claimant laboured under a legal disability during the life of the ancestor, as of infancy, coverture, insanity, imprisonment, or being beyond the realm. And by the stat. 32 Hen. 8, c. 33, if the disseisor die within five years after the disseisin done, such disseisin

(*m*) Skinn. 412; B. N. P. 103. (*n*) 2 Wils. 45.

(*o*) *Rowe* v. *Power*, 2 N. R. 1. *Podger's Case*, 9 Co. 106. It is a general rule, that no fine or warranty shall bar any estate in possession, reversion or remainder, which is not divided or put to a right before or at the time of the fine, or by the operation of the fine itself; for a party not put out of possession has all that claim or possession could give. Entry is not necessary, though one tenant in common of a reversion levy a fine of the whole. *Roe* d. *Truscott* v. *Elliot*, 1 B. & A. 85. And though a tenant in common levy a fine of the whole estate in possession, and take the rents and profits for nearly five years, yet it is no evidence on which the jury ought to be directed to find an actual ouster. *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568. So if ejectment be brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 H. 7, c. 24. *Doe* d. *Duckett* v. *Watts*, 9 East, 17. So where the lessee of tenant for life continued in possession after the death of the tenant for life, without paying rent, and after his death his son levied a fine with proclamations, it was held that the son of the remainder-man might maintain ejectment without actual entry. *Doe* d. *Burrell* v. *Perkins*, 3 M. & S. 271; and see *Doe* d. *Davis* v. *Davis*,[1] 1 C. & P. 130. In order to constitute a disseisin the original entry must have been wrongful. See *Doe* v. *Perkins*, 3 M. & S. 271.

(*p*) *Doe* v. *Perkins*, 3 M. & S. 279. (*q*) Andr. 326.

(*r*) *Smith* v. *Parkhurst*, Andr. 326.

(*s*) *Fitchett* v. *Adams*, Str. 1128. *Custis*, v. *Wolverton*, Cro. J. 56. As to whether an actual entry in such case be necessary, vide *Ib.* A verbal assent is sufficient; *Ib.* And see Watkins on Descent, s. 73.

(*t*) The same exceptions are contained in the Statute of Fines, 4 Hen. 7, c. 24.

(*u*) 3 & 4 Will. 4, c. 27, s. 16. By s. 17, no action shall be brought after the expiration of forty years from the time at which the right first accrued.

(*x*) *Doe* d. *Duroure* v. *Jones*, 4 T. R. 300. [See *Faw* v. *Robendean's Ex'r*, 3 Cranch, 174.]

(*y*) 1 Burr. 89. A right of entry cannot be reserved to a stranger to the estate. *Doe* v. *Lawrence*, 4 Taunt. 23.

[1]Eng. Com. Law Reps. xi. 343.

shall not take away the right of the disseisee, although he has made no claim (*z*).

Evidence of a disseisin.

What is sufficient evidence of a disseisin is a question subject to some doubt. It seems originally to have meant an actual ouster or dispossession of the owner (in which all the definitions concur) by force, or in spite of the owner (*a*), for every dispossession was not a disseisin (*b*). The ambiguity seems to have arisen from an extension of the term disseisin, for the sake of the easy remedy by assize, and its meaning was restricted or extended alternately for the benefit of the owner. To entitle him to the remedy by assize against a mere wrongful possessor, almost every obstruction of the owner's right was construed into a disseisin. And again, in favour of the true owner, where he had been actually dispossessed, and to protect him against a claim founded on a wrong, the meaning of the term
*404 was restricted *to an ouster in *spite* of the owner, or not *congeable* (*c*). This seems to have been the foundation of the doctrine of disseisin *at election* (*d*).

To the action of ejectment a mere dispossession is usually immaterial, since the title of the lessor is the only question, an ouster being admitted; therefore, where the defendant contends that the entry has been barred by an actual disseisin, and descent cast, feoffment, &c., it seems to be necessary that he should prove a disseisin in the ancient and strict sense of a *personal trespass* (*e*), an actual expulsion (*f*) and putting out of the owner, and usurpation of the freehold tenure, and not merely such a disseisin as the owner might have considered to be such at his election, for the sake of the remedy by assize.

A lease for years made by a tenant at will (*g*); an entry into lands by one who pays rent, and claims to hold as a tenant at will (*h*); the receipt by the tenant in tail of the rents of lands leased by his father to his younger brother for lives under a power (*i*), do not operate as disseisins, except at the election of the owner for the sake of his remedy; and if he has made no such election, do not take away any right of entry.

The doctrine that a descent cast tolled the entry, did not apply to the case of a devisee, nor to any case where the party had no other remedy than by entry, for if so he would be left without remedy (*k*); nor to customary or copyhold estates, where the freehold was in the lord (*l*); and therefore the devisee of a copyhold was not barred by a descent cast on the defendant by his father, who had been admitted as heir-at-law of the testatrix (*m*).

(*z*) The foeffee of the disseisor formerly acquired the right of possession by one year's non-claim; but the disseisee's right was capable of being kept alive by continued claims. Co. Litt. 256, a.

(*a*) See Litt. sec. 279; Co. Litt. 153, b. (*b*) Co. Litt. 153, b.

(*c*) Litt. sec. 279.

(*d*) See *Blunden* v. *Baugh*, Cro. Car. 303; Pal. 201; Cro. Jac. 659. *Kynaston* v. *Parry*, Salop Ass. 25 March, 1742; and Ld. Mansfield's observations in *Atkyns* v. *Horde*, 1 Burr. 89.

(*e*) Co. Litt. 153, b.

(*f*) Per Ld. Holt, Salk. 246; and per Ld. Ellenborough, 7 East, 312. And see *William* v. *Thomas*, 12 East, 141.

(*g*) *Pousley* v. *Blackman*, Palm. 201. And therefore a subsequent devise by the original lessor was held to be good, because he had not elected to admit himself to be disseised.

(*h*) Cited Cro. Car. 303. And therefore the entry of the heir of the person so entering does not bar the entry of the heir of the owner.

(*i*) *Kynaston* v. *Parry*, Salop Ass. March 1742. And therefore a recovery suffered by the tenant in tail did not operate as a bar.

(*k*) Co. Litt. 240, b. and *Doe* v. *Danvers*, 7 East, 321. But *qu.* whether the devisee has not a remedy by writ *ex gravi querela*. And see the note by Hargrave & Butler. And see *Roe* v. *Read*, 8 T. R. 118. *Doe* v. *Wroot*, 5 East, 138. The assignee of a copyhold by a common-law conveyance cannot bring ejectment even against the widow of the assignor. *Doe* v. *Webber*,[1] 3 Bing. N. C. 922.

(*l*) *Doe* v. *Danvers*, 7 East, 299.

(*m*) *Ibid.*; and now see the stat. 3 & 4 W. 4, c. 27; *infra*, tit. LIMITATIONS.

[1]Eng. Com. Law Reps. xxxii. 383.

A vendee of land let into possession on an agreement to purchase has no adverse possession (*n*) against the vendor, unless he refuse to give up possession or pay interest (*o*). Possession claimed under a lease for lives which has expired, and a new one having been granted, is not adverse (*p*).

II. It is an inflexible rule, that the lessor of the plaintiff must entitle himself to recover by the strength of his own legal title, and that he can derive no support, either from any equitable title or from weakness of his adversary (A). Thus it has been held, that an unsatisfied term for securing an annuity might be set up against the heir-at-law, although he merely claimed the premises as subject to the charge (*q*). Title in general.

*The title must be proved to exist at the the time of the demise; and if it be proved to have existed, then it will be sufficient, although the right be devested before the trial (*r*). *405

Evidence of title consists either, 1st, in showing possession and acts of ownership from which a legal title may be presumed (B); or, 2dly, in proving a particular title, as heir-at-law, devisee, executor, &c.

In the first place, long uninterrupted possession of an estate by a man and his ancestors is the strongest presumptive evidence of an estate in fee. Where lands have descended for many generations from father to son, such possession may be the only evidence, and it is the best presumptive evidence of title. Presumptive, from possession.

In the next place, in analogy to the stat. 21 Jac. 1, c. 16, a clear undisturbed possession of twenty years is evidence of an estate in fee, if no other title appear; and upon such evidence a plaintiff may recover in ejectment (*s*).

The presumption of title resulting from such possession of twenty years is liable to be rebutted by evidence that the possession was not adverse to

(*n*) *Doe* v. *Edgar*, 2 Bing. N. C. 498. (*o*) *Ibid.*

(*p*) *R.* v. *Axbridge*,[1] 2 Ad. & Ell. 520.

(*q*) *Doe* v. *Staple*, 2 T. R. 684. But notwithstanding the general rule that the legal title must prevail in ejectment, yet a party may be estopped from contesting the title of the adversary. A man cannot recover contrary to his own covenant for quiet enjoyment. *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 597. *Right* d. *Green* v. *Proctor*, 4 Burr. 2208. A tenant cannot set up the title of a third person against his lessor. *Doe* d. *Bristowe* v. *Pegge*, 1 T. R. 750, n. *infra*. Nor can a mortgagor defeat his mortgagee's title by setting up a title in a third person. *Doe* v. *Pegge*, 1 T. R. 760. And see *Doe* d. *Nepean* v. *Budden*, *supra*, 22, note (*q*).

(*r*) For although the plaintiff would not be entitled to sue out an *habere facias possessionem*, he would still be entitled to the intermediate mesne profits, to be recovered through the medium of an ejectment. *Doe* v. *Black*, 3 Camp. 447. B. N. P. 105. Co. Litt. 285, a.

(*s*) Per Ld. Mansfield, *Denn* v. *Barnard*, 1 Cowp. 597; and per Holt, C. J. *Stokes* v. *Berry*, Salk. 421. And see *Cholmondely* v. *Clinton*, 2 Jar. & W. 156. *Taylor* v. *Horde*, 1 Burr. 119. And see the provisions of the stat. 3 & 4 Will. 4, c. 27, s. 34, which expressly extinguishes title of one against whom possession has run. So if the plaintiff prove possession for twenty years, and the defendant prove possession for less than twenty, an ejectment is maintainable on twenty years' adverse possession, although it was in continuation of possession by a sister who entered by abatement into land to which her elder brother was entitled as heir (whose issue was still living), and who died more than twenty years before the ejectment suit. *Doe* v. *Lawley*,[2] 3 N. & M. 331. The plaintiff relied on a twenty-three years' possession prior to the later possession by the defendant for ten years; held, that the defendant proving no title in himself or any other, the prior presumptive title ought to prevail. *Doe* d. *Harding* v. *Cooke*,[3] 7 Bing. 346, and 5 M. & P. 181.

(A) (*Kennedy* v. *Skeer*, 3 Watts, 95. *Jared* v. *Goodtitle*, 1 Blackf. 30. *Miller's Lessee* v. *Holt*, Tenn. R. 49. An outstanding title in a person other than the lessor of the plaintiff in ejectment, is sufficient to defeat his recovery, though the defendant do not claim under that title. *Jackson* v. *Harrington*, 9 Cow. 86.)

(B) (*Kennedy* v. *Skeer*, 3 Watts, 95. A plaintiff in ejectment having given evidence that he and the defendant claimed under the same title, is not thereby estopped from showing the truth of his case, because it would conflict with the evidence of title which he had previously given. *Zeigler* v. *Hantz*, 8 Watts, 380. But before a deed can be given in evidence, it is necessary to show title in the grantor, though it need not be a perfect title; for any evidence, however slight, is sufficient; and upon evidence tending to show title having been given, it is error in the court to reject the deed, and peremptorily to direct the jury to find against the party offering it. *Ib.*

[1]Eng. Com. Law Reps. xxix. 160. [2]*Id.* xxviii. 400. [3]*Id.* xx. 156.

the party legally entitled (*t*), or that the latter laboured under some disability when his right accrued, which continued down to a period within the twenty years (*u*).

Proof of a lease for a long period, coupled with possession, is evidence of a title to the remainder of the term, although the party cannot prove the mesne assignments from the original lessee (*v*).

And evidence of possession for a period short of twenty years affords presumptive evidence of title sufficient to prevail against a mere wrong-doer who shows no title (*x*).

In cases where there has been no continued occupation of the premises, the possession and title may be evidenced by any acts of ownership which the circumstances of the case afford, such as cutting down trees (*y*), digging for turves, and getting stones.

*406 *Proof of occupation for a period less than twenty years, will be evidence of title against a mere wrong-doer (*z*). But possession, to confer a right against one having title, must be adverse (*a*).

It is to be presumed *primâ facie*, that waste lands adjacent to a road belong to the owner of the adjoining freehold; this presumption is of course liable to be rebutted by evidence of acts of ownership by the lord (*b*).

As the plaintiff must recover by virtue of his legal title, he will fail if it appear that a term of years has been created which is still outstanding in another, there being no count in the declaration on a demise by the trustee. It will not be sufficient, however, for the defendant to produce and prove a lease for 1,000 years, unless he also prove a possession under it by the trustee within the last twenty years, for otherwise a surrender of the term will be presumed (*c*). So proof of the execution of a mortgage-deed by the lessor of the plaintiff will be insufficient, unless it be also proved that the money was not paid at the day; but if the defendant prove the payment of interest subsequent to the day, and within twenty years, the plaintiff will be nonsuited (*d*).

Presumptive evidence of a surrender.

An indorsement on a lease, of the receipt of principal and interest, and releasing the term, amounts to a surrender of the term (*e*).

When the trusts of a term have been completely fulfilled, a surrender will be presumed; thus, where trustees were directed to convey to a devisee when he attained the age of twenty-one, it was held that the jury might properly presume a conveyance at any time afterwards, and long before the

(*t*) *Supra*, 401. (*u*) Ibid.

(*v*) *Earl* v. *Baxter*, Bl. 1228.

(*x*) *Doe* v. *Dyeball*, 1 M. & M. 346, *cor.* Ld. Tenterden; and see tit. Possession. In *Allen* v. *Rivington*, 2 Saund. 11, it was held that the plaintiff was entitled to recover on a special verdict, which showed that the plaintiff was in possession but that the defendant had no title. And possession is clearly sufficient to enable the possessor to maintain trespass, but not, as it seems, to maintain ejectment, where the evidence *negatives* his title. See *Doe* v. *Barber*, 2 T. R. 749. *Doe* v. *Billyard*, 8 Mo. & Ry. 112.

(*y*) *Stanley* v. *White*, 14 East, 332. As to presumptive evidence of title, see Trespass.—Possession.—Liberum Tenementum.—Prescription.

(*z*) Where a party had the key of the premises delivered to him by the lessor of plaintiff, and went in and enjoyed peaceable possession for nearly a year; held, that it was sufficient proof of title as against a party taking forcible possession. *Doe* d. *Hughes* v. *Dyeball*,[1] 3 C. & P. 610.

(*a*) *R.* v. *Okeford Fitzpaine*,[2] 1 B. & Ad. 254. Where the party in possession of a cottage built on the side of a road above fifty years, upon possession being within twenty years, demanded by *B.*, the owner of the land adjoining on both sides of the road, had gone out, and on retaking possession by leave of such owner, had been told that "if he let him in again it would be during his pleasure," and he continued to occupy it without paying any rent for fifteen years; held, that it was a question for the jury to say whether he remained in the cottage by adverse title or by permission of *B.*, and they having found that he occupied by permission, the Court refused to disturb the verdict. *Doe* v. *Clark*,[3] 8 B. & C. 717.

(*b*) *Steele* v. *Prickett*,[4] 2 Starkie's C. 463. Vide Trespass.—Liberum Tenementum.

(*c*) B. N. P. 110. (*d*) Ibid.

(*e*) Ibid.

[1]Eng. Com. Law Reps. xiv. 481. [2]*Id.* xv. 331. [3]*Id.* xx. 382. [4]*Id.* iii. 433.

expiration of twenty years (*f*). But if the surrender of the outstanding term cannot be presumed, or if the existence of such a term be proved, and the jury do not find a surrender, the plaintiff (there being no count on a demise by the trustee) cannot recover (*g*). But it seems that the surrender of a term attendant on the inheritance, either by operation of law or by special declaration, after the extinction of the purposes for which it was created, is not to be presumed (*h*); nor from mere satisfaction, and *without such evidence of dealing with the term as warrants the presumption (*i*). *407

Enrolment. In ejectment, upon the assignment of a term to secure an annuity, an enrolment of the memorial is to be presumed, unless the contrary be shown (*k*).

Estoppel. In general a party is estopped from claiming premises in ejectment by his covenant that the defendant shall enjoy them (*l*).

A lessee (*m*) or licensee is (*n*) not allowed to dispute the title of the party who admitted him into possession. So a defendant may be estopped by an arbitrator's award (*o*).

Administrator. III. An administrator, to prove his title to a term, should produce the letters of administration under the seal of the ecclesiastical court, or the entry in the book of orders of the court for the granting of administration (*p*), which may be proved by means of an examined copy. So he may show his title by producing an exemplification of the letters of administration (*q*). The assignees of a bankrupt, in ejectment to recover the bankrupt's leasehold property, must prove their acceptance (*r*). An executor proves his title by the production of the probate; the term vests in the executor (*s*) upon the death of the testator, before the probate, and he may recover on a demise laid after the death of the testator, but before probate (*t*). The

By executor.

(*f*) *England* v. *Slade*, 4 T. R. 682. *Doe* v. *Lloyd*, Peake's Ev. Appen. See further, on the subject of presumed surrenders, *Doe* v. *Wright*, 2 B. & A. 720. *Doe* v. *Hilder*, 2 B. & A. 791. *Aspinal* v. *Kempson*, Sugden's Vend. & Pur. 446. *Doe* v. *Plowman*, 2 B. & Ad. 573.

(*g*) *Goodtitle* v. *Jones*, 7 T. R. 47; and see *Doe* v. *Wroot*, 5 East, 132. That an equitable title cannot prevail against a legal title in ejectment, see the above case, and the cases cited, 5 East, 139. Cas. temp. Redesdale, 67.

(*h*) The owner of the inheritance becoming the *cestui que* trust of the term, there is no ground for such a presumption. *Doe* v. *Hilder*, 2 B. & A. 791. *Townsend* v. *Champernown*, 1 Y. & J. 544. *Evans* v. *Bicknell*, 6 Ves. 185; especially if the term has been expressly assigned to attend the inheritance. *Doe* v *Plowman*,[1] 2 B. & Ad. 573. Sugden's V. & P. 389, 391. And see *Doe* v. *Cooke*,[2] 6 Bing. 174, where Tindal, C. J. observes, no case can be put in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance but wanting some collateral matter necessary to make it complete in point of form. In *Doe* v. *Reed*,[3] 5 B. & A. 237, Bayley, J. intimated that a jury ought not to be required to presume what they did not believe. In that case *A.* having devised to trustees for years, remainder to *B.*, who eighteen years after the death of *A.* dealt with the estate as his freehold, granting leases for lives; it was held that a surrender ought not to be presumed.

(*i*) *Doe* v. *Williams*, 2 M. & W. 749.

(*k*) Per Lord Ellenborough, *Doe* v. *Mason*, 3 Camp. 7. [See *Doe* v. *Bingham*,[4] 4 B. & A. 672.]

(*l*) *Goodtitle* d. *Edwards* v. *Bailey*, Cowp. 597. *Right* d. *Green* v. *Proctor*, 4 Burr. 2203. *Infra*, 412, note (*a*).

(*m*) *Infra*, 424.

(*n*) See the observations of the Court in *R.* v. *Baytup*, 2 Ad. & Ell. 188. If the lessee or licensee be really entitled, his course is to give up possession and bring ejectment. *Ib.* Where *A.* without title entered on land and built a cottage, and afterwards took a lease by indenture from *B.*, and then for 20*l.* gave up the possession to *C.*, it was held that *C.* was estopped from controverting *B.*'s title. *Doe* v. *Mills*,[5] 2 Ad. & Ell. 17. But a party is not estopped from disputing the title of one through whom both he and his adversary claim. The plaintiff claiming under a lease from *A.* in 1818, the defendant may claim under a conveyance from *A.* in 1824, and show that in 1818 he had no power to make such a lease.

(*o*) *Doe* v. *Rosser*, 3 East, 15. *Hunter* v. *Rice*, 15 East, 100.

(*p*) 1 Lev. 25, 101; B. N. P. 138, 246; 8 East, 187.

(*q*) Ca. temp. Hard. 108; 8 East, 187.

(*r*) *Copeland* v. *Stevens*, 1 R. & A. 593. *Broom* v. *Robinson*, cited 7 East, 339. See tit. BANKRUPT.

(*s*) *R.* v. *Stone*, 6 T. R. 295. *R.* v. *Horseley*, 8 East, 410; B. N. P. 246.

(*t*) Com. Dig. Administ. B. 10; 2 Rol. 554, l. 15, 25; Salk. 303. But an administrator cannot commence an action before administration granted; 1 Salk. 303; Com. Dig. Administ. B. 19. It has been said that administration when granted relates to the death. Com Dig. Administration, B. 10. But *Woolley* v. *Clark*,[6] 5 B. & A. 745, is to the contrary; and see the provision of the st. 3 & 4 W. 4, c. 27, s. 6.

[1]Eng. Com. Law Reps. xxii. 145. [2]*Id.* xix. 44. [3]*Id.* vii. 79. [4]*Id.* vi. 560. [5]*Id.* xxix. 17. [6]*Id.* vii. 249.

lease to the testator or intestate must also be proved. The defendant's answer to a bill in equity, stating that he believed that the testator was possessed of the leasehold premises in the bill mentioned, is *primâ facie* evidence that the testator had a chattel interest in the premises in the bill mentioned (*u*).

By the st. 3 & 4 W. 4, c. 27, s. 6, for the purposes of the Act, an administrator claiming the estate or interest of the deceased, shall be deemed to
*408 *claim as if there had been no interval between the death, and the grant of letters of administration.

Conusee of statute-merchant.

2. The plaintiff who claims as the conusee of a statute-merchant (*v*) must produce the recognizance, or an examined copy of it (*x*); an examined copy of the writ of *capias si laicus*, and return (*y*), and also an examined copy of the writ and return of the extent and *liberari feci*.

An interest is vested in the conusee by the return to the extent, and the intention of the *liberate* is to give him actual possession; and by the return of *liberari feci* the conusee is estopped from saying that he has not had possession (*z*).

If the action be not against the conusor, but against one who had possession previous to the acknowledgement, the plaintiff must also prove the conusor's title; or if one claim under the conusor, that his interest is determined (*a*), and the identity of the parties.

Conusee of statute-staple.

The conusee of a statute-staple (*b*), or of a recognizance in the nature of a statute-staple (*c*), must prove the recognizance either by its production under the proper seals, or, as it seems, by an examined copy of its certification into the court of Chancery (*d*) by the clerk of recognizances, and by examined copies of the writ of *capias* and return, and also of extent and *liberate*. A copy of the record, containing the recital of the award of these writs, and of their returns, seems to be sufficient evidence to prove them (*e*).

In case of the loss of a recognizance taken under the stat. 23 H. 8, c. 6, it is provided by the st. 8 G. 1, c. 25, s. 2, that in order to enable the conusee to have process, a transcript from the roll should be certified by the clerk of recognizances into Chancery, in the same way as recognizances were directed by the former Act to be certified in the same manner as if the recognizance had not been lost. The same section also directs that in case of such loss or damage, a copy from the roll, under the hand of the clerk or his deputy, when duly proved, shall be as good evidence of the recognizance as if it had been produced under seal. Evidence of identity is also neces-

(*u*) *Doe* d. *Digby* v. *Steel*, 3 Camp. 115.

(*v*) See the st. 11 Edw. 1, and 13 Edw. 1, st. 3.

(*x*) B. N. P. 104; Salk. 563. The recognizance is sent by the mayor, at the request of the conusor, into Chancery. See the stat. 13 Edw. 1, st. 3.

(*y*) This writ issues out of Chancery, but is made returnable in the K. B. or C. B. by the provisions of the stat. 13 Edw. 1, st. 3; but by the stat. 5 Hen. 4, c. 12, after a writ once awarded and returned into the Common Pleas, the Justice may award process without any further showing of the recognizance.

(*z*) Per Holt, C. J., *Hammond* v. *Wood*, 2 Salk. 563. The statutes 23 Hen. 8, c. 6, and 27 Eliz. c. 6, s. 7 & 8, require a copy of every statute-merchant and staple to be delivered to the clerk of recognizances within four months after acknowledgement, or it will be void against subsequent purchasers. The latter stat. s. 9, requires the clerk to make the enrolment within six months after the acknowledgement, indorsing the day and year of entry on the statute; and by the stat. 29 Car. 2, c. 3, the day and year of the enrolment of recognizances is to be set down in the margin of the roll, and no recognizance shall bind a *bona fide* purchaser of lands for a valuable consideration but from that time.

(*a*) *Doe* v. *Wharton*, 8 T. R. 2.

(*b*) See the stat. 27 Ed. 3, s. 2, c. 9.

(*c*) See the provisions of the stat. 23 Hen. 8, c. 6.

(*d*) By the provisions of the several Acts referred to, upon the request of the conusee the recognizance is to be certified into the court of Chancery; and it seems that the recognizance itself should be sent into Chancery, properly certified by the clerk of recognizances. See the stat. 23 Hen. 8, c. 6, s. 5, and 8 Geo. 1, c. 25, s. 2; which provide for the certifying in case of the loss of the original recognizance.

(*e*) See 2 M. & S. 565; and *infra*, tit. ELEGIT.

sary; and if the proceedings be not against the conusor, the plaintiff must also give evidence of his title (*f*).

3. The *devisee* of a freehold interest must prove, 1st, The seisin of the *devisor; and 2dly, the execution of the will (A); 3dly, the death of the devisor (B). He need not prove his own possession, since the law casts the seisin on the devisee; and although the heir enter before him, his entry is not barred (*g*). Devisee. *409 Freehold.

1st. Seisin of the devisor. Proof of his possession is *primâ facie* evidence of a seisin in fee (*h*).

2dly. The execution of the will, see tit. WILL (*i*), and identity of the devisee (*j*).

3dly. The death of the devisor, see tit. DEATH.—PEDIGREE.

Proof of title, as devisee of a copyhold, has already been considered (*k*). Copyhold.

The devisee of a leasehold must prove, 1st, the lease to the devisor; 2dly, the will by the probate (*l*), and the identity of the devisee; and 3dly, assent of the executor (*m*). Leasehold.

1st. An admission by the defendant of the testator's interest will supersede the necessity of proving the lease (*n*).

2dly. The will must be proved in order to show the devise of the chattel real; and this must be done by means of the probate, the only evidence of such a title to personal property recognized by courts of law (*o*).

3dly. Inasmuch as the legal title to the personal estate vests in the executor, even where it has been specifically bequeathed by the will, and does not vest in the legatee until the executor has assented to it, proof of such assent must be given. It is sufficient to prove that it was given either before or after probate (*p*). The legal interest vests in the legatee irrevocably by the executor's assent (*q*). No particular form is necessary. A general assent is sufficient (*r*). So is a letter, by which the defendant promises to

(*f*) *Supra*, note (*a*). (*g*) Co. Litt. 240; and vide *supra*, p. 404.

(*h*) See tit. HEIR. To make a good devise there must be a seisin by the devisor at the time of making the will. *Bunter* v. *Coke*, Salk. 237; Co. Cust. 364; Rast. 747. The statute empowers those having land to devise, &c. But now see the statute 7 W. 4 & 1 Viet. c. 26.

(*i*) Whether a devise in trust takes a *legal* title, is of course a question of mere law, and sometimes one of difficulty. Amongst the general rules on the subject, the following may be mentioned: The legal estate is vested in trustees where anything is to be done by them which makes it necessary that they should have the legal estate for the purpose. See Powell on Devises, by Jarmin; the note to *Jefferson* v. *Morton*, 2 Williams; 1 Saund. 11. As where they are required to sell; *Keene* v. *Dearden*, 8 East, 148. To pay the testator's debts; *Ib.* To pay taxes; *Ib.* Keep the premises in repair; *Ib.;* and *White* v. *Parker*,[1] 1 Bing. N. C. 573. But although a trust to receive the rents and profits, and pay them over, vests the legal estate, a trust to permit and suffer the *cestui que* trust to receive them, vests the property in the *cestui que* trust. *Doe* v. *Homfray*,[2] 6 Ad. & Ell. 207. *Broughton* v. *Langley*, 1 Lutw. 814. Powell on Devises, by Jarman. And in the case of a devise in trust to pay, or permit and suffer the *cestui que* trust to receive the latter of the two inconsistent directions being contained in a will, is to prevail. *Doe* v. *Biggs*, 2 Taunt. 109. Where the estate is devised for particular purposes, it vests so long as is necessary for those purposes, and no longer. *Doe* v. *Nicholls*, 1 B. & C. 342.

(*j*) *Doe* d. *Hanson* v. *Smith*, 1 Camp. 196. (*k*) See tit. COPYHOLD.

(*l*) *Antea*, Vol. I. Ind. tit. PROBATE and tit. EXECUTOR; and see *Stone* v. *Forsyth*, Doug. 681.

(*m*) 1 Inst. 111, a. *Young* v. *Holmes*, Stra. 70.

(*n*) *Doe* d. *Digby* v. *Steel*, 3 Camp. C. 115. (*o*) *Infra*, tit. EXECUTOR.

(*p*) *Doe* v. *Guy*, 3 East, 120, 123.

(*q*) 4 Rep. 28. *Paramour* v. *Yardley*, Plowd. 539. *Young* v. *Holmes*, 1 Str. 70. And per Ld. Ellenborough, *Doe* v. *Guy*, 3 East, 123. In case of a deficiency of assets, a court of equity would interfere, and cause the legatee to refund a proportional part.

(*r*) See *Duppa* v. *Mayo*, 1 Saund. 278; and the observations of Lawrence, J., 3 East, 124.

(A) (The plaintiff in ejectment need not go further back in deducing his title in the first instance, than the will of a person under whom he claims, who died seised of the land. The law presumes a fee simple in the devisor, unless the contrary is shown. *West* v. *Pine*, 4 Wash. C. C. R. 691. See also *Lessee of Ludlow's heirs* v. *Hemphill's heirs*, 3 Ohio R. 236.)

(B) (See *Wells* v. *Prince*, 4 Mass. R. 64.)

[1]Eng. Com. Law Reps. xxvii. 493. [2]*Id.* xxxiii. 55.

give possession *at a particular time (*s*). It seems that an assent is not to be *implied* from the sufficiency of assets (*t*); but an express assent will vest a term in the legatee from the death of the testator (*u*). An action of ejectment does not lie for dower which has not been assigned (*x*).

Tenant by elegit.

4. The tenant by *elegit* should produce an examined copy of the judgment-roll, reciting the judgment, the award of the *elegit*, and the return (*y*) (A). It has indeed been formerly held, that an examined copy of the *elegit* itself, or of the inquisition and return, ought to be proved (*z*), but this seems to be unnecessary, since the judgment-roll is incontrovertible evidence of every matter which it recites (*a*). It must appear from the return that the sheriff has set out a moiety by metes and bounds, or the return will be bad (*b*); the objection may be taken on the trial (*c*). If more than a moiety appear to have been extended, the plaintiff cannot recover (*d*); but the sheriff is not bound to set out one-half of each particular tenement (*e*). If another than the debtor be in possession of the lands, the plaintiff must prove, in addition, the title of the debtor himself to the lands (*f*). As an ejectment will not lie unless the lessor has a right of entry, it seems that the tenant may take possession without an ejectment (*g*). Where a tenant has come into possession by lease, after the judgment, but before the issuing of the writ of *elegit*, notice to quit is unnecessary (*h*).

By a guardian.

5. A guardian in socage has an interest in the lands of the infant until the latter attain to the age of fourteen years, which will enable him to maintain an action of ejectment to recover them (*i*) (B). To make out his title he must prove 1st. That the infant is the heir to socage lands; which is to be proved, as in the case of title by an heir, by evidence of the seisin of

(*s*) *Doe* v. *Guy*, 3 East, 120.

(*t*) *Deeks* v. *Strutt*, 5 T. R. 690; and per Lawrence, J., 3 East, 124.

(*u*) *Saunders's Case*, 5 Rep. 12, b.; 3 East, 125.

(*x*) *Doe* v. *Nutt*,[1] 2 C. & P. 430. (*y*) *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565.

(*z*) Salk. 563; Ld. Raym. 718; B. N. P. 104; Gilb. Ev. 9; 2 Will. Saund. 69, c.; Trials per P. 386, 5th edit.; Tidd's Pract. 1013, 5th edit.; Runn. Eject. 330.

(*a*) 2 M. & S. 565.

(*b*) *Fenny* v. *Durrant*, 1 B & A. 40. [See Dalison, 26 pl. 2 and old precedents, *contra*.] *Pullen* v. *Birkbeck*, Carth. 453; Hutton, 16.

(*c*) *Fenny* v. *Durrant*, 1 B. & A. 40.

(*d*) *Putten* v. *Purbeck*, Salk. 563. *Denn* v. *Ld. Abingdon*, Doug. 456; B. N. P. 104.

(*e*) Doug. 472; 1 Salk. 563; 1 Sid. 91; Cro. Car. 319.

(*f*) It is sufficient to prove a *prima facie* title in the debtor; this throws it on the tenant in possession to show a title anterior to the judgment. *Doe* v. *Owen*. 2 C. & J. 71. Premises were conveyed to such uses as a party should appoint, and in the meantime to the use of himself for life, and afterwards a judgment was obtained against him, upon which an *elegit* was issued, but prior to the execution of it he executed the power in favour of a mortgagee, and appointed the estate for a term of 500 years; held, that as suffering judgment was an act in *invitum* and not done by the party himself, it was not within the exception to the rule, that where a power is executed, the person taking under it takes under him who created the power and not under him who executes it, and the lien of the judgment creditor upon the land was therefore defeated by such appointment. *Doe* d. *Wigan* v. *Jones*,[2] 10 B. & C. 459. And see *Clere's Case*, 6 Co. 18, and *Witham* v. *Bland*, 3 Swanst. 277, a.

(*g*) See the opinion of Gibbs, C. J., *Rogers* v. *Pitcher*,[3] 6 Taunt. 207; 3 T. R. 295; 2 Tidd's Pr. tit. Elegit; Eq. Ca. Ab. 381.

(*h*) *Doe* v. *Hilder*, 2 B. & A. 782. In ejectment under a sale by the sheriff under a *fi. fa.*, it is unnecessary to prove the judgment, as in the case of an *elegit* or outlawry; Devon Lent Ass. 1811, *cor.* Power, J.; Vin. Ab. Evidence, T. b. 104. *Secus*, where the lessor sued out the execution. *Infra*, tit. SHERIFF, SALE BY. As to proof of the assignment, *vide* Ibid.

(*i*) Litt. sec. 123; Co. Litt. 88, 89; Bro. tit. Guardian, 70; Bac. Ab. tit. Guardian, 6; 2 Roll. Ab. 41.

(A) (It is well settled in modern practice, that the officer executing a writ of "*elegit*" does not put the creditor into actual possession of the land, but gives him only a legal possession which must be enforced by ejectment. *Ronald's heirs* v. *Barkley*, 1 Brockenb. C. C. R. 356.)

(B) (But a *prochein ami* cannot make a demise to sustain an action of ejectment. *Lessee of Massie's heirs* v. *Long*, 2 Ohio R. 293.)

[1]Eng. Com. Law Reps. xii. 205. [2]*Id.* xxi. 113. [3]*Id.* i. 355.

the ancestor, of his death, and of the pedigree (*j*). 2dly. His own character as guardian; that is, that he is next of blood to the heir, to whom the inheritance *cannot descend (*k*); and by evidence that the infant was under *411
the age of fourteen at the time of the demise, for from that time the title of the guardian ceases (*l*). A guardian who has been appointed by deed or will, by virtue of the stat. 12 C. 2, c. 24, s. 8, 9, must prove his appointment, either by the deed of the father, or his last will and testament, executed as the statute directs, in the presence of two or more credible witnesses; the title of the infant, and his minority at the time of the demise.

6. The title of the heir-at-law consists, 1st, In proof of the seisin of the ancestor from whom he claims, or if he claims from a remainder man, that he was the person in whom the remainder vested by purchase (*m*) (A). 2dly, In proof that he is heir to that person (*n*). By heir at law.

1st. Seisin. Actual possession, or receipt of rent from a tenant of the premises, is *primâ facie* evidence of a seisin in fee (*o*). It is not necessary to prove an actual entry by the relation from whom the claimant derives his title. If a father die, leaving his estate let on a lease for years, the possession of the tenant will be a possession by his eldest son, so as to constitute a *possessio fratris* to the exclusion of the brother of the half-blood (*p*). If on the other hand the estate on the death of the father was let on a freehold lease, there would be no *possessio fratris* unless the eldest son lived to receive rent after the expiration of the lease (*q*). Where the father died, leaving two daughters by different mothers, and the mother of the youngest daughter entered generally as guardian in socage of her youngest daughter, it was held that this constituted a sufficient seisin of the eldest daughter to carry the descent of her moiety to her heirs (*r*). By the provisions of the late stat. 3 & 4 W. 4, c. 106, s. 2, every descent (*s*) shall be traced from the purchaser (*t*); and to the intent that the pedigree may never be carried further back than the circumstances of the case and nature of the title *require, *412

(*j*) See TITLE BY HEIR.—PEDIGREE.

(*k*) Sec 1 P. Wms. 260; Bac. Abr. Guardian, [A]; 9 Mod. 142; Hargr. Co. Litt. 87, b. n. 6. *Qu.* as to such a relation under the new statute for regulating the law of descents. [*Byrne* v. *Van Hoesh*, 5 Johns. 66.]

(*l*) Bac. Ab. Guardian, [E.]; Hard. 69. *Doe* v. *Bell*, 5 T. R. 471.

(*m*) If a reversion or remainder be expectant on an estate for life or in tail, then he who claims the reversion as heir ought to make himself heir to him who made the gift or lease, if the reversion or remainder descend from him; or if a man purchase such remainder or reversion, he who claims as heir ought to make himself heir to the first purchaser. *Ratcliffe's Case*, 3 Rep. 42.

(*n*) For proof of title as heir-at-law to a copyhold, or by virtue of a custom, see tit. COPYHOLD.

(*o*) B. N. P. 103; Co. Litt. 243, a. The possession of a tenant for years, or of a guardian in socage, constitutes an actual seisin by the owner of the inheritance or infant. Ib. *Doe* v. *Newman*, 3 Wils. 516. The holding of courts and appointing gamekeepers is evidence to prove the existence of a manor, or to prove the *locus in quo* to be within the manor. *Doe* v. *Heakin*,[1] 6 Ad. & Ell. 495; but evidence of shooting and appointing a gamekeeper is, it seems, no evidence of right to the soil. Per Bayley, J., *Tyrwhitt* v. *Wynne*, 2 B. & A. 560. See further tit. POSSESSION.—TRESPASS.—LIBERUM TENEMENTUM. As to declarations by tenants, see that title Vol. I., and *Peaceable* v. *Watson*, 4 Taunt. 16. *Carne* v. *Nicoll*,[2] 1 Bing. N. C. 430. That which must be pleaded in a real action must be proved in ejectment, in order to make out a title by descent. *Shaw* v. *Lord*, 2 Bl. 1099. Proof of the possession of lands, and pernancy of rents, is *prima facie* evidence of a seisin in fee. *Jayne* v. *Price*,[3] 5 Taunt. 326. But proof of forty years subsequent possession by a daughter, whilst the son and heir lived near, and knew the fact, was held to be much stronger evidence that the father had but a particular estate.

(*p*) Co. Litt, 15, a.; Jenk. 242. *Doe* v. *Keene*, 7 T. R. 390.

(*q*) Ibid. (*r*) *Doe* v. *Keene*, 7 T. R. 386.

(*s*) The Act (sec. 11) does not extend to any descent before June 1st, 1834.

(*t*) By sec. 1, purchaser means the person who last acquired the land otherwise than by descent. The words "person last entitled" extend to the last who had a right to the land, whether he did or did not obtain the possession or receipt of the rent and profit.

(A) (Where one takes by descent as a co-heir and tenant in common, in ejectment by his co-heir, or one claiming under him, he cannot show that the ancestor had no title. *Jackson* v. *Streeter*, 5 Cow. 529.)

[1]Eng. Com. Law Reps. xxxiii. 126. [2]*Id.* xxvii. 446. [3]*Id.* i. 121.

the person last entitled to the land shall, for the purposes of that Act, be considered to have been the purchaser, unless it be proved that he inherited the same, in which case the person from whom he inherited shall be considered to have been the purchaser, unless it be proved that he inherited; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be presumed to have been the purchaser, unless it be proved that he inherited.

By sect. 4, where any one shall acquire land by purchase, under a limitation to the heir or heirs of the body of any of his ancestors in any assurance executed after the 31st of December 1833, or in any will of a testator dying after that day, the land shall descend, and the descent shall be traced as if his ancestor had been the purchaser.

By sect. 10, an heir may trace his descent through an attainted person who died before the descent took place, unless the land escheated in consequence of the attainder before the 1st of January 1834.

Proof of heirship. 2dly. That he is heir. The requisite proofs to establish this fact are considered under the title PEDIGREE.—If the defendant rely on a devise of the lands to him, and give *primâ facie* evidence of the due execution of the will, it is incumbent on the plaintiff either to disprove the execution of the will according to the statute, or to prove the want of assent of the supposed devisor to make a will, by proof of the practice of some fraud, or of his inability; or to dispute the operation of the will (*u*); or lastly, to prove its revocation. These proofs are considered under the title WILL. If the action be brought by the heir-at-law against a devisee under the will, the plaintiff will, in the usual course, be entitled to begin, and to the general reply, but if the devisee admit the plaintiff's *primâ facie* case as heir, and rely solely on the devise, he will be entitled to the opening and reply (*x*).

The heir-at-law may show that a devise has been waived, but such a waver to be binding must be express and absolute. A repudiation of the devise by one who mistakenly claimed as heir is not sufficient (*y*). An heir-at-law may lay the demise on the day on which his ancestor died (*z*).

Husband and wife. Upon a demise by husband and wife, in right of the wife, title must be proved in the wife (*a*). If the wife be joint-tenant of a term, the husband and wife should join in the ejectment with the other joint-tenant (*b*). A joint demise by the husband and wife is negatived by a receipt for rent given in the name of the husband alone (*c*) (A).

By landlord. 7. If the ejectment be brought upon the determination of a lease, the plaintiff must prove, 1st, The demise. 2dly, Its determination.

Proof of the demise. If the demise has been by deed or other written instrument, it should be produced, and proved in the usual way, and if it be in the defendant's possession, notice must be given to produce it (*d*). After notice to produce the original, which is not produced, the plaintiff may give a counterpart in evi-

(*u*) In order to disinherit the heir, there must either be express words or a necessary implication. 3 Wils. 488; Doug. 763; Cowp. 31, 302, 661.

(*x*) Vide *supra*, Vol. I. (*y*) *Doe* d. *Smyth* v. *Smyth*,[1] 6 B. & C. 112.

(*z*) *Doe* v. *Hersey*, 3 Wils. 274. A posthumous son taking lands by way of remainder, under the stat. 10 & 11 Will. 3, c. 16, may lay the demise on the day of his father's death. B. N. P. 105.

(*a*) The husband is only possessed of a term in her right; the term or legal interest continues in her. 7 H. 6, 2; 2 Roll. Ab. 341; Co. Litt. 351.

(*b*) Bac. Ab. tit. Baron and Feme, [C. 2]. (*c*) *Parry* v. *Hindle*, 2 Taunt. 180.

(*d*) *Supra*, Vol. I. tit. PROOF OF WRITTEN DOCUMENT. *Fenn* v. *Griffith*,[2] 6 Bing. 533. *Doe* v. *Harvey*,[3] 8 Bing. 439.

(A) (It is not necessary that the wife should join with the husband in an action of ejectment, for the recovery of land conveyed to husband and wife. *Jackson* v. *Leek*, 19 Wend. 339.)

[1]Eng. Com. Law Reps. xiii. 113. [2]*Id.* xix. 159. [3]*Id.* xxi. 286.

dence, *or, if there be none, a copy (*e*). If there has been no written demise, the plaintiff may prove a demise by parol; proof of payment of rent by the defendant is *primâ facie* evidence of a tenancy from year to year (*f*). It is usual for this purpose to give notice to the tenant to produce the receipts, but the fact of payment may be proved by other evidence.

Evidence of the payment of an entire rent to the trustees of a charity, is evidence to support a joint demise, and it is not sufficient for the defendant to show that they were appointed at different times, in order to prove them to be tenants in common; in such a case express proof is requisite (*g*). Payment of small sums on three different occasions, as rent in respect of land enclosed from a waste thirty-three years, was held to be conclusive evidence of permissive occupation (*h*).

Where encroachments have been made by a tenant on waste lands adjoining to the demised premises, it seems that it is to be presumed that they were made in right of the demised premises, and that the lessor is entitled to show the determination of the lease (*i*).

A party holding over after the expiration of a lease, at an advanced rent, is presumed to hold upon the other terms of the former lease (*j*). So if he be let into possession under an agreement for a lease, and pays rent (*k*), or admits such rent to be due (*l*).

A tenancy may be presumed from circumstances; where the tenant of glebe lands continued in possession for eight months after the death of the *incumbent, it was held that the succeeding incumbent might be presumed *414
to have assented to the continuance of the tenancy, and that a notice to quit was necessary (*m*).

2dly. The determination of the lease. This may be proved, 1st, by the

(*e*) *Burleigh* v. *Stubbs*, 5 T. R. 465; 7 East, 363. It seems that a counterpart is evidence in the first instance. *Roe* v. *Davis*, 7 East, 363.

(*f*) *Doe* v. *Samuel*, 5 Esp. C. 173. If the tenant for life leases and dies, and the remainder-man receives rent from the tenant, a tenancy from year to year is created. *Sykes* v. *Burkitt*, cited 1 T. R. 161; and see tit. USE AND OCCUPATION.

(*g*) *Doe* v. *Grant*, 12 East, 221. In *Doe* d. *Brookes* v. *Fairclough*, 6 M. & S. 40, where lands had been devised to the rector and churchwardens of a parish, and their successors, for the use of the poor, and there were two demises, one by five churchwardens who were in office when the tenant entered, and another by a rector since appointed and the same churchwardens jointly, and notice was given to deliver up the premises to the rector and churchwardens for the time being, it was held that the lessors of the plaintiff were not entitled to recover on either demise, though the defendant had paid rent to one of the churchwardens (who gave a receipt as churchwarden for the use of the poor), and had promised to quit after receiving the notice; that is, 182 days before the end of the year.[1] 5 Ad. & Ell. 351. But where the rent is payable on the usual feast days, notice on one feast day to quit on the next but one, being the end of the year, is sufficient. *Right* v. *Darby*, 1 T. R. 159. *Roe* v. *Doe*,[2] 6 Bing. 574. *Doe* v. *Keightly*, 7 T. R. 63. *Howard* v. *Wemsley*, 6 Esp. C. 53. *Doe* v. *Green*, 4 Esp. C. 199.

(*h*)[3] 3 B. & C. 413, where Holroyd, J. cited the following passage from Buller's N. P. 104: "A distinction has been taken and allowed by all the judges on a case reserved by Pengelly, C. B., that if a cottage is built in defiance of a lord, and quiet possession has been had of it for twenty years, it is within the statute; but if it were built at first by the lord's permission, or any acknowledgement have since been made (though it were 100 years since), the statute will not run against the lord." "Here," adds Mr. J. Holroyd, "the payment of rent was an acknowledgement that the occupation was by permission." When, however, the sum paid is very small, and has not been regularly paid, it may be a question for the jury, whether the payment did not result from some oppression. P. C., K. B. Easter term, 1829.

(*i*) *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208. *Doe* d. *Challmer* v. *Davis*, 1 Esp. C. 461, *contra*. *Doe* d. *Colclough* v. *Miller*, Ibid. 460. Note, that in the first of these cases the landlord was seised in fee of the waste, which had been inclosed and enjoyed by his tenant for life for thirty years; it was left to the jury to say whether it was not inclosed with the consent of the lessor, in right of the demised premises.

(*j*) *Hutton* v. *Warren*, 3 M. & W. 475. So in the case of a lease void by the statute of frauds, if the tenant being let into possession pay rent, the holding will be from year to year, regulated by the terms of the void lease. *Doe* v. *Bell*, 5 T. R. 471.

(*k*) *Knight* v. *Bennett*,[4] 3 Bing. 361. *Mann* v. *Lovejoy*, R. & M. 355; *Doe* v. *Stratton*,[5] 4 Bing. 446.

(*l*) *Cox* v. *Bent*,[6] 5 Bing. 185. (*m*) *Doe* v. *Somerville*,[7] 6 B. & C. 126.

[1]Eng. Com. Law Reps. xxxi. 353. [2]*Id.* xix. 169. [3]*Id.* x. 135. [4]*Id.* xiii. 8. [5]*Id.* xv. 36. [6]*Id.* xv. 410. [7]*Id.* xiii. 118.

Determination of the lease. Notice to quit.

terms of the lease itself, where the term is certain; 2dly, by proof of notice where it is necessary (*n*); 3dly, by proof of some act of forfeiture.

1st. Where by the terms of the original lease the tenancy is to end on a precise day, no notice to quit is necessary, for both parties are apprized of the determination of the term (*o*).

Time of entry.

2dly. If the tenancy be from year to year (*p*), the plaintiff must prove that the defendant has had the usual *notice to quit* six months previous to the time of the year when the defendant entered (*q*) (1) (A). A receipt for

(*n*) A covenant to lease is not a lease, and is no defence to an action by the landlord. *Fenny* v. *Child*, 2 M. & S. 255. *P.*, the lessor of the plaintiff, being seised in fee of lands, having agreed for the sale thereof to *W.* on or before a certain day, *W.* before that day agreed to let them to the defendant, who, with the permission of the vendor, was let into possession as tenant to *W.*; the conveyance was, after the stated day, executed, whereby the lands were conveyed to *W.*, but for the use of *P.* the vendor for a term, subject to a proviso for redemption by *W.* on payment of the purchase-money, for default of which, the ejectment was brought; held, that the entry and possession of the defendant being only that of *W.* by anticipation, no notice to quit was necessary. *Doe* d. *Parker* v. *Boulton*, 6 M. & S. 146. A party defends as landlord; the occupiers having suffered judgment by default, he cannot object that his tenants have not received notice to quit from the lessor of plaintiff. *Doe* v. *Creed*,[1] 5 Bing. 327. The minister of a dissenting chapel is permitted by the trustees to occupy a dwelling-house; having no other estate in the premises than that of a mere tenant at will, it is put an end to by a demand of possession by the trustees, and they are entitled to recover the possession without notice. *Doe* v. *Jones*,[2] 10 B. & C. 718; S. P. *Doe* d. *Nicholl* v. *M'Kaeg*,[3] Ib. 721. The wrongful payment of rent to a person not entitled, does not operate as a disseisin of the landlord or disclaimer of his title, so as to amount to a forfeiture of the lease. *Doe* d. *Dillon* v. *Parker*, 1 Gow's C. 18. But where the defendant in ejectment alleged that the person through whom the lessor of the plaintiff claimed a title in fee held only as tenant to the defendant, such an assertion of title operating as a disclaimer of the title of the landlord, amounts to a forfeiture of the lease or subsisting tenancy, and notice to quit need not be proved. *Doe* d. *Jeffries* v. *Whittick*, 1 Gow's C. 103.

(*o*) Per Lord Mansfield, *Right* v. *Darby*, 1 T. R. 162. *Messenger* v. *Armstrong*, 1 T. R. 54. *Cobb* v. *Stokes*, 8 East, 358. A clause in an agreement by the lessee to give up a portion of the demised land to the lessor upon certain terms, in case the lessor should want it for building, without any clause of re-entry, operates as a covenant, and not as a condition in defeasance of the estate, and the lessor cannot recover in ejectment. *Doe* d. *Wilson* v. *Phillips*,[4] 2 Bing. 13. In some instances proof may from efflux of time be unnecessary; as where notice has been given to a weekly tenant to quit on Friday, or otherwise at the end of his tenancy next after one week from the date of the notice, and the ejectment is not brought until a time has elapsed which covers every day in that week. *Doe* v. *Scott*,[5] 6 Bing. 362.

(*p*) A demise for a year, and afterwards from year to year, operates as a demise for two years. *Birch* v. *Wright*, 1 T. R. 280. A demise from year to year constitutes a tenancy for two years at least. *Denn* v. *Cartwright*, 4 East, 29. Under a demise for twelve months certain, and six months notice afterwards, the tenant is at liberty to quit at the end of twelve months, giving six months previous notice. *Thompson* v. *Maberly*, 2 Camp. 573. But a tenant who enters under an agreement for a lease for seven years, and who occupies for the whole of that time, is not entitled to a notice to quit at the end of the seven years, although a notice would have been necessary for the purpose of ejecting him within the seven years. *Doe* v. *Stratton*, 4 Bing. 446. An under-tenant holding over is not bound by the terms of a lease granted after his coming in to the tenant, with the terms of which he is unacquainted. *Torriano* v. *Young*,[6] 6 C. & P. 8.

(*q*) *Kemp* v. *Derrett*, 3 Camp. 510. But that may be varied by showing a payment of rent for the portion of the quarter between entry and quarter-day. *Doe* v. *Johnson*, 6 Esp. C. 10. *Doe* v. *Stapleton*,[7] 3 C. & P. 275. *Doe* v. *Selwyn*, Adams on Eject. 129. A variation in the rent during the tenancy does not affect the time of notice. *Doe* v. *Kendrick*, Adams on Ejectment, 129.

(1) [See, on the subject of notice, Mr. Day's note to the case of *Denn* v. *Rawlins*, 10 East, 263.]

(A) (A notice to quit previously to bringing an action of ejectment is not required in many cases. To entitle a party to such notice there must be an existing relation of landlord and tenant. *Jackson* v. *Deyo*, 3 John. R. 422. *Jackson* v. *Aldrich*, 13 John. R. 106. *Jackson* v. *Stackhouse*, 1 Cow. 122. *Jackson* v. *Burton*, 1 Wend. 341. *Whiteside et al.* v. *Jackson*, Id. 418. *Jackson* v. *French*, 3 Id. 337. *Jackson* v. *Robinson*, 4 Id. 436. *Jackson* v. *Moncrief*, 5 Id. 26. *Jackson* v. *Rowland*, 6 Id. 666. *Rockwell* v. *Bradley*, 2 Conn. 1. *Wakeman* v. *Banks*, Id. 446.

Besides the existence of a tenancy, to give one a right to this notice, it would seem that it must be a tenancy from year to year. *Cherry* v. *Batten*, Cowp. 245. *Logan* v. *Herron*, 8 Serg. & Rawle, 459. *Jackson* v. *M'Leod*, 12 John. R. 182. *Jackson* v. *Miller*, 7 Cow. 747. *Ellis* v. *Paige*, 2 Pick. 71 (*n*). The principle is well established, that a tenant by sufferance is not entitled to this notice. But a tenancy by sufferance, when created after the determination of a lease for years, may readily be converted into a tenancy from year to year, and give the tenant a right to this notice.

If there is a lease for a year, and the tenant is afterwards permitted to remain from year to year, a notice to quit in the first month of a new year is illegal. The tenant has a right to hold for that year. *Fahnestock*

[1]Eng. Com. Law Reps. xv. 459. [2]*Id.* xxi. 153. [3]*Id.* xxi. 154. [4]*Id.* ix. 296. [5]*Id.* xix. 204. [6]*Id.* xxv. 253, [7]*Id.* xiv. 303.

rent due at a particular day is *primâ facie* evidence of a holding from that day (*r*). *And where the tenant continues to hold the premises after the expiration of a lease, and assigns his interest, the assignee holds from the day on which the tenancy under the lease commenced (*s*). It was once held that the notice to quit was in itself *primâ facie* evidence that the tenancy commenced at the day specified in the notice for quitting (*t*). But on subsequent consideration of the point by the Judges, it was thought that this rule was not sufficiently supported by any principle; and it is now held, that the notice is not evidence of the time of entry, unless it be unobjected to at the time of service upon the defendant (*u*). Hence the notice is not evidence for that purpose unless it be served personally (*x*); nor then, unless the party can and does read it (*y*). And whether the defendant did or did not assent is a question for the jury. Where the defendant at the time of service gave an angry answer, complaining that he had been harshly treated, it was held that he was not thereby precluded from showing that the notice had been served too late (*z*). But where the tenant, on application by the lessor's attorney, as to the commencement of his tenancy, misinformed him, and notice was given in conformity with his answer, it was held that he was concluded by it, and that it made no difference whether the information so given resulted from accident or design, since he had induced the party to act upon it (*a*). *415

Proof of notice.

In general it must be proved that the notice to quit was served half a year before the expiration of the current year (*b*). A longer notice may be

(*r*) *Doe* v. *Samuel*, 5 Esp. C. 173. And so ruled in *Doe* v. *Beaumont*, York Summer Assizes, 1834, by Lord Lyndhurst, C. B. If no direct evidence can be given as to the time of entry, the custom of the country is *prima facie* evidence of the time; if there be no such custom, the rent-day is to be considered as the day of entry. If there be two rent-days, the plaintiff's notice shall be presumed to be right till the defendant prove it to be wrong; and if the tenant enters about the usual day, the entry shall relate to such day. Per Buller, J., Lancaster Lent Assizes, 1790. Salkeld, by Evans, 413, note (*b*). And see *Doe* v. *Lambe*, Adams on Ej. 316, 3d ed.; *Timmins* v. *Rowlinson*, 3 Burr. 1609.

(*s*) *Doe* v. *Samuel*, 5 Esp. C. 173. So in the case of holding under a lease void by the statute of frauds. *Doe* v. *Bell*, 5 T. R. 472.

(*t*) *Doe* v. *Harris*, 1 T. R. 161.

(*u*) *Thomas* v. *Thomas*, 2 Camp. 647. *Doe* v. *Wombwell*, 2 Camp. 559. *Doe* v. *Foster*, 13 East, 406. *Doe* v. *Calvert*, 2 Camp. 388.

(*x*) *Doe* v. *Calvert*, 2 Camp. 388.

(*y*) *Thomas* v. *Thomas*, 2 Camp. 647, by the Court of K. B. So where the notice being general, and not mentioning any time of quitting, a declaration was served nearly a year afterwards, laying the demise half a year after the notice, the tenant on service making no objection as to the time, Ld. Ellenborough held that it was a question for the jury whether the tenant must not be taken to have admitted that the notice was good. *Doe* v. *Wombwell*, 2 Camp. 559.

(*z*) *Oakapple* v. *Copons*, 4 T. R. 361.

(*a*) *Doe* v. *Lambley*, 2 Esp. C. 635.

(*b*) *Right* v. *Darby*, 1 T. R. 159. If a house be taken by the month, a month's notice is sufficient. *Doe* v. *Hazell*, 1 Esp. C. 94. A weekly reservation of rent is evidence of a weekly holding. *Doe* d. *Peacock* v. *Faustenaur*, 5 Serg. & R. 174. *Bedford* v. *M'Elherron*, 2 Id. 49. *Danforth* v. *Sargeant et al.* 14 Mass R. 491. *Jackson* v. *Salmon*, 4 Wend. 327.

It may well be doubted, whether a mere tenant at will, who is not by construction of law a tenant from year to year, can demand a notice to quit before the institution of an action of ejectment against him. *Jackson* v. *Bradt*, 2 Caines R. 169. *Ellis* v. *Paige*, 2 Pick. 71, n. are authorities against such a position, while the learned opinion of Putnam, J., in the latter case supports the opinion that a mere tenant at will is entitled to this notice. See also *Jackson* v. *Miller*, 7 Cow. 747. However, the principles to be elicited from the decisions generally on the subject of a notice to quit, appears to be in opposition to such a right.

In Ohio the notice to quit is legally given by the service of the declaration, ten days before the term to which it is returned. *Lessee of Spencer* v. *Marckal*, 2 Ohio R. 265. In Kentucky a notice to quit is not necessary to enable a widow to recover her land conveyed by her husband during the coverture. *Miller* v. *Shackleford*, 3 Dana, 289. And in Indiana, a judgment debtor in possession, or his vendee, subsequent to the judgment, is not entitled to a notice to quit in an action of ejectment brought against him by the purchaser at sheriff's sale under the judgment. *Smith* v. *Allen*, 1 Blackf. 27.

An ejectment may, in some cases, be supported on a warrant without a survey. *Smay* v. *Smith et al.* 1 Penn. R. 1.

An entry is not necessary in any case in Pennsylvania, in order to enable the person who has title, to recover the possession of lands. *Carlisle et al.* v. *Stitler*, 1 Penn. R. 6.)

*necessary, or a shorter one sufficient, if a custom to that effect be proved (*c*). There is no distinction between houses and lands as to the time of notice (*d*). Where a tenant enters upon different portions of the premises at different times, for the convenience of husbandry, and it does not appear from any express agreement from what point of time the tenancy was to commence, the rule of law is, that it shall be taken to commence from the time of entering upon that which is the principal and substantial subject of the demise (*e*); and it is a question of fact for the jury to ascertain what is the principal, and what the accessorial subject of demise (*f*).

In the case of *Doe* v. *Snowden* (*g*), the arable part of the farm was held from Candlemas, but the rent was made payable from Old Lady-day, and the tenancy was held to commence on the latter day (*h*). Where the tenant was to enter upon the arable lands at Candlemas, and all the other premises on the Lady-day following, and agreed to quit the same according to the terms of entry as aforesaid, and the rent was reserved half-yearly, at Michaelmas and Lady-day, the tenancy was held to commence from Lady-day, with a privilege for the in-coming tenant to enter on the arable land at Candlemas, for the purpose of ploughing (*i*). Under an agreement of demise of a dwelling-house, mills, and other buildings, for the purpose of carrying on a manufactory, together with meadow, pasture, and bleaching grounds; to commence, as to the meadow, from the 25th of December last, and as to the pasture, from the 25th of March next; and as to the housing, mills, and all the rest of the premises, from the 1st of May, reserving the first year's rent on the day of Pentecost, and the other half-year's at Martinmas, it was held, that the substantial subject of the demise being the house and buildings for the manufacture, which were to be entered upon the 1st of May, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the in-coming tenant had liberty of entering on the meadow, which was merely ancillary to the other and principal subject of the demise; and therefore, that a notice to quit, served on the 28th of September, was sufficient (*k*). Where the time of entry depends on the terms of a deed or other written instrument, no parol evidence can be admitted to vary the terms. Where the demise was

v. *Raffan*, 6 Esp. C. 4. And see *Kemp* v. *Derrett*, 3 Camp. 510. Where the tenant entered in the middle of a quarter under an agreement to pay rent for the half quarter and quarterly, it seems that the tenancy commences from the preceding quarter-day. *Doe* v. *Selwyn*, Adams on Ejec. 129. But a quarterly reservation of rent does not dispense with a half-year's notice. *Shirley* v. *Newman*, 1 Esp. C. 226. Where the entry was in the middle of a quarter, and payment was made for the fraction between the time of entry and Christmas, and the rent was afterwards paid at Christmas and Midsummer, it was held to be a holding from Christmas. *Doe* v. *Johnson*, 6 Esp. C. 10. Notice on the 28th September, to quit at the ensuing 25th March, is good; the customary half-year is sufficient. *Roe* v. *Doe*,[1] 6 Bing. 574. The tenant came in at the half-quarter, and at quarter-day paid the half-quarter's rent, and from thence paid quarterly; a notice to quit at the last quarter-day of the current year is sufficient, notwithstanding a previous notice expiring at the half-quarter. *Doe* v. *Stapleton*,[2] 3 C. & P. 275. And see *Doe* v. *Johnson*, 6 Esp. C. 10. Notice to quit to a weekly tenant "on *F.* provided his tenancy expired on *F.*, or otherwise at the end of his tenancy next after one week from the date of the notice," is sufficient. *Doe* v. *Scott*,[3] 6 Bing. 362.

(*c*) *Roe* v. *Wilkinson*, Co. Litt. by Butler, 270, b. *Roe* v. *Charnock*, Peake's Cas. 4.

(*d*) 1 T. R. 162.

(*e*) *Doe* v. *Spence*, 6 East, 120. *Doe* v. *Lea*, 11 East, 312. *Doe* v. *Howard*, 11 East, 498. See Co. Litt. 68; Allen, 4; 2 Ld. Raym. 1008; 2 Jones, 5; 2 Salk. 413, 4; 3 Burr. 1603.

(*f*) *Doe* v. *Howard*, 11 East, 498. (*g*) 2 Bl. 1224, cited 2 East, 383.

(*h*) Ibid. This case is said to have been overruled by Lord Kenyon, at *Nisi Prius*, in the case of *Doe* ex dem. *Lord Grey de Wilton*, where the defendant entered upon the arable lands at Candlemas, and the buildings and pastures at May-day, the rent payable at Michaelmas and Lady-day, and the notice to quit was given six months before May-day, but not six months before Candlemas; and Lord Kenyon nonsuited the plaintiff. But it does not appear in that case whether six months notice previous to Lady-day had been given. See the observations of Grose, J., 2 East, 383.

(*i*) *Doe* v. *Spence*, 6 East, 120. (*k*) *Doe* v. *Watkins*, 7 East, 551.

[1]Eng. Com. Law Reps. xix. 169. [2]*Id.* xiv. 303. [3]*Id.* xix. 104.

of lands to be held from the Feast of St. Michael, which must be taken to mean from New Michaelmas (*l*), it was held that evidence could not be admitted to show that Old Michaelmas was meant (*m*). Under an agreement between the *landlord and tenant that the other party may determine *417
the tenancy by giving a quarter's notice, such notice must expire on or Proof of notice to quit.
before the day of the year on which the tenancy commenced (*n*). According to the ordinary rule the words of a demise are to be taken *fortius contra proferentum*, and therefore when two periods of quitting are designated by the same words, the tenant shall have his option (*o*). Less than six months notice will not be sufficient, although it be accepted by the landlord, unless there be a surrender in writing or by operation of law (*p*).

The service of notice in writing is usually proved by the agent who served it, who produces a duplicate original (*q*), signed by the landlord; if there be no duplicate it seems that notice should be given to produce the original notice (*r*). If the notice has been attested, the attesting witness should be called (*s*). It is not, however, essential that the notice should have been in writing (*t*), although served on the behalf of a corporation aggregate (*u*): it is sufficient in such case to prove that the notice was given by the steward of a corporation aggregate, without showing that he had a power of attorney for the purpose, the adoption of the notice, by the bringing the action, being sufficient proof of his authority (*x*); and it seems that an agent who has authority to let lands and receive rents has also authority to give a sufficient notice to quit (*y*); as in the instance of a receiver appointed by the Court of Chancery.

Where a lease contained a proviso for its determination by either landlord or tenant, their respective heirs and executors, on giving six months notice under his or their respective hands, a notice signed by two of the landlord's executors, on behalf of themselves and a third executor, was held to be insufficient, for the proviso required the signature of all three, and the notice was not sustainable on the general rule of law, that one joint-tenant may bind the rest by an act done for their benefit, since there was no evi-

(*l*) *Doe* v. *Vince*, 2 Camp. 257.

(*m*) *Doe* v. *Spicer*, 11 East, 312. *Secus*, it is said, where the letting is by parol. *Doe* v. *Benson*,[1] 4 B. & A. 588; *supra*, tit. Custom. And where the demise is by deed, extrinsic evidence is inadmissible to show that by such words New Michaelmas was meant. *Doe* v. *Lea*, 11 East, 312. *Smith* v. *Walton*,[2] 8 Bing. 235. But where the letting has been by *parol*, it has been held that evidence was admissible of the custom of the country to show that, by Lady-day, Old Lady-day was meant. *Doe* v. *Benson*,[1] 4 B. & A. 588. *Furley* v. *Wood*, Runn. Ej. 112. 1 Esp. C. 198. In the case of *Doe* v. *Benson* above cited, the demise appears to have been not only by parol in the technical sense without deed, but also without writing; Abbott, C. J., and Holroyd, J., lay stress on the solemnity of a demise by *deed*, but the latter adds, that the letting being by parol, the party is at liberty to explain the *words* used. So evidence is admissible to explain the intention of the parties in such cases. *Denn* v. *Hopkinson*,[3] 3 D. & R. 507.

(*n*) *Doe* v. *Donovan*, 2 Camp. 78; 1 Taunt. 555.

(*o*) Per Heath, J., in *Doe* v. *Donovan*, 1 Taunt. 556, citing *Dann* v. *Spurrier*, 3 B. & P. 399.

(*p*) *Johnstone* v. *Huddlestone*,[4] 4 B. & C. 922. See Frauds, St. of.

(*q*) *Kine* v. *Beaument*,[5] 3 B. & C. 288.

(*r*) But see *Ackland* v. *Pearce*, 2 Camp. 261; *supra*, tit. Bills of Exchange; *Grove* v. *Ware*,[6] 2 Starkie's C. 174; *supra*, tit. Attorney; *infra*, tit. Notice.

(*s*) *Doe* v. *Deanford*, 2 M. & S. 62.

(*t*) *Doe* v. *Crick*, 5 Esp. 106. *Secus*, where by agreement a written notice is required, *Timmins* v. *Rowlinson*, 3 Burr. 1603, or by the provisions of a power. *Legg* v. *Benison*, Willes, 43.

(*u*) *Roe*, on the dem. of the *Dean and Chapter of Rochester* v. *Pierce*, 2 Camp. 96.

(*x*) *Ibid.*; 2 Camp. 96, *cor.* Macdonald, C. B.

(*y*) *Doe* v. *Read*, 12 East, 57; and see 5 Burr. 2694. *Doe* v. *Wood*, and *Doe* v. *Blair*, MSS. *Doe* v. *Mizem*, per Pattison, J., 2 Mo. & R. 56. But a mere receiver of rents has no power to determine a tenancy. *Doe* v. *Walters*,[7] 10 B. & C. 611, per Parke, J. The mere agent of an agent cannot give such notice. *Doe* v. *Robinson*,[8] 3 Bing. N. C. 677.

[1]Eng. Com. Law Reps. vi. 527. [2]*Id.* xxi. 286. [3]*Id.* xvi. 177. [4]*Id.* x. 471. [5]*Id.* vii. 440. [6]*Id.* iii. 300. [7]*Id.* xxi. 139. [8]*Id.* xxxii. 278.

dence that the determination of the tenancy was for the benefit of all (*z*). And it was held, that the subsequent assent by the third executor did not make the notice good by relation, since the general principle did not apply to cases where the intermediate conduct of the parties would be affected by the ratification (*a*). Under a proviso in a lease, so that if either of the parties should be desirous to determine it, it should be lawful for either his execu-
*418 tors or *administrators to do it, the devisee of the lessor is entitled to give such notice (*b*). If four joint-tenants jointly demise the land from year to year, such as give notice to quit may recover their several shares in ejectment upon their several demises (*c*). Where a leesee underlet a part, and gave up the remainder to the lessor, it was held that the latter could not determine the sub-lessee's tenancy by notice, since there was no privity between them (*d*). Proof of service at the dwelling-house of the tenant, although not upon the demised premises, is sufficient (*e*), and so is service on a servant on the premises (*f*), to warrant the presumption that the notice was received by the tenant. So where, on the tenant's having left the premises, notice is served on the party who takes possession after him, for it may be presumed that he came in as assignee (*g*). But after the death of the tenant, in an action against the widow, proof of leaving the notice at the dwelling-house without any proof of delivery to a servant, or that the defendant lived there, was held to be insufficient (*h*). Upon a joint demise to two, one of whom resides on the premises, service upon him is sufficient to enable the jury to presume that it reached the other (*i*). If the notice has been signed by an attesting witness, he must be called to prove it (*k*); and it is not sufficient in such a case to show that upon service of the notice the tenant read it over, and did not object to it (*l*). In the case of a corporation, notice should be addressed to the corporation, and served upon the proper officer (*m*).

It must appear on the face of the notice thus proved, that the tenant was sufficiently apprized by it of the landlord's intention to determine the tenancy at the expiration of the current year (*n*). A notice to quit at Lady-

(*z*) *Right* v. *Cuthell*, 5 East, 491. (*a*) Ibid.

(*b*) *Roe* v. *Hagly*, 12 East, 464.

(*c*) *Doe* d. *Wayman* v. *Chaplin*, 3 Taunt. 420. The several demises to the plaintiff in ejectment sever the joint-tenancy. Per Ld. Ellenborough, *Doe* v. *Read*, 12 East, 57. And where one gives notice in the name of all, it is a good notice for all. *Doe* v. *Summersett*,[1] 1 B. & Ad. 135; and, as it seems, such a notice is sufficient to determine the tenancy, although all the co-tenants did not concur, *Ib.* 140, and see 2 Man. & R. 434. Notice given by a stranger professing to act as agent for several joint-tenants, is not available unless it be ratified before the notice begins to run. *Doe* v. *Walters*,[2] 10 B. & C. 626. Contra. *Goodtitle* v. *Woodward*,[3] 3 B. & A. 689. A landlord having let premises to a firm in which he is a co-partner, may eject on notice given. *Doe* v. *Francis*, 4 M. & W. 331.

(*d*) *Pleasant* v. *Benson*, 14 East, 234. If the lessee, on receiving notice to quit, gives notice to his sub-lessees to quit, and they refuse, ejectment may be maintained against him for so much as his sub-lessees refuse to give up. *Roe* v. *Wiggs*, 2 N. R. 330.

(*e*) See Lord Kenyon's observations in *Jones* v *Griffiths*, 4 T. R. 464.

(*f*) *Jones* v. *Marsh*, 4 T. R. 464; Runn. 112; 4 T. R. 361. It is sufficient, although the tenant, by reason of absence, was not informed of it till within half a year of its expiration. *Doe* v. *Dunbar*,[4] 1 M. & M. 10. But service on a relation of the sub-tenant on the premises is insufficient, although it be directed to the lessee. *Doe* v. *Levi*, Adams Ej. 115.

(*g*) *Doe* v. *Williams*,[5] 6 B. & C. 41. (*h*) *Doe* v. *Lucas*, 5 Esp. C. 153.

(*i*) *Doe* v. *Watkins*, 7 East, 551. So a parol notice to one has been deemed to be sufficient. 5 Esp. C. 196. *Doe* v. *Crick*, Co. Litt. 49, b.

(*k*) 2 M. & S. 62. (*l*) *Doe* v. *Durnford*, 2 M. & S. 62.

(*m*) *Doe* v. *Woodman*, 8 East, 428.

(*n*) A notice, it seems would be sufficient, requiring the tenant to quit "as soon as by law he might." Per Ld. Abinger, in *Good* v. *Howels*, 4 M. & W. 199. A notice, however, will be insufficient, if it be too general, as if it be to quit forthwith, or henceforth, or simply "to quit" generally. *Ib.* Or be in the alternative to quit or hold on a new agreement; and therefore, although a notice to quit, *or* I shall insist on double rent, is good as referring only to the penalty of the stat. 4 G. 2, c. 28, against holding over (although

[1]Eng. Com. Law Reps. xx. 361. [2]*Id.* xxi. 139. [3]*Id.* v. 424. [4]*Id.* xxii. 233. [5]*Id.* xiii. 105.

*day *generally*, is a sufficient notice for Old Lady-day (*o*). Notice to quit on the 25th of March, *or* 8th of April, is sufficient, if it be delivered six months before the former day, although it be doubtful which of these was the day of entry (*p*). Where the lease was by parol from *Lady-day*, and notice was given to quit at Old Lady-day, it was held that parol evidence was admissible of the custom of the country to show that by Lady-day the parties meant Old Lady-day (*q*).

Where the tenancy of land began on the 2d of February, and of the houses on the 1st of May, a notice was given on the 22d of October to quit both land and houses "at the expiration of half a year from this notice, or at such other time or times as your present year's holding of the premises or any part thereof respectively shall expire, after the expiration of half a year from this notice," was held to be sufficient to determine the tenancy of the houses on the 2d of April 1834, and of the lands the 2d of February 1835 (*r*).

But a notice to quit part of the demised premises (*s*).

Where *A.* was tenant of the premises, but left them several years ago, and *B.* then entered and occupied, but no rent had been paid since *A.*'s occupation; it was held that it was sufficient to serve notice to quit on *B.*, for an assignment to him might be presumed (*t*).

A mis-description of the premises in the notice will not be fatal, unless the party be misled by it. Where by mistake the Waterman's Arms was inserted for the Bricklayer's Arms, the variance was held to be unimportant (*u*). Although the notice be directed to the tenant by a wrong Christian name, yet if he keep it the mistake is waived (*x*). A notice requiring the tenant of lands demised to the rector and churchwardens of a parish in trust, signed by the rector and churchwardens, and requiring the tenant to deliver up the premises to the churchwardens for the time being (there being no such corporation), has been held to be bad (*y*). The plaintiff, instead of proving the notice to quit, may show that the tenant has denied his (the landlord's) title (*z*), and holds adverse-

its terms were mistaken), was held to be good; yet if the notice had been to quit, "or else that you agree to pay double rent," it would have been insufficient. Per Ld. Mansfield, in *Doe* v. *Jackson*, Doug. 175. Objections of this nature, however, are reluctantly admitted by the courts. *Doe* v. *Archer*, 14 East, 245. And an obvious mistake will not avoid the notice. Where notice was given at Michaelmas 1795 to quit at Lady-day which will be in the year 1794, and the tenant was told, on service of the notice, that he must quit on the next Lady-day, it was held to be sufficient. *Doe* v. *Kightley*, 7 T. R. 63; and see *Doe* v. *Culliford*, 4 B. & R. 248.

(*o*) *Dunn* v. *Walker*, Peake's Ev. 367. *Dunn* v. *Wane*, Ibid. *Doe* v. *Vince*, 2 Camp. 256. *Doe* v. *Brookes*, 2 Camp. 257. See *Furley* v. *Wood*, 1 Esp. C. 198; *Doe* v. *Lea*, 11 East, 312. So a notice to quit on the 25th of March or the 8th of April, is sufficient, the disjunctive being used not to give an alternative, but to quit a holding from either old or new Lady-day. *Doe* v. *Wrightman*, 4 Esp. c. 5.

(*p*) *Doe* v. *Wrightman*, 4 Esp. c. 5.

(*q*) *Doe* d. *Hall* v. *Benson*,[1] 4 B. & A. 588. *Secus*, where the letting is by deed. *Doe* v. *Lea*, 11 East, 312. And see *Furley* v. *Wood*, 1 Esp. C. 198; *supra*, tit. CUSTOM.

(*r*) *Doe* v. *Smith*,[2] 5 Ad. & Ell. 350.

(*s*) *Doe* v. *Archer*, 14 East, 245. *Doe* v. *Church*, 3 Camp. 71. For the lessor cannot split the tenancy, determining it as to part and continuing it as to the rest; but the Court will, if the notice be capable of such a construction, construe it as putting an end to the tenancy altogether. *Doe* v. *Archer*, 14 East, 245.

(*t*) *Doe* d. *Morris* v. *Williams*,[3] 6 B. & C. 41. *Doe* v. *Murless*, 6 M. & S. 110.

(*u*) *Doe* v. *Cox*, 4 Esp. C. 185. (*x*) *Doe* v. *Spiller*, 6 Esp. C. 70.

(*y*) *Doe* v. *Fairclough*, 6 M. & S. 40.

(*z*) B. N. P. 96; Cowp. 622. What shall be deemed to amount to a disclaimer is usually a question of law. According to Best, J., notice is in no case necessary, unless a tenancy be admitted on both sides. *Doe* v. *Frowd*,[4] 4 Bing. 557. If a tenant denies his tenancy, there can be no necessity for terminating that which does not exist. *Ib.* The question is, has he denied the landlord's title? The act must be one inconsistent with the landlord's title; the mere paying rent to another does not operate as a forfeiture of the lease. *Doe* v. *Pasquali*, Peake's C. 96. But if a tenant pay rent to a person claiming to be landlord, and allow him as such to branch and cut the trees, the submission to such acts amounts to an acknowledgement of title.

[1]Eng. Com. Law Reps. vi. 527. [2]*Id.* xxxi. 353. [3]*Id.* xiii. 105. [4]*Id.* xv. 70.

ly *(*a*); but if it appear that the tenant has refused to quit on account of a dispute between contending claimants, notice will still be necessary (*b*). Such disclaimer, to be available, must be proved to have occurred before the demise (*c*).

Tenant at will.

In the case of a tenancy at will or otherwise, where the party is lawfully in possession (*d*), the plaintiff must prove an entry upon the premises, or a notice to quit, or demand of possession, or some other (*e*) act done by him to determine the tenancy, previous to the day of the demise in the declaration (*f*). The confession of the defendant by entering into the common rule, is not evidence to show such determination (*g*). One put into possession *421 *upon an agreement for the purchase of land, cannot be ousted of the possession before the lawful possession has been determined, by a demand,

Per Ld. Tenterden, in *Grubb* v. *Grubb*,[1] 10 B. & C. 824. Where a tenant at will dies, and his heir enters and claims the land as his own, notice is not necessary. *Doe* v. *Thompson*, 1 N. & P. 215. Where the defendant, holding under a tenant for life, in answer to a claim by the plaintiff as heir, stated, that, he held the premises as tenant to *S.*; that he had never considered the plaintiff as his landlord; that he should be ready to pay rent to any one proved to be entitled to it, and that, without disputing the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner: he was held to have disclaimed. *Doe* v. *Frowd*,[2] 4 Bing. 557. It is a disclaimer if the tenant say to the landlord, "I have no rent for you, for *A.* has ordered me to pay you none." *Doe* v. *Pitman*, 2 N. & M. 678. Where the tenant gives possession, and also the lease, to one who claims hostilely, it is a forfeiture of the lease. *Doe* v. *Flynn*, 1 C. M. & R. 137. Where the disclaimer is merely as to part, the plaintiff may recover *pro tanto;* and so where ejectment being brought against several, in respect of several tenements, the plaintiff may recover as to those who have disclaimed, although he fail as to the rest. *Doe* v. *Clarke*, Peake's Add. C. 239. A defendant, holding under a tenant for life, on his death receives a letter from the plaintiff, claiming as heir and demanding rent; he answers that the defendant was tenant to *S.*, and that he never considered the plaintiff his landlord, but would pay rent to the party entitled: held to be a disclaimer of plaintiff's title. There the lessor of plaintiff was, on death of tenant for life, entitled to treat defendant as a trespasser; and a notice to quit is only necessary where a tenancy is admitted on both sides. *Doe* v. *Frowd*,[2] 4 Bing. 557. A letter, dated June, 1813, disclaiming all connection with the lessor of the plaintiff (to whom he had once paid rent) for many years, is sufficient evidence to support a demise laid in May, 1813. *Doe* v. *Grubb*,[1] 10 B. & C. 817. See *Doe* d. *Ld. Cawdor* v. *King*, Exchequer.

(*a*) A mere oral disclaimer, without any act done, is insufficient. Per Parke, B. in *Doe* v. *Stannion*, 1 M. & W. 702. And where the tenant, having made a bargain for the purchase of the property from his landlord, refused to give it up on demand, saying he had bought and would keep it, and was ready to pay the money; it was ruled that it was no disclaimer superseding notice. *Ib.* Where any act has been done disclaiming the tenancy, and setting the landlord at defiance, as where the tenant attorns to another, the landlord may treat him as a trespasser. *Doe* v. *Whittick*, Gow. 195. Whether he be tenant merely from year to year, or for a longer term. *Doe* v. *Flynn*, 1 C. M. & R. 137.

(*b*) *Doe* v. *Pasquali*, Peake's C. 196.

(*c*) *Doe* v. *Litherland*, 1 Ad. & Ell. 784. *Doe* v. *Cawdor*, 1 C. M. & R. 398. So an admission of a disclaimer is insufficient, unless it be of a disclaimer before the demise. *Ib.*

(*d*) *Denn* v. *Rawlins*, 10 East, 261. *Doe* v. *Jackson*,[3] 1 B. & C. 448. *Doe* v. *Stannion*, 1 M. & W. 700. A party suffered to occupy cannot be deemed a trespasser. Per Parke, B. *Ib.*

(*e*) *Goodtitle* v. *Herbert*, 4 T. R. 680.

(*f*) Anything amounting to a determination of the will is, in the case of a tenancy at will or permissive occupation, equivalent to a demand of possession. Where a purchaser, let into possession, refuses to complete his purchase, and assigns his interest, the assignment, without any demand, amounts to a determination of the will. *Doe* v. *Abbott*. Winton Summ. Ass. 1838; Roscoe on Ev. 437; and see *Doe* v. *Price*,[4] 9 Bing. 356. *Ball* v. *Cullimore*, 2 C. M. & R. 120. *Doe* v. *Thompson*, 444. See further, tit. VENDOR & VENDEE. Such a demand may be made on the wife of the tenant at will, on the premises. *Doe* v. *Street*,[5] 2 Ad. & Ell. 329.

(*g*) *Right* v. *Beard*, 13 East, 210. In the case of a tenant by sufferance, it is sufficient that the owner make an entry on the premises previous to ejectment, without any demand of possession. *Doe* v. *Lawder*,[6] 1 Starkie's C. 308. In the case of *Weakly* v. *Bucknell*, Cowp. 473, where the defendant had had possession for eighteen years, under an unstamped agreement, for a lease for twenty-one years, and a half year's notice to quit had been duly served, it was held that the plaintiff could not recover, inasmuch as it would merely give the Court of Chancery an opportunity of undoing all again. *Qu.* In *Doe* d. *Nowell* v. *Adam*, where the defendant was let into possession under an agreement for sale, with stipulations that the purchase money should be paid by instalments, and some of the instalments had been paid, but default had been made as to others, it was held, that the plaintiff was entitled to recover possession. K. B. Easter T. 1819. Where *A.* agreed to let a house to *B.* for life, supposing it to be occupied by *B.*, or a tenant agreeable to *A.*, and a clause was to be added to give *B.*'s son the option to possess the house when of age, it was held that this was a mere agreement for a term, and that on *B.*'s death *A.* might recover the possession from *B.*'s executrix. *Doe* d. *Bromfield* v. *Smith*, 6 East. 530. *Doe* d. *Oldershaw* v. *Breach*, 6 Esp. C. 106.

[1]Eng. Com. Law Reps. xxi. 174. [2]*Id.* x. 70. [3]*Id.* viii. 126. [4]*Id.* xxiii. 305. [5]*Id.* xxix. 108. [6]*Id.* ii. 402.

or otherwise (*h*). And so it is where a tenancy at will is created by means of a lease for four years, without writing (*i*).

In ejectment for a forfeiture by the tenant or his assignee, the plaintiff must first prove the lease (*k*), and secondly, the breach of it (*l*). Forfeiture.

(*h*) *Right* v. *Beard*, 13 East, 210. *Newby* v. *Jackson*,[1] 1 B. & C. 448. [9 Johns. 330; 10 Johns. 335.] So where the party is in possession under a void or imperfect lease or conveyance. *Doe* v. *Fernside*, 1 Wils. 276. *Doe* v. *Edgar*,[2] 2 Bing. N. C. 503. Or, where the tenant continues in possession after the expiration of a former lease, and pending negotiations for a new one. *Doe* v. *Stennett*, 2 Esp. C. 717. And in general, one lawfully in possession.

(*i*) *Goodtitle* v. *Herbert*, 4 T. R. 680.

(*k*) A clause of re-entry is to be construed strictly. Per Ld. Tenterden, *Doe* v. *Marchetti*,[3] 1 B. & Ad. 720. But an agreement in a demise not to assign is a condition for the breach of which the lessor may maintain ejectment. *Doe* v. *Watt*,[4] 8 B. & C. 308. Where an underlease contained a proviso, that for breach of covenant the lessor *and* lessee might enter, it was held that the lessee alone might take advantage of the proviso. *Doe* v. *White*,[5] 4 Bing. 276.

(*l*) The defendant, on motion, is entitled to a particular of the breaches. *Doe* v. *Phillips*, 6 T. R. 597. As to proof of breaches, vide *supra*, COVENANT. A covenant not to let, assign, transfer, set over, or otherwise part with premises demised, is not broken by the depositing the lease as a security for goods sold. *Doe* d. *Pitt* v. *Hogg*,[6] 4 D. & R. 226. A lessee who covenants to pay rent and to repair, with an express exception of casualties by fire, is liable on the covenant for rent, though the premises are burnt down, and not repaired by the lessor after notice. *Belfour* v. *Weston*, 1 T. R. 300. *Camden* v. *Morton*, 1 Sel. N. P. 464. *Hare* v. *Groves*, 3 Anst. 687. Lessee covenanting to repair generally, is bound to rebuild, though the subject of repair be destroyed by accidental fire. *Bullock* v. *Dommett*, 6 T. R. 650. *Digby* v. *Atkinson*, 4 Camp. 275. So if a party covenant to keep a bridge in repair for a speeific period, and it be destroyed by an extraordinary flood. *Brecknock Navigation* v. *Pritchard*, 6 T. R. 750. A covenant substantially to repair, uphold and maintain a house, extends to inside painting. *Marke* v. *Noyes*,[7] 1 C. & P. 265. Notice given to repair in three months, according to the terms of a covenant, is evidence of the waver of a breach of a general covenant to repair. *Doe* d. *Morecraft* v. *Meux*,[8] 4 B. & C. 606. Note, that this was distinguished from the case of *Roe* d. *Goatly* v. *Paine*, 2 Camp. 550, where the language of the notice was to repair *forthwith*, which did not (per Bayley, J.) prevent the plaintiff from bringing his action at any time. If a tenant set up a title, or assist another in setting up a title hostile to the landlord, it is a forfeiture. *Doe* v. *Flynn*, 2 Cr. M. & R. 137. The mere act of paying rent to a third person does not operate as a forfeiture of the lease. *Doe* v. *Parker*, Gow. 180. An omission to repair is not an act done within the meaning of a clause of re-entry for doing or causing to be done any act, &c. *Doe* v. *Stevens*,[9] 3 B. & Ad. 299. By a memorandum of agreement to let as on lease, lands, part in possession and part as lives should fall in, it is "stipulated and conditioned, that the said lessee should not assign, transfer, underlet, or part with any part of the said lands, otherwise than to his wife, child, or children:" these words create a condition, for breach of which the landlord may maintain ejectment, and it is immaterial that the demise was by an instrument not under seal. *Doe* v. *Watt*,[10] 8 B. & C. 308. And see Cro. Eliz. 242, 384, 386; Co. Litt. 203. A covenant to insure, and keep the premises insured during the term, and to deposit the policy with the lessor, with a clause of re-entry for breach of any of the covenants, extends to the lessee, his executors and assigns: and it is a breach if the premises are left uninsured during any part of the term, and a continuing breach for every portion of the time during which they are left uninsured; where, therefore, the lessor distrained on the 30th of September for rent then due, and the premises being uninsured, brings an ejectment upon a demise laid on the 24th October, although the distress was a recognition of a tenancy subsisting on the 30th September, and a waver of any forfeiture previously incurred, yet the lessor is entitled to recover on a forfeiture incurred by the breach for not insuring between the 30th September and the day of the demise. *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428. Covenant not to convert or use rooms in a dwelling for certain purposes; for a continuing breach, after a receipt of rent with knowledge of the previous breach, the lessor may still take advantage of the forfeiture. *Doe* d. *Ambler* v. *Woodbridge*,[11] 9 B. & C. 376. Covenant not to erect or alter buildings without consent in writing of the landlord; a breach, and omission to reinstate the premises in their former condition, within thirty days after notice, is not a cause of forfeiture within the meaning of the clause giving power of re-entry if the tenant should make default in the performance of any or either of the clauses, such a proviso being confined to the not performing acts to be performed by the lessee. *Semble*, where the original lessee has underlet, and afterwards surrendered and taken a new lease of the landlord, without any surrender by the under-tenant, the intention and effect of the 4 Geo. 2, c. 28, s. 6, is to place all parties, as to every matter, in the same situation as if no surrender had taken place. *Doe* d. *Palk* v. *Marchetti*,[12] 1 B. & Ad. 715. An agreement was made to demise premises for a term "at and under the clear yearly rent of —*l.*," and the lessee agreed to repair and insure, &c.; it was also provided, that in case of the rent being in arrear for twenty-one days, the lessor should have the like power of re-entry, in case of breaches of any of the agreements therein mentioned, as if a lease had been granted; it was held that the former part amounted to an agreement to pay that rent, and that *assumpsit* would lie for it, and that upon the latter clause, although inartificially expressed, the lessor might recover the premises for non-payment of the rent. *Doe* v. *Kneller*,[13] 4 C. & P. 3. Upon a covenant in a building lease to erect certain houses within twelve months, and power in default for the lessor to re-enter; held, that there being a clear ground of forfeiture, the steward of the lessor having knowledge that the defendant, after the day

[1] Eng. Com. Law Reps. viii. 126. [2] *Id.* xxix. 402. [3] *Id.* xx. 480. [4] *Id.* xv. 225. [5] *Id.* xiii. 432. [6] *Id.* xvi. 196. [7] *Id.* xi. 386. [8] *Id.* x. 417. [9] *Id.* xxiii. 75. [10] *Id.* xv. 225. [11] *Id.* xvii. 399. [12] *Id.* xx. 480. [13] *Id.* xix. 248.

*Although the forfeiture be in not performing a covenant, it lies on the plaintiff to give some evidence of non-performance (*m*).

In ejectment against the assignee on a clause of re-entry for non-payment of rent, it has been held to be sufficient to prove the execution of a counterpart, without proving the original lease, or notice to produce it (*n*).

2dly. Determination by forfeiture (A). Where the landlord is entitled to re-enter for a forfeiture, it is unnecessary to prove an actual entry (*o*), or demand of possession (*p*). In general, where the covenant is to do an act, the plaintiff ought to give some evidence, it is said, of the omission to do the act (*q*).

In ejectment, upon a condition for re-entry for non-payment of rent, the landlord must prove an actual demand (*r*) of the rent, although no one be there to pay it (*s*), of the precise rent (*t*), on the precise day (*u*); upon the
*423 demised land, at the most notorious place upon it; *at a convenient time before sunset (*v*), by the landlord, or by a person duly authorized by him to demand it by a power of attorney (*w*), which he produced at the time, or which he had ready to produce, having notified it to the tenant (*x*).

The same formalities must still be observed where there is a sufficient distress on the premises, unless they be expressly dispensed with by the terms of the lease (*y*).

Non-payment of rent.

By the stat. 4 Geo. 2, c. 28, which was made to relieve the landlord from the difficulties under which he laboured at common law, the landlord may, when one half-year's rent is in arrear (*z*), and no sufficient distress is

stated, had proceeded for a short time in completing the works, it was a waver of the right of re-entry. *Doe* v. *Brindley*,[1] 12 Moore, 37. A lessee who leases for the whole term on condition, may enter on condition broken. *Doe* v. *Bateman*, 2 B. & A. 168. So may a feoffer in fee. *Ib.*

(*m*) *Doe* v. *Robson*,[2] 2 C. & P. 245.

(*n*) *Roe* v. *Davis*, 7 East, 363; and see *Nash* v. *Turner*, 1 Esp. C. 217.

(*o*) It has been so held since the time of Lord Holt. 2 Will. Saund. 287, n. 16.

(*p*) Thus where the term is to depend upon the lessee's actual occupation, and he has become bankrupt, no demand of possession from his assignees, who have taken possession, is necessary. *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185. Nor is a demand of possession, as it seems, necessary in any case where the lessee of the plaintiff has a legal right to enter, independently of any contract or demise on his part. See *Doe* v. *Bradbury*,[3] 2 D. & R. 706; *Doe* d. *Shirley* v. *Carter*,[4] 1 R. & M. 237; *supra*, 303, note (*g*).

(*q*) *Doe* d. *Chandless* v. *Robson*, 2 Esp. C. 245. *Cor.* Abbot, L. C. J.

(*r*) Proof that the lessor went upon the land, and said to an under-tenant, "I am come to demand of you such a sum for my rent," is sufficient. *Doe* v. *Brydges*,[5] 2 D. & R. 29. The grantee of a rentcharge, with power in default of payment to enter and receive the rents, may maintain ejectment, although no previous demand has been made. *Doe* v. *Horsely*,[6] 1 Ad. & Ell. 766.

(*s*) *Kidwelly* v. *Brand*, Plow. 69; 1 Roll. Ab. 458. Covenant by lessee, that if rent be unpaid twenty-eight days, lessor may re-enter; *qu.* whether a demand of rent be first necessary. *Smith* v. *Spooner*, 3 Taunt. 246.

(*t*) 1 Leon. 305; Cro. Eliz. 209, *Fabian* v. *Winston*. [Sav. 121, S. C.]

(*u*) See the cases, 2 Will. Saund. 287, n. 16; *Doe* v. *Paul*,[7] 3 C. & P. 613.

(*v*) Ibid. and 7 T. R. 117; 7 East, 363; Cro. Eliz. 209; Harg. C. Litt. 202. [See *Jackson* v. *Harrison*, 17 Johns. 64.]

(*w*) Co. Litt. 201; 1 Roll. Ab. 458; *Mees* v. *King*, 2 B. & B. 514; Forrest, 19.

(*x*) *Roe* v. *Davis*, 7 East, 363. (*y*) *Doe* v. *Masters*,[8] 2 B. & C. 490.

(*z*) It is sufficient if at the trial the plaintiff prove that half a year's rent is in arrear, although he has claimed more in his particular of demand. *Tenny* v. *Moody*,[9] 3 Bing. 3. A tenant may save the forfeiture under the statute, by a tender of the rent. If at the time of service of the declaration the tenant be ready to pay the rent, although he did not tender it when it became due, the statute gives him the same benefit as if it had been tendered at the time. Per Holroyd, J., *Doe* v. *Shawcross*,[10] 3 B. & C. 756.

(A) (In ejectment founded on waste, a judge is not authorized to instruct the jury that the acts complained of as working a forfeiture, have that effect simply because done without the permission of the landlord. The question should be submitted to the jury to decide whether the acts done were in truth prejudicial to the plaintiff's interest; waste being that which does a permanent injury to the inheritance. *Jackson* v. *Tibbits*, 3 Wend. 341.)

[1]Eng. Com. Law Reps. xxii. 429. [2]*Id.* xii. 111. [3]*Id.* xvi. 115. [4]*Id.* xxi. 426. [5]*Id.* xvi. 66. [6]*Id.* xxviii. 201. [7]*Id.* xiv. 483. [8]*Id.* ix. 158. [9]*Id.* xi. 4. [10]*Id.* x. 223.

to be found, and he has a right to enter for non-payment (*a*), serve a declaration in ejectment, or, in case it cannot be legally served, may affix it to the door of the demised messuage, or upon some notorious place on the lands comprised in the declaration, which service, or affixing of declaration, shall stand instead of a demand and re-entry. Under this statute, the plaintiff, after proof of the lease, and of service of declaration (*b*), or that it was affixed as the statute directs, must prove that there was not sufficient distress upon the premises. Proof must be given that every part of the premises was searched (*c*). Unless the tenant prevent such search by locking the door; for a distress which cannot be made without a trespass, is not available (*d*) within the Act.

Where the rent was due on Lady-day, and the declaration served on the 6th of June, and by the lease the lessor was empowered to re-enter in fourteen days after the time for payment, evidence that the plaintiff's broker went upon the premises *in May* and found nothing to distrain upon, was held to be presumptive evidence that there was no sufficient distress on the 2d of May, the day of the demise (*e*). On a clause not to assign or underlet, proof of occupation of the premises by a person appearing to be tenant, is, it is said, sufficient *primâ facie* evidence to throw it on the defendant to explain the nature of such possession (*f*).

*By the stat. 11 G. 4 and 1 W. 4, c. 70, s. 36, where a tenancy ends or right of action accrues during or after Hilary or Trinity terms, the lessor may at any time within ten days after serve a declaration in ejectment (the action being brought in any of His Majesty's Courts at Westminster) entitled on the day next after the day of the demise in the declaration, &c., provided that at least six clear days notice of trial be given. The not commencing the action within ten days is a mere irregularity, and cannot be objected at *nisi prius* (*g*). *424

By the provisions of a late stat. (*h*), if it shall appear that the tenant has been served with due notice of trial, the landlord may, on the production of the consent-rule, and proof of his title to the whole or part of the premises Damages.

(*a*) Where the proviso was, that if the rent was in arrear twenty-one days, the lessor might re-enter, "although no formal or legal demand shall be made for payment thereof," it was held that the landlord was entitled to recover without either demand or re-entry. *Doe* d. *Harris* v. *Masters*,[1] 2 B. & C. 490. Lease reserving rent payable quarterly, proviso if rent be in arrear twenty-one days, *being lawfully demanded*, the lessor may re-enter, five quarters being in arrear, and no *sufficient distress*, the lessor may re-enter without demand made. *Doe* v. *Alexander*, 2 M. & S. 525. Proviso in a lease for the determination of the term on non-payment of rent, it is not competent to the lessee to determine the lease by non-payment. *Reid* v. *Parsons*,[2] 2 Chitty's R. 247.

(*b*) The statute says, that the service of the declaration in ejectment shall stand in the place of the demand and re-entry; and the service of declaration has relation to the day when the landlord ought to have entered, as at common law. And therefore it is no ground of nonsuit that the declaration was served on a day subsequent to the day of the demise, the day of the demise being subsequent to the day on which the lessor ought to have entered at common law. *Doe* d. *Lawrence* v. *Shawcross*,[3] 3 B. & C. 754.

(*c*) Per Heath, J., Hereford Summer Assizes, 1800, and afterwards by the Court of Exchequer. See[4] 2 B. & B. 514. *Rees* v. *King*, 2 B. & B. 514; Forest, 19.

(*d*) Per Ld. Tenterden in *Doe* v. *Tyson*,[5] M. & M. 77.

(*e*) *Doe* v. *Fuchau*, 15 East, 286.

(*f*) *Doe* d. *Hindley* v. *Rickarby*, 5 Esp. C. 4. *Doe* v. *Williams*,[6] 6 B. & C. 41. And the declarations of such a person have been admitted in evidence. But see *Doe* v. *Payne*,[7] 1 Starkie's C. 86, where it was held to be insufficient to prove that the premises were in possession of a stranger, who said that they had been demised by another stranger.

(*g*) *Doe* v. *Brindley*,[8] 4 B. & Ad. 84.

(*h*) 1 Geo. 4, c. 87, s. 2. The statute applies only to cases where the term has come to a natural end, or been extinguished by a regular notice to quit: where the tenant had surrendered the lease, but afterwards refused to quit, the Court refused the rule calling upon him under the statute to enter into the recognizance. *Doe* d. *Tindal* v. *Roe*,[9] 2 B. & Ad. 922. Notice of trial must be proved in an action brought in the county palatine of Lancaster. Per Holroyd and Park, Js.

[1]Eng. Com. Law Reps. ix. 158. [2]*Id.* xviii. 322. [3]*Id.* x. 223. [4]*Id.* vi. 223. [5]*Id.* xxii. 256. [6]*Id.* xiii. 105. [7]*Id.* ii. 307. [8]*Id.* xxiv. 28. [9]*Id.* xxii. 211.

mentioned in the declaration, give evidence of and recover the mesne profits which shall have accrued from the day of the determination of the tenant's interest down to the time of the verdict, or some preceding day specially mentioned therein.

Evidence for the defendant(A).

It is a general rule, that a tenant shall not be permitted to dispute his landlord's title (*i*) (B), nor a mortgagor to impeach his own title at the time of the mortgage (*k*). Nevertheless it is competent to a tenant to show that the landlord's title has expired (*l*) subsequently to the demise. And as the

*425 *tenant cannot deny the landlord's title, neither can any one controvert it who claims by him. A third person cannot defend as landlord where the tenant came into the possession under an agreement with the lessor of the plaintiff (which has expired), and paid rent to him, but afterwards disclaimed (*m*).

(*i*) The estoppel of a tenant exists during his occupation only; during that he is not permitted to deny his landlord's title, for he has a meritorious consideration. A tenant under a tenant for life cannot dispute the title of the reversioner, for they are the same title (*Doe* v. *Whitroe*,[1] 1 D. & R. 1); neither can a tenant dispute the title of the lessee of the landlord. *Rennie* v. *Robinson*,[2] 1 Bing. 147. So if *B.*, claiming under *A.*, demise to *C.* for a year, and die, and *A.* bring ejectment against *C.*, the latter cannot dispute the title of *A.* *Barwicke* v. *Thompson*, 7 T. R. 488. See *Bryan* d. *Child* v. *Vinewood*, 1 Taunt. 208. But if the tenant be ousted by a title paramount, he may plead it. *Hayne* v. *Maltby*, 3 T. R. 438. In *Doe* d. *Lowden* v. *Watson*,[3] 2 Starkie's C. 230, Lord Ellenborough held that it was competent to a sub-lessee, in an ejectment, to show that subsequently to the under-lease to him by the lessor of the plaintiff, the latter had assigned his interest. In *Doe* v. *Clarke*, Peake's Ev. App. 45, the defendants having paid rent in respect of cottages which were alleged by the lessor of the plaintiff to be encroachments, and having afterwards disclaimed, were admitted to disprove the *prima facie* evidence of right arising from payment of rent. *Cor.* Bayley, J. Though a tenant set up an adverse claim against his landlord, he may still defend his possession under the lease. *Rees* d. *Powell* v. *King*, Forrest, 19. See Appendix.

(*k*) B. N. P. 110. *Lade* v. *Holford*, 3 Burr. 1416. A tenant cannot set up the title of the mortgagee against the mortgagor (per Buller, J., 1 T. R. 760). A tenant cannot insist against the will of the landlord that his own act amounts to a forfeiture (*Doe* v. *Banckes*,[4] 4 B. & A. 401). *Doe* v. *Whitroe*,[1] Dowl. & Ry. C. 1. *Doe* v. *Mills*,[5] 2 Ad. & Ell. 17; and see *Doe* v. *Baytup*,[6] 3 Ad. & Ell. 188, *supra*. A party admitted to defend as landlord is subject to the same estoppel as the tenant would have been had he defended. *Doe* v. *Mizem*, 2 Mo. & R. 56. The widow of a vendor, under an agreement that he shall hold for life, is estopped after his death from setting up a mortgage against the alienee. *Doe* v. *Skirrow*,[7] 7 Ad. & Ell. 157. Where evidence of tenancy consists merely in showing payment of rent by the defendant to the lessor of the plaintiff, the defendant may show that the payment was to him merely as agent. *Doe* v. *Francis*, 2 Mo. & R. 57.

(*l*) *England* v. *Slade*, 4 T. R. 682. *Doe* v. *Ramsbotham*, 3 M. & S. 516. See *Doe* d. *Grundy* v. *Clarke*, 14 East, 488. A landlord does not by waiving his right on an under-letting, waive his right on any under-letting. *Doe* v. *Bliss*, 4 Taunt. 735.

(*m*) *Doe* v. *Lady Smythe*, 4 M. & S. 347. Where the lessor had demised mining premises, &c. to a company, of which he was also a partner, and who had paid rent to him, held that the company were estopped from disputing his title, although in an answer to a bill in Chancery, which was in evidence, he had admitted that he had no legal title; and that his being a partner was no objection to his maintaining the ejectment. *Francis* v. *Doe*, 4 M. & W. 331.

(A) (But a notice to quit at the end of a year certain, is not waived by the landlord's permitting the defendant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease, that is, to clear and fence the land and pay taxes. *Boggs* v. *Black*, 1 Binn. 333. *A.* by his attorney executed a lease to *B.* for three years, and after the expiration of the term, the attorney gave *B.* permission to remain in possession until *A.* was heard from. It was held that *B.* was only a tenant by sufferance, and was not entitled to a notice to quit. *Jackson* v. *Packhurst*, 5 John. R. 128. A distress made for rent accrued after the expiration of a notice to quit, is a waver of the notice not to be qualified. *Zouch* d. *Ward* v. *Willingale*. *Supra*.)

(B) (A tenant cannot set up an outstanding title in a third person, holding directly from the state, in an action of ejectment against him by his landlord, or by those deriving their title from the landlord. *Jackson ex dem. Cotton* v. *Harper*, 5 Wend. 246. Nor will he be permitted to show that the landlord has acknowledged by parol, that the title was in another. *Jackson* v. *Davis*, 5 Cow. 123; but although a tenant will not be permitted to gainsay the title of his landlord, yet if possession was not obtained from the landlord, but from another who falsely represented himself to be the owner, it is competent for the tenant to show that the plaintiff was not the owner at the time the agreement to pay the rent was made, or liability to pay it accrued. *Gleim* v. *Rise*, 6 Watts, 44. {See also *Miller* v. *M'Brier*, 14 Serg. & R. 382.} Whether there

[1]Eng. Com. Law Reps. xvi. 409. [2]*Id.* viii. 275. [3]*Id.* iii. 328. [4]*Id.* vi. 462. [5]*Id.* xxix. 16. [6]*Id.* xxx. 67. [7]*Id.* xxxiv. 64.

The defendant may prove in answer, a tender at any time on the last day for the payment of the rent (*n*), or a waver of the forfeiture by the receipt of rent subsequently due (*o*), or by giving advice to a purchaser to purchase the term (*p*), provided the landlord had notice of the forfeiture; and reasonable evidence ought to be given that he had such notice (*q*); such receipt of subsequent rent will not set up a void lease for years (*r*). But as a lease for life cannot be avoided without entry, the acceptance of subsequent rent without entry will restore the lease (*s*). So the defendant may show a confirmation by the remainder-man, of a lease by a tenant for life (*t*). If the defendant rely on a waver by the landlord of his noticeto quit, by the acceptance of subsequent rent (*u*), it is a question of fact for the jury, whether it was paid *as rent, and received as such, or merely as a compensation for damage (*v*). He may show that the landlord has distrained (*x*)

Waver of forfeiture.

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(*n*) Co. Litt. 201, 202, *a*.

(*o*) *Goodright* v. *Davis*, Cowp. 803. 3 Rep. 64; 2 T. R. 425; Co. Litt. 201. *Goodright* v. *Cordwent*, 6 T. R. 219. *Fryett* d. *Harris* v. *Jefferys*, 1 Esp. C. 393. Forfeiture by using rooms in a particular manner is not waived in case of continued user after acceptance of rent. *Doe* v. *Woodbridge*,[1] 9 B. & C. 376.

(*p*) *Doe* d. *Sore* v. *Eykins*,[2] 1 C. & P. 154. *Secus* where the party has an annuity secured on the premises, and the advice is merely "to take to them." *Ibid.* So it is said, that though there be no release from or dispensation with the covenant, yet, if the conduct of the lessor be such (when in possession of both parts of the lease) as to induce a reasonable and cautious lessee to suppose that he was doing all that was necessary or required of him in insuring in his own name, and not in his own name and that of the lessor, he cannot recover as for a forfeiture. *Doe* d. *Knight* v. *Rowe*,[3] 1 R. & M. 343.

(*q*) Cowp. 803. *Roe* v. *Harrison*, 3 T. R. 425. *Pennant's Case*, 3 Rep. 64, b.; 1 Will. Saund. 287, c.

(*r*) Co. Litt. 215; Will. Saund. 287; 3 Rep. 64; Willes, 176. See *Doe* v. *Banckes*,[4] 4 B. & A. 401. *Reid* v. *Parsons*,[5] 2 Chitty's R. 247. Where a lease for years is conditioned to be void for the benefit of the lessor, it is voidable only at his election. *Doe* v. *Banckes*,[4] 4 B. & A. 401. *Reed* v. *Farr*, 6 M. & S. 121. And though it be provided that a lease or leases for lives shall be void for breach of covenant, and that it shall be lawful for the lessor to re-enter, &c, it is voidable only. *Arnsby* v. *Woodward*,[6] 6 B. & C. 519. *Roberts* v. *Davy*,[7] 4 B. & Ad. 664. So if the condition be that the lessor shall re-enter. *Goodright* v. *Davids*, Cowp. 804.

(*s*) 2 Will. Saund. 287; Co. Litt. 211, b.; Co. Litt. 215, a.; 3 Rep. 64.

(*t*) The defendant held under a lease from a tenant for life, containing, besides the money rent, certain duties to be performed by the tenant, *inter alia*, of carrying three loads of culm from the pits to the lessor's dwelling-house yearly; shortly after the death of the tenant for life, at Michaelmas, the lessor of plaintiff, as the next remainder-man, desired his servant to go and look for carts to bring home culm, and he went to the defendant, and also to the other tenants, who accordingly carried a load to the house mentioned in the lease, and in the May following the defendant also sent two loads, which were received, as well as from other tenants; held, that whether the lease were valid or not, it was properly left to the jury to say, whether the culm was carried by the defendant and received by the lessor of plaintiff after his title accrued, in the way of rent, under the reservation to that effect in the lease; and the Court refused to disturb their decision that it was so carried and received. *Doe* d. *Tucker* v. *Morse*,[8] 1 B. & Ad. 365. And see *Doe* v. *Watts*, 7 T. R. 83. See Index, tit. CONFIRMATION.

(*u*) Where a provision avoided the lease in case of repairs omitted three months after notice, and notice was given on the 1st of January, the receipt of rent due on the 25th of March is no waver. *Doe* v. *Brindley*,[9] 4 B. & Ad. 84. The right of re-entry is not waived by distraining for the rent, for the non-payment of which the lease became forfeited; for (although it was otherwise at common law) the statute gives the right to eject only in the case where there is no sufficient distress. *Brewer* v. *Eaton*, 3 Doug. 231; 6 T. R. 220.

(*v*) *Doe* v. *Batten*, Cowp. 243; 2 H. B. 312. *Goodright* v. *Cordwent*, 6 T. R. 219. *Goodright* v. *Davis*, Cowp. 803. *Sykes* d. *Murgatroyd* v. ——, 1 T. R. 161, n. Note, that in the case of *Doe* v. *Batten* a receipt was given as *for rent*, in order to deceive the landlord. Per Wilson, J., 1 H. B. 312.

(*x*) *Zouch* v. *Willingall*, 1 H. B. 311. *Doe* d. *Taylor* v. *Johnson*,[10] 1 Starkie's C. 411. *Secus*, if he distrain for rent due before the expiration of the notice. *Ibid.* and *Brewer* v. *Eaton*, 6 T. R. 220. A payment of rent for a quarter ending after the expiration of a notice made to the landlord's banker without special authority, and without evidence that the money had come to the landlord's hands, is no waver, although the rent was usually paid to that banker. *Doe* v. *Calvert*, 2 Camp. 387. Under a provision for re-entry in case of rent in arrear for twenty-one days, the lessor distrained within the twenty-one days, but remained afterwards in possession; and Lord Ellenborough held that the forfeiture was not waived. *Doe* v. *Johnson*,[9] 1 Starkie's C. 411.

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is a tenancy or not, is matter of fact, and the defendant may produce parol evidence to disprove the existence of it. *Jackson ex. dem. Van Allen* v. *Vosburgh*, 7 John. R. 186.)

[1]Eng. Com. Law Reps. xvii. 399. [2]*Id.* xi. 352. [3]*Id.* xii. 112. [4]*Id.* vi. 462. [5]*Id.* xviii. 322. [6]*Id.* xiii. 241. [7]*Id.* xxiv. 136. [8]*Id.* xx. 398. [9]*Id.* xxii. 211. [10]*Id.* ii. 448.

for subsequent rent, or brought covenant (*y*) (A), or recovered for use and occupation (*z*), or brought any other action for the rent (*a*). But the merely lying by with knowledge of a forfeiture is no waver (*b*); an agreement to allow the tenant more than the three months time to repair expressed in the proviso, is a suspension, not a waver of the forfeiture (*c*). Where the breach which is the cause of forfeiture is a continuing one, the receipt of rent after one breach is no waver of a subsequent breach by using rooms in a manner prohibited by the lease (*d*).

But if, after the expiration of a notice to quit, the landlord gives the tenant a fresh notice that unless he quit in fourteen days he will be required to pay double value, the second notice is no waver of the first (*e*).

A second notice to quit on a subsequent day is a waver of the first notice (*f*). Where a tenant for years levied a fine, and the reversioner granted the reversion without taking advantage of the forfeiture, it was held that ejectment could not be maintained on the demise either of the grantor or of the grantee (*g*). It is in general a good defence to show that the lessor of the plaintiff has recognized a legal possession by the defendant as tenant, by the receipt of rent from him for a time subsequent to that on which the alleged title of the lessor of the plaintiff accrued, or by bringing an action
*427 of covenant for such *rent (*d*). Where a tenant for life made a lease, which was void, and a subsequent tenant for life received rent from the lessee the defendant, it was held that this was such a recognition of a lawful possession by the defendant that ejectment could not be maintained against him without notice to quit (*e*). But where the rent is not received as between landlord and tenant, but is attributable to another consideration, such receipt is not evidence of a recognition of a legal possession (*f*); and therefore the receipt of a nominal rent from one as *cestui que vie*, after the death of the tenant for life, is not sufficient to entitle the widow of the former to notice to quit (*g*).

(*y*) *Crompton* v. *Minshull*, Easter, 33 G. 2. Runn. Ej., 80. Where the lease contained a general covenant to repair, and a covenant to repair on three month's notice, and the lessor gave notice to repair forthwith, it was held to be no waver of the breach of the general covenant. *Doe* v. *Paine*, 2 Camp. 520. But in such case a notice to repair in three months is a waver of the breach of the general covenant, and ejectment does not lie until the expiration of the three months. *Doe* v. *Meux*,[1] 4 B. & C. 606. And see *Doe* v. *Lewis*,[2] 5 Ad. & Ell. 277. *Doe* v. *Miller*,[3] 2 C. & P. 348.

(*z*) *Birch* v. *Wright*, 1 T. R. 387.

(*a*) *Roe* v. *Minshull*, B. N. P. 76.

(*b*) *Doe* v. *Allen*, 3 Taunt. 78.

(*c*) *Doe* v. *Brindley*,[4] 4 B. & Ad. 84.

(*d*) *Doe* v. *Woodbridge*,[5] 9 B. & C. 376. But where forfeiture by insolvency is waived by acceptance of rent from the insolvent after his discharge, the non-payment of a scheduled debt to the lessor is not a continuing insolvency. *Doe* v. *Rees*,[6] 4 Bing. N. C. 384.

(*e*) *Doe* v. *Steel*, 3 Camp. C. 117.

(*f*) *Doe* v. *Palmer*, 16 East, 53, n.; and see *Doe* d. *Scott* v. *Miller*,[3] 2 C. & P. 348. *Secus*, if under the circumstances the tenant could not understand the second notice as amounting to a waver of the first (*Doe* v. *Humphreys*, 2 East, 237). Where a landlord gave notice to quit, and after the expiration of that notice, gave notice to quit or pay double rent, the second notice was held to be no waver of the first, or of the double rent to which the plaintiff was entitled under it. *Messenger* v. *Armstrong*, 1 T. R. 53. *Doe* v. *Steel*, 3 Camp. 115. So where no notice to quit was necessary. *Doe* v. *Inglis*, 3 Taunt. 54. A mere promise not to turn the tenant out unless the premises were sold, the premises being afterwards sold, is no waver of the notice, and the tenant refusing to quit after the sale, is a trespasser from the expiration of the notice. *Whiteacre* v. *Symonds*, 10 East, 13.

(*g*) *Fenn* v. *Smart*, 12 East, 444, [and Mr. Day's notes.]

(*d*) *Supra*, notes (*x*) and (*y*).

(*e*) *Denn* v. *Rawlins*, 10 East, 261. *Doe* v. *Watts*, 7 T. R. 83.

(*f*) 3 East, 260.

(*g*) *Right* v. *Bawden*, 3 East, 260.

(A) (Under the plea of "not guilty," the defendant in ejectment may prove that the plaintiff was dead at the time when the suit was instituted. *Patterson* v. *Brindle*, 9 Watts, 98. And in support of his possession, he may give in evidence any matter which could have operated as a bar, if pleaded by him by way of estoppel to a real action, brought for the recovery of the same premises, or to an action of trespass, brought to try the right to the same property. *Wood* v. *Jackson*, 8 Wend. 35.)

[1]Eng. Com. Law Reps. x. 417. [2]*Id.* xxxi. 333. [3]*Id.* xii. 163. [4]*Id.* xxiv. 28. [5]*Id.* xvii. 399. [6]*Id.* xxxiii. 384.

A notice may be waived by the tenant who gives it, as well as by the landlord. Where the tenant continued in possession after the expiration of the notice, it was held to be a question for the jury whether he meant to waive the notice, or continue the possession in the exercise of a right supposed to exist by custom (*h*).

9. The proof of the execution of the deeds (*i*) by the mortgagor, who is in possession of the premises, is usually conclusive against him, since he cannot set up a title inconsistent with his own deed (*k*). And the receipt of interest as such since the date of the demise is no recognition of a lawful possession by the mortgagor or his tenant, to make a demand necessary (*l*). But if a third person be defendant, it is necessary to prove that the mortgagor was in possession, by the receiving of rents or otherwise, at the time of the mortgage (*m*) (A). And where the defendant claims as tenant to the mortgagor under a lease prior to the mortgage, a regular determination of the tenancy by a notice to quit, must be proved (*n*). But where the mortgagor has let the premises subsequently to the mortgage, no notice is necessary (*o*), although the mortgage was assigned to the lessor after the defendant had been let into possession (*p*), unless he has by some act acknowledged a tenancy, as by the receipt of rent (*q*). If the tenant has a

By mortgagor.

(*h*) *Jones* v. *Sheare*,[1] 4 Ad. & Ell. 832.

(*i*) *Doe* d. *Bristow* v. *Pegge*, 1 T. R. 760, n.; and see tit. Deed; Estoppel. A second mortgagee, who takes an assignment of a lease to attend the inheritance, and has all the title-deeds, may recover against the first mortgagee (not having had notice of such prior mortgage). *Goodtitle* d. *Norris* v. *Morgan*, 1 T. R. 755. A mortgagee of such a proportion of the tolls arising from a turnpike road, and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, may maintain ejectment, notwithstanding a clause in the Act that all the mortgagees shall be creditors on the tolls in equal degree. *Doe* d. *Barclay* v. *Booth*, 2 B. & P. 219.

(*k*) 1 T. R. 760. Peake's Ev. 313. The demise may be laid on a day anterior to the actual determination of the will. Per Buller, J., in *Birch* v. *Wright*, 1 T. R. 383. But if the deed contain a clause that the mortgagor shall remain in possession until default in payment, the demise must be laid on a subsequent day. *Wilkinson* v. *Hall*,[2] 3 Bing. N. C. 508.

(*l*) *Doe* v. *Cadwallader*,[3] 2 B. & Ad. 473. *Rogers* v. *Humphries*,[4] 4 Ad. & Ell. 313. *Doe* v. *Hales*,[5] 7 Bing. 322. But notice by the mortgagee to the mortgagor's tenant in possession, will not alone create a tenancy without attornment. *Evans* v. *Elliott*, 9 Ad. & Ell. 342. An agreement that the mortgagor may hold till such a day, operates as a re-demise till that day. *Wilkinson* v. *Hall*,[2] 3 Bing. N. C. 508.

(*m*) *Ibid.*

(*n*) *Birch* v. *Wright*, 1 T. R. 379.

(*o*) *Keech* v. *Hall*, Doug. 21; 3 East, 449.

(*p*) *Thunder* v. *Belcher*, 3 East, 449.

(*q*) *Ibid.* and *Clayton* v. *Blakey*, 8 T. R. 3. Where the mortgagor after the mortgage and the mortgagee applies for rent, he cannot afterwards recover in ejectment on a demise laid on a day previous to the application. *Doe* v. *Hales*,[5] 7 Bing. 322, and 5 M. & P. 132. In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a day later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. *Doe* d. *Rogers and Wife* v. *Cadwallader*,[3] 2 B. & Ad. 473. By the mortgage deed it was covenanted that in default of payment on the day, the mortgagee might enter and proceed to sell, &c.; held, that after that day the mortgagee was in the situation of a lessee whose term has expired, and no notice to quit was necessary to entitle the mortgagee to maintain ejectment. The payment of interest does not give any right to the possession of the land, as payment of rent would do. *Doe* d. *Fisher* v. *Giles*,[6] 5 Bing. 421, and see *Partridge* v. *Beere*,[7] 5 B. & A. 694. *Keech* v. *Hall*, Doug. 21. *Moss* v. *Gallimore*, Ib. 282. A mortgagor remaining in possession is at all events nothing more than a tenant at sufferance, and is liable to be treated as tenant or trespasser at the option of the mortgagee. *Doe* d. *Roby* v. *Maisey*,[8] 8 B. & C. 767. The mortgagee is entitled to the growing crops. *Birch* v. *Wright*, 1 T. R. 383; *secus* where by special terms the mortgagor is tenant at will. *Ex parte Temple*, 1 Glyn and J. 216.

(A) (A stranger not claiming title under a mortgage, will not be permitted to set it up to defeat a legal title. *Collins* v. *Torrey*, 7 John. R. 278. And though no regular foreclosure of the mortgage be shown, yet the assignee of the mortgage being in possession may protect his possession by it. *Jackson* v. *Minkler et al.* 10 John. R. 480. See also *Phyfe* v. *Riley*, 15 Wend. 248. But where the mortgagee has never entered, and there has been no foreclosure, and interest has not been paid within twenty years, a mortgage is not a subsisting title. *Collins* v. *Torrey*, 7 John. R. 278. *Jackson* ex dem. *Klock* v. *Hudson*, 3 John. R. 375. An equitable lien or mortgage cannot be set up at law, as a legal estate, to defeat a recovery in an action of ejectment. *Jackson* v. *Parkhurst*, 4 Wend. 369.)

[1]Eng. Com. Law Reps. xxxi. 198. [2]*Id.* xxxii. 226. [3]*Id.* xxii. 126. [4]*Id.* xxxi. 72. [5]*Id.* xx. 147. [6]*Id.* xv. 485. [7]*Id.* vii. 204. [8]*Id.* xv. 335.

legal title to *the term, the lessor of the plaintiff cannot recover, although his only object is to get into possession of the rents and profits (*r*).

The lessor of the plaintiff need not prove any notice to the mortgagor to give up the possession, or any previous demand of possession (*s*).

It must appear that the title accrued by the mortgagor's default, before the day of the demise laid in the declaration.

A second mortgagee who takes an assignment of a term to attend the inheritance, and has the title-deeds, may recover against the first mortgagee (*t*).

By a rector, &c.

10. Where the plaintiff seeks to recover land as rector or vicar, he must, unless the defendant be estopped by an acknowledgement of tenancy or otherwise, prove his title. Where the rector has been instituted and *inducted* into a living, proof of the letters of institution (*u*), and of his induction, by which he acquires the corporeal possession, are sufficient evidence of title, without proof of title in the patron; for institution and induction (*v*) upon the presentation of a stranger is sufficient to bar the rightful claimant in ejectment, and to put the rightful patron to his *quare impedit* (*x*); and the plaintiff need not, until some proof has been given to the contrary, prove his subscription to, and reading of, the thirty-nine articles, and his assent to all things contained in the book of common-prayer, for the law will presume the affirmative where the negative includes a crime (*y*). Where, however, induction has not followed upon institution, it seems to be necessary to prove presentation by the patron, and that the recital of a presentation in the letters of institution would not be evidence of it (*z*). Where induction or possession has not followed, proof of a verbal presentation is sufficient (*a*): but it has been said that the patron would not be

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competent to *prove this right, although he were but the grantee of the avoidance (*b*). It has been stated, that reputation would be admissible to prove the fact; but this position may, with reason, be doubted (*c*). Some evidence is of course necessary to show that the property sought to be recovered is the property of the particular church; as that the premises were occupied or otherwise enjoyed by the preceding incumbent. Adverse possession is not in general evidence against the right of a rector or vicar, unless he be the party who has acquiesced in the possession (*d*). An in-

(*r*) *Doe* v. *Wharton*, 8 T. R. 2. *Aliter*, B. N. P. 96; Doug. 23. And see *Doe* v. *Maisey*,[1] 8 B. & C. 767. *Doe* v. *Giles*,[2] 5 Bing. 420.

(*s*) *Birch* v. *Wright*, 1 T. R. 279. The mortgagor is strictly tenant at will to the mortgagee. *Partridge* v. *Beere*,[3] 5 B. & A. 604. The levying a fine by the mortgagor will not render an actual entry necessary. *Hall* v. *Doe*,[4] 5 B. & A. 687.

(*t*) *Goodtitle* v. *Morgan*, 1 T. R. 755. *Right* d. *Jefferys* v. *Bucknell*,[5] 2 B. & Ad. 278. See further, *infra*, tit. Estoppel.

(*u*) The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese. These ought to record the time of institution, and upon whose presentation, Gibs. Cod. 813, and seem to be evidence of the fact of presentation so stated, where induction has followed.

(*v*) Induction may be proved either by any witness who was present, or by the indorsement on the mandate directed by the Ordinary to the Archdeacon, or by the return to the mandate, if a return has been made. *Chapman* v. *Beard*, 3 Ans. 942. 2 Phill. Ev. 257.

(*x*) B. N. P. 105. *Doe* d. *Kirby* v. *Carter*,[6] 1 Ry. & M. 237. *Heath* v. *Pryn*, 1 Vent. 14.

(*y*) *Monke* v. *Butler*, 1 Roll. R. 83. *Powell* v. *Millbank*, Blacks. R. 851; 3 Wills. 355. *Williams* v. *East India Co.* 3 East, 199. *Sherard's Case*, cited 2 Bl. 853.

(*z*) B. N. P. 105; 1 Vent. 15; 1 Sid. 426. Letters of institution of a party, reciting the cession of his predecessor, followed by induction, are evidence of the cession. *Doe* v. *Carter*,[6] R. & M. 238.

(*a*) B. N. P. 105; Co. Litt. 120, a. *R.* v. *Eriswell*, 3 T. R. 723. A presentation by a corporation must be in writing under the common seal; Gibs. Cod. 794. A corporation cannot present the head of the corporation. Vin. Ab. tit. Presentation.

(*b*) B. N. P. 105. (*c*) Ibid.

(*d*) *Doe* d. *Cooper* v. *Runcorn*,[7] 5 B. & C. 696. *Croft* v. *Howell*, Plowd. 538. *Stowel* v. *Zouch*, Ib. 355. *Barber* v. *Richardson*,[8] 4 B. & A. 579.

[1]Eng. Com. Law Reps. xv. 335. [2]*Id.* xv. 485. [3]*Id.* vii. 204. [4]*Id.* vii. 232. [5]*Id.* xxii. 73. [6]*Id.* xxi. 428. [7]*Id.* xii. 359. [8]*Id.* vi. 523.

cumbent is entitled to recover glebe lands, although the current year of a tenancy created by his predecessor is unexpired (*e*). A rector may recover on a lease avoided by his own non-residence (*f*); so on his own demise to a spiritual person (*g*), and the description of the lessee in the lease is evidence that he is a spiritual person.

A resignation-bond having been declared simoniacal, the presentee of the Crown, who is put into corporeal possession of the church, on the avoidance, is entitled to maintain ejectment against the former incumbent (*h*).

11. Where the lessor of the plaintiff is a tenant in common (*i*), co-parcener, or joint-tenant with the defendant, he ought to be prepared with the consent-rule, to show that the ouster has been admitted (*j*); and it seems that if the defendant mean to deny the ouster, he ought to enter into a special consent-rule, which does not admit the ouster (*k*). By joint-tenant, &c.

The bare perception of the whole of the profits does not amount to an ouster (*l*); although such perception of the profits, continued for a great length of time, will be evidence of an actual ouster (*m*), for the mere possession supports the common title; and a bare refusal to pay over his share of the profits to a tenant in common is not sufficient evidence of ouster without a denial of title; but if upon a demand of possession by a tenant in common the co-tenant refuse, and claim the whole, it is evidence of an actual ouster (*n*). Proof of ouster.

*The payment of an entire rent to the lessors of the plaintiff is evidence of their joint-tenancy (*o*), such as to support a joint demise in the declaration; but although the defendant prove that he has paid an entire rent to a receiver, for two jointly, for which the receipts stated the rent to be due to the two, yet they may recover on a declaration, stating separate demises by the two of the whole property, for by the several demises the joint-tenancy is severed (*p*). So if four joint-tenants jointly demise, such as have given notice to quit may recover on separate demises (*q*). A notice by one of *430 By joint-tenants.

(*e*) *Doe* d. *Kirby* v. *Carter*,[1] 1 R. & M. 237, *cor.* Littledale, J. *Secus*, if an interval (*e. g.* of nine months) elapse from which an assent to the continuance of the tenancy may be presumed, *Doe* d. *Capes* v. *Somerville*,[2] 6 B. & C. 126.

(*f*) *Frogmorton* v. *Scott*, 1 East, 467, under the stat. 13 Eliz. c. 20.

(*g*) Ib. under the st. 24 H. 8, c. 13, s. 3.

(*h*) *Doe* v. *Fletcher*,[3] 8 B. & C. 25; 2 M. & Ry. 206. *Doe* v. *Inglis*, 3 Taunt.

(*i*) It is doubtful whether one of several parceners can recover in ejectment, on a forfeiture of a lease made by the ancestor. *Doe* v. *Lewis*,[4] 5 Ad. & Ell. 177.

(*j*) *Doe* d. *White* v. *Cuffe*, 1 Camp. 173; 7 Mod. 39. *Oates* d. *Wigfall* v. *Brydon*, 3 Burr. 1895; Runn. Ej. 195. [See *Doe* v. *Roe*, 1 Anst. 86.]

(*k*) Ibid. and *Doe* d. *Gigner* v. *Roe*, 2 Taunt. 397. But see *Doe* d. *Hellings* v. *Bird*, 11 East, 49; Salk. 392.

(*l*) *Reading* v. *Rawstorne*, 2 Ld. Raym. 829; *Fairclaim* v. *Shackleton*, 5 Burr. 2604. The tenant in common had been in possession of the whole of the profits for twenty-six years; but there was no evidence of his having actually claimed the whole estate, and he had been admitted to one moiety only of the land. And see *Peaceable* v. *Read*, 1 East, 568. The stat. 3 & 4 Will. 4, c. 27, s. 12, provides that the possession of land, profits, or rent, by one or more as coparcener, joint-tenant, or tenant in common, of more than his or their undivided shares for his or their own benefit, or that of any other than the party entitled, shall not be deemed the possession or receipt of the latter. This it is said has made no difference in the practice in ejectment. Per Littledale, J. Bail court, M. T. 1838; Roscoe on Ev. 432; and see *Doe* v. *Horne*, 3 M. & W. 333.

(*m*) *Doe* d. *Fisher* v. *Prosser*, Cowp. 217.

(*n*) *Doe* d. *Hellings* v. *Bird*, 11 East, 49. *Doe* d. *Fisher* v. *Prosser*, Cowp. 217. So (*semble*) where three or four co-tenants authorized the using of the land for a railroad. Per Parke, B., *Doe* v. *Horne*, 3 M. & W. 333.

(*o*) *Doe* d. *Clarke* v. *Grant*, 12 East, 221. *Qu.* whether receipts given by an agent in the joint names of two, will be evidence of a joint-tenancy. *Doe* v. *Read*, 12 East, 57.

(*p*) *Doe* d. *Marsac* v. *Read*, 12 East, 57. Ejectment will lie on the several demises of three joint-tenants. *Doe* v. *Fenn*, 3 Camp. 190, *cor.* Ld. Ellenborough. *Doe* d. *Raper* v. *Lonsdale*, 12 East, 39.

(*q*) *Doe* d. *Wayman* v. *Chaplin*, 3 Taunt. 420. *Doe* v. *Read*, 12 East, 57.

[1]Eng. Com. Law Reps. xxi. 426. [2]*Id.* xiii. 118. [3]*Id.* xv. 151. [4]*Id.* xxxi. 333.

several in the name of all, is sufficient as to all (*r*). It is sufficient for a purchaser under the sheriff to prove the writ without proving the judgment (*s*), unless he be the judgment-creditor, in which case he must prove the judgment also (*t*).

Variance from local description.

IV. Proof must be given of the subject-matter sought to be recovered, and of its local situation, according to the allegations (A). Houses may be recovered under the description of land, for they are mere accessories to the land (*u*). Although it be not necessary to allege the land to be situated in a township or parish, yet if it be so described, a variance in proof will be fatal (*v*).

Variance from the demise.

If it appear that the title of the lessor of the plaintiff did not accrue until after the day of the demise laid in the declaration, the variance will be fatal (B) (1); but a demise of copyhold lands laid between the times of the surrender and admittance, will be good, for the title relates from the admittance to the surrender, as against all except the lord (*x*).

*431 *A demise laid by the heir on the day when his ancestor died, is good; for the fiction that there is no fraction of a day, is not allowed to prejudice any party (*y*). So where the ejectment was brought by a posthumous son, and the demise was laid at the time of the father's death (*z*). No variance

(*r*) *Doe* v. *Summersett*,[1] 1 B. & Ad. 185. (*s*) *Doe* v. *Merless*, 6 M. & S. 110.

(*t*) *Doe* v. *Smith*,[2] 2 Starkie, C. 289.

(*u*) Ejectment will lie by the owner of the soil for land, part of the King's highway, or for an acre of land described as land, though a wall and park and part of a house be on it. *Goodtitle* d. *Chester* v. *Almer*, 1 Burr. 133; 1 Ld. Ken. 427. In Ireland, ejectment will lie for so many acres of mountain land, 1 Bro. P. C. 74; and see *Cottingham* v. *King*, 1 Burr. 621. The action does not lie for a messuage *or* tenement; but if the declaration be for a messuage and tenement, the Court will give leave to enter the verdict according to the Judge's notes. *Goodtitle* v. *Otway*, 8 East, 357. See *Doe* d. *Bradshaw* v. *Plowman*, 1 East, 441; and *Doe* d. *Stewart* v. *Denton*, 1 T. R. 11. The action is not maintainable against one who erects a stall in the street without leave of the owner of the soil; the proper remedy is trespass. *Doe* v. *Cowley*,[3] 1 C. & P. 123.

(*v*) See tit. VARIANCE. Proof that the place where the house stands for which the ejectment is brought is watched by watchmen of the parish where it is alleged to be situate, is *prima facie* evidence of its situation in that parish. *Doe* v. *Welch*, 4 Camp. 264. If the premises be described as situate in the *parish* of *A.* and *B.*, and part be in parish *A.*, part in parish *B.*, but there be no such parish as *A.* and *B.*, the variance will, it seems, be fatal. (Per Parke, B.) *Doe* v. *Edwards*, 1 M. & M. 319; but leave was given to amend. Had the word parishes been used the allegation would have been admissible, *Ib.*; and see *Goodtitle* v. *Walter*, 4 Taunt. 671; Vol. I. tit. VARIANCE.

(*x*) *Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 600. *Doe* d. *Bennington* v. *Hall*, 16 East, 208. But where the devisee of a copyhold surrendered to the use of the will, died before admittance, his devisee, though afterwards admitted, could not, it was held, recover in ejectment; his admittance has no relation to the surrender, but the legal title remains in the heir of the surrenderor. *Doe* d. *Vernon* v. *Vernon*, 7 East, 8. *Doe* d. *Burrough* v. *Reade*, 8 East, 353. Where the lord of the manor by copy of court-roll granted to *A.* the reversion of certain premises then in his tenure to hold to *B.* for his life, immediately after the death of *A.*, it was held, that *B.* on the death of *A.* might maintain ejectment, having acquired a perfect legal title by the grant without admittance. For an admittance is necessary in those cases only where the estate passes from the surrenderor to the lord, and then from the lord to the surrenderee by admittance; when it passes immediately from the lord to another by grant, no admittance is necessary. And in analogy to the case of freehold, a reversion may be granted without liberty of seizin. *Roe* d. *Cosh* v. *Loveless*, 2 B. & A. 453. An admittance where there was no title to be admitted, as in the case of an administrator *de bonis non*, to the grantee of a copyhold *per autre vie*, cannot support an ejectment as on a grant by the lord. *Zouch* v. *Forse*, 7 East, 188. There can be no special occupant of a copyhold, the freehold being in the lord. *Ib. Smartle* v. *Penhallow*, 6 Mod. 65; 1 Salk. 88; 2 Ld. Raym. 994. See as to the surrender of chambers in an inn of court, *Doe* d. *Warry* v. *Miller*, 1 T. R. 393.

(*y*) 3 Wils. 274. (*z*) B. N. P. 105.

(A) (*Leach* v. *Cooper's Lessee*, Cooke's Rep. 249.)

(B) (*Boyd* v. *Barkley*, 4 Dana, 227.)

(1) [*Van Alen* v. *Rogers*, 1 Johns. Cas. 281; the demise must be laid at, or subsequent to the time when the lessor's right accrued. See also *Bailey & al.* v. *Fairplay*, 6 Binney, 454. Where there was no period stated in the declaration for the commencement of the term, and no date to the demise, the declaration was held bad even after verdict. *Nokes* v. *Shaw*, Cam. & Nor. 457. Where the declaration laid the demise, Feb. 1, 1801, and possession under it "afterwards on the 1st *January last aforesaid*;" it was held that the last words might be rejected, so that the possession would appear to be after the demise. *Brown* v. *Lutterloh*, Cam. & Nor. 425.]

[1]Eng. Com. Law Reps. xx. 360. [2]*Id.* iii. 312. [3]*Id.* xi. 339.

between the extent of the lease laid in the declaration, and the extent of the interest of the lessor of the plaintiff, is material, for the lease is but a fiction (*a*).

If such a title be not proved as would enable the lessor of the plaintiff to make such a demise in point of law as is alleged in the declaration, the variance will be fatal (*b*); and therefore, if *A.* be tenant for life, with remainder to *B.*, a count upon a joint demise by *A.* and *B.* cannot be supported, for it is not the lease of *A.* and *B.*, but the lease of *A.* confirmed by *B.* (*c*). So a count upon a joint lease, by tenants in common, is bad (*d*). There should, in such case, be a distinct count upon the separate demise of each tenant in common, or they should join in a lease to a third person, who may make a lease to try the title (*e*) (A). But joint-tenants or coparceners may either join or sever (*f*).

Where the demise was upon a joint lease by the husband and wife, and proof was given of a lease made by a third person, by virtue of a power of attorney, executed by both, it was held to be a variance, but it was also held that the power of attorney was void as to the wife only, and that the lessee might declare on a lease by the husband alone (*g*). It seems that joint-tenants may make several demises (*h*).

Where the lease is alleged in the declaration to be by deed under the corporation seal, it is unnecessary to prove the fact, since by the rule the lease is admitted as stated (*i*) (1).

Evidence of taking tithes only, is not sufficient to prove an ouster from a rectory (*k*).

A variance in the fractional amount sought to be recovered will not preclude the plaintiff from recovering any smaller fraction; if the declaration be for one-fourth of one-fifth part, and he prove his title to one-third part of a fourth of a fifth part, the verdict may be taken accordingly (*l*), but the

(*a*) *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; Runn. 94.

(*b*) For the word "demise," when used in pleading, is to be taken in its legal sense; 3. T. R. 15; 2 Bl. 1077; 5 Burr. 2604; 1 Wils. 1; Moor, 682; Cro. Jac. 166; 1 Show. 342; 2 Wils. 232; Cro. Jac. 83; 1 Brownl. 39, 134. But see below, note (*d*).

(*c*) 6 Co. 14, b.; Woodfall's Land. & Ten. 461; Co. Litt. 45, a.; Poph. 37.

(*d*) Cro. Jac. 166; 1 Ins. 200: 2 Wils. 232; 12 East, 221. *Doe* v. *Errington*,[1] 1 Ad. & Ell. 750; and see Vol. I. But *qu.* whether, as a lease is admitted by the consent-rule, a lease may not be presumed in which each demised his undivided share. See *Doe* v. *Read*, 11 East, 57; and the observations of Gibbs, A. G. [See Phil. Ev. 170, 171, n.]

(*e*) 2 Wils. 232.

(*f*) *Doe* v. *Read*, 12 East, 57. *Doe* v. *Fenn*, 3 Cowp. 190.

(*g*) Yelv. 1; 2 Brownl. 248; Cro. Jac. 617; Cro. Car. 165, *contra*.

(*h*) *Doe* v. *Read*, 12 East, 57. [See *Milne* v. *Cummings*, 4 Yeates, 577.]

(*i*) Per Ashurst, J., *Farley* on d. *Mayor, &c. of Canterbury* v. *Wood*, Runn. 150; 3 Esp. C. 198.

(*k*) Latch. 62; Runn. 136.

(*l*) 1 Sid. 239; 1 Burr. 330. [*Santee* v. *Keister*, 6 Binney, 36; *Squires* v. *Riggs*, 2 Hayw. 150; *Den* v. *Evans*, ibid. 222.]

(A) (It has now become immaterial whether tenants in common declare on joint or separate demises. *Jackson* v. *Bradt*, 2 Caines' R. 169. *Barrett* v. *French*, 1 Conn. R. 354. A co-parcener may declare in ejectment on her separate demise. *Jackson* v. *Sample*, 1 Johns. C. 231. [Where a declaration contains separate demises from several lessors, the plaintiff may give in evidence the separate titles of the lessors to separate parts of the premises and recover accordingly. *Jackson* v. *Sidney*, 12 Johns. 185.

In North Carolina, tenants in common may recover on a joint demise. *Doe* v. *Potts*, 1 Hawkes, 469.

In Kentucky, tenants in common cannot make a joint demise. *Innis* v. *Crawford*, 4 Bibb, 241. On a joint demise, the title must be joint, or the plaintiff cannot recover. *Taylor* v. *Taylor*, 3 Marsh. 19. An ejectment cannot be maintained on a joint demise by husband and wife, when the title is in the husband alone. *Tucker* v. *Vance*, 2 Marsh. 458. But where the plaintiff declares on separate demises by two, and fails to prove title in one of the moieties, he may nevertheless recover, according to the title proved in the other lessor. *Allen* v. *Trimble*, 4 Bibb, 21. A declaration, stating that the lessors jointly and severally demised, is supported by proving a tenancy in common. *Courteney* v. *Shropshire*, 3 Littell's Rep. 266].)

(1) [In ejectment by a corporation, the court will presume the demise to have been under their corporate seal. *University* v. *Johnston*, 1 Hayw. 375, *note*.]

[1] Eng. Com. Law Reps. xxviii. 197.

*verdict cannot be taken for more than is claimed (*m*). So the verdict may be for any quantity of land less than that specified in the declaration (*n*). Upon a demise of the whole, an undivided moiety may be recovered (*o*) (1). In general, the plaintiff may recover, according to his title, so much as he has a title to, where he declares for more, but not more where he declares for less (*p*).

Defendant's possession.

V. The plaintiff must prove that the defendant was in possession of the premises in question at the time of bringing the action (*q*); for otherwise, if the plaintiff could prove title to any premises answering the description in the declaration, he would be entitled to a verdict and his costs, although the defendant never intended to dispute his title to those premises, but only his title to others, which the plaintiff has failed to prove (*r*); but now, by a rule of the Court of King's Bench, a party, on being admitted to defend in ejectment, must, on entering into the common rule, specify the premises in respect of which he intends to defend, and admit that they are in his own possession, if he defends as tenant, or in the possession of his tenant, if he defends as landlord; and undertake to admit such possession on the trial of the cause (*s*). Where there is any doubt as to the identity of the premises sought to be recovered, the lessor of the plaintiff ought to produce the rule (*t*).

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Competency of witnesses.

*VI. Where two persons are contending for the possession, who are to pay rent in different rights, it seems that the landlord is not a competent witness to prove the priority of demise, in an action of ejectment. As where

(*m*) 1 Burr. 330. [*Davies* v. *Whitesides*, 1 Bibb, 510.]

(*n*) Cro. Eliz. 13; Yelv. 114. It was formerly held, that upon a declaration for one acre, a verdict for half an acre would be bad, because it would be uncertain of which half the plaintiff was to have execution. The Court will not on the trial of an ejectment, where the plaintiff has proved his title to a verdict, inquire as to the metes and boundaries, which are to be tried more properly in an action of trespass. 2 Starkie's C. 477.

(*o*) *Doe* v. *Wippel*, 1 Esp. C. 360. *Doe* v. *Fenn*, 3 Camp. 190. *Roe* v. *Lonsdale*, 12 East, 39. The Court will not try a question of metes and bounds in an action of ejectment. *Doe* v. *Wilson*,[1] 2 Starkie's C. 477.

(*p*) *Doe* d. *Burgess* v. *Purvis*, 1 Burr. 326.

(*q*) *Astlin* v. *Parkins*, 2 Burr. 668; and per Bayley, J., *Doe* d. *James* v. *Stanton*, 2 B. & A. 371.

(*r*) See *Doe* v. *Cuff*, Camp. 173. *Smith* v. *Man*, B. N. P. 110; 1 Wils. 220. *Goodright* v. *Rich*, 7 T. R. 327. *Fenn* v. *Wood*, 1 B. & P. 573. But see *Jesse* v. *Bacchus*, Runn. 293. *Fenn* v. *Cooke*, 3 Camp. 512. *Doe* v. *Alexander*, 3 Camp. 516. But the plaintiff is entitled to recover, although the defendant in possession is the servant of another. *Doe* d. *Cuff* v. *Stradling*,[2] 2 Starkie's C. 187. It is sufficient that the defendant has the visible occupation of the premises, and it is not necessary that he should have such an interest as would enable him to maintain trespass. *Doe* d. *James* v. *Stanton*, 2 B. & A. 371. Where the defendant on being served with the declaration (not on the premises), answered as tenant in possession, and it appeared that he sold coals on the premises as servant to the proprietor of the premises (a coal-wharf); it was held, that the plaintiff was properly nonsuited. *Ibid.*

(*s*) See the rule, 4 B. & A. 196. It is there recited that plaintiffs have frequently been nonsuited in ejectment for want of proof of the defendant's possession, contrary to the true intent and meaning of the consent-rule. It is therefore ordered, "That from henceforth, in every action of ejectment, the defendant shall specify in the consent-rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed." Before this rule, it was held, that on ejectment against several defendants, the lessor might recover from each severally the tenement in his several occupation. *Doe* v. *Clarke*, Peake's Ev. App. 45.

(*t*) *Doe* d. *Lamble* v. *Lamble*, 1 M. & M. 237. But see where there is no doubt as to the identity of the premises sought to be recovered and those for which the tenant defends, the lessor of the plaintiff is not required to produce the consent-rule. *Doe* d. *Greaves* v. *Roby*,[3] 2 B. & Ad. 948.

(1) [In Maryland and North Carolina, where an entirety is demanded in ejectment, there cannot be a recovery of an undivided part—the *nature* of such recovery being considered different from that of the claim. *Carroll* v. *Norwood*, 1 Har. & J. 463, *note*. *Young* v. *Drew*, 1 Taylor, 119. *Secus*, in Kentucky. *Gist* v. *Robinet*, 2 Bibb, 2. *Ward* v. *Harrison*, ibid. 304. *Larue* v. *Slack*, 4 Bibb, 358.]

[1] Eng. Com. Law Reps. iii. 439. [2] *Id.* iii. 307. [3] *Id.* xxii. 219.

A. the landlord demises to *B.*, and afterwards to *C.*, and the latter demises to *D.*, against whom *B.* brings ejectment, *A.* is not competent to prove the demise to *B.*, for the effect would be to change the possession (*u*). But if in such case no rent be reserved (*v*), or if the question arose on an action of covenant brought by *C.* against *D.*, then *A.* would be competent to prove the priority of the demise to *B.*; for the result would not alter the possession, and the verdict would not be evidence afterwards, either for or against *A.* the landlord (*w*). So in ejectment by one claiming as heir of *B.*, the son of an elder brother of *B.* is a competent witness for the defendant to show a better title in himself; if the defendant succeeds, the witness will not be benefited; if the plaintiff succeeds, his obtaining possession will not injure the witness, unless the defendant be his tenant (*x*) (A).

Where the party in possession would be liable for mesne profits if the lessor of the plaintiff should succeed, he is an incompetent witness for the defendant (*y*).

A remainder-man, after a tenant in tail, is not a competent witness for the tenant in tail, on ejectment for the entailed property; for he would acquire a vested interest (*z*).

An executor in trust may be a witness with respect to the estate, as to prove the sanity of the testator (*a*). So where a grantee is a bare trustee, he is competent to prove the execution of the deed to himself (*b*). A co-defendant is not a competent witness (*c*).

(*u*) Per Buller, J., in *Bell* v. *Harwood*, 3 T. R. 308, and *Fox* v. *Swann*, Sty. 482. *Smith* v. *Chambers*, 4 Esp. C. 164.

(*v*) Per Buller, J., in *Bell* v. *Harwood*, 3 T. R. 308.

(*w*) *Bell* v. *Harwood*, 3 T. R. 308. See also *Rex* v. *Woodland*, 1 T. R. 261; and *Fox* v. *Swann*, Sty. 482.

(*x*) *Doe* v. *Clarke*,[1] 3 Bing. N. C. 429; and see *Doe* v. *Maisey*,[2] 1 B. & Ad. 439; 5 B. & C. 335. *Rees* v. *Walters*, 3 M. & W. 527. As to the competency of creditors, executors, &c. of a testator to prove a will, see the stat. 7 Will. 4 & 1 Vict. c. 26.—WILL.

(*y*) *Doe* v. *Preece*,[3] 4 C. & P. 556.

(*z*) *Doe* v. *Tyler*,[4] 6 Bing. 394.

(*a*) 1 Mod. 107; Doug. 139, 141; 4 Burr. 2254.

(*b*) 1 P. Will. 287, 290.

(*c*) *Dormer* v. *Fortescue*, Runn. 250. *Doe* v. *Green*, 4 Esp. C. 198.

(A) In an action of ejectment, it is not a valid objection to the competency of a witness called by the plaintiff, that he is one of the defendants, if he was merely made a defendant because he lived on the land. *Hain* v. *Martin*, 5 Watts, 179. *Patterson* v. *Hagerman*, 2 Yeates, 163. But see *Jackson* v. *Hills*, 8 Cow. 290. He is incompetent if liable in any event for mesne profits. *Boyer* v. *Smith*, 5 Watts, 65. A grantor with a covenant of warranty is a competent witness for his grantee in an action of ejectment brought by him for the recovery of the possession of the premises conveyed, the liability of the grantee attaching only in case of an eviction after possession obtained. *Jackson* v. *Rice*, 3 Wend. 180. *Burns* v. *Lyon*, 4 Watts, 363. But a *cestui que* trust is not made a competent witness by an assignment of all his interest in the land to a third person, who stipulated to pay all the costs which had accrued, and which should accrue in the action, without the right to reclaim the same in any event. Nothing short of an actual payment and deposit of the money in Court will render him competent. *Campbell* v. *Galbreath*, 5 Watts, 423. Nor is a defendant a competent witness for his co-defendants although in point of amount he has a greater interest in the plaintiff's recovery. *Lies* v. *Stub*, 6 Watts, 48. In an action of ejectment to recover a tract of land purchased at sheriff's sale by the defendant, on the ground of a fraud practised by him in making the purshase, after proof of the fraud, it is competent to give evidence that other persons were prevented from bidding, by the alleged fraudulent act of the defendant. *M'Kennan* v. *Pry*, 6 Watts, 137. In an action of ejectment, the field notes of a deputy surveyor, who is dead, containing a memorandum of the name of the person for whom the survey was made, and of the payment of the expenses of making it, are competent evidence. *Galbraith* v. *Elder*, 8 Watts, 81. So also a verdict and judgment or a nonsuit in a former trial between the same parties for the same land. *Koons* v. *Hartman*, 7 Watts, 20. The books found in the commissioner's office are official documents, and competent evidence in an action of ejectment for unseated land sold for taxes. So also is a receipt of the treasurer for the surplus bond required of the purchaser by the act of Assembly. *Fager* v. *Campbell*, 5 Watts, 287. A return of survey made after suit brought is competent evidence for a defendant in ejectment. In this respect there is a difference between a plaintiff and a defendant; the former, to entitle him to recover, must establish his title to have existed before he commenced his action; but the latter may prevent a recovery by proof of facts occurring subsequently. *Galbreath* v. *Elder*, 8 Watts, 81.)

[1]Eng. Com. Law Reps. xxxii. 191. [2]*Id.* xx. 420. [3]*Id.* xix. 525. [4]*Id.* xix. 111.

A tenant is not competent to defend his landlord's possession (*d*). Where *primâ facie* evidence has been given against the defendant, a witness is incompetent to prove that he himself is the real tenant, and that the defendant is but his bailiff (*e*).

A lessor of the plaintiff cannot, it seems, be called as a witness by the defendant, though no title be proved in him (*f*). Where a lessor had become a bankrupt, and released his assignees, it was held that he was competent *(*g*). It seems that one who sells an estate without any covenant or warranty, on which he may be liable in case the title be defective, is a competent witness for the plaintiff; otherwise, if he be a mere mortgagor (*h*).

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In ejectment by a mortgagee against an assignee under the Lords' Act, a letter written by the mortgagor to the plaintiff before the assignment is evidence against the defendant (*i*), and it will be presumed to have been written at the time of the date (*j*). The declarations of a deceased occupier against his own interest, and tending to show that his possession was not adverse, are admissible (*k*) (A).

An admission made by the tenant in possession is evidence against one who claims as landlord (*l*), and defends jointly with the tenant, and relies on the tenant's title.

VII. *Trespass for mesne profits.*

Proof in action for mesne profits.

Where trespass is brought against the tenant in possession (*m*), for mesne profits, whether by the lessor or by the nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; it is sufficient to prove the judgment in ejectment, and the writ of possession executed (*n*), the posses-

(*d*) *Bourne* v. *Turner*, Str. 633. *Doe* v. *Williams*, Cowp. 621. *Doe* v. *Pye*, 1 Esp. C. 304. *H.* and *W.* occupied a cottage divided, from 1808 till 1821 (as servants of *C.*, without paying any rent); a year or two before *C.*'s death, *H.* having taken *L.* to live with him, by will devised the moiety occupied by him to *W.*, and *L.* after the death of *H.* continued in possession: upon ejectment by *W.*, the defendants coming in to defend as landlords of *L.*, held, that as *L.* came in under *H.*, who might have maintained ejectment against him, *W.*, who claimed under *H.*, had a sufficient *prima facie* title, and that as the defendants came in to defend *L.*'s possession, the latter was not a competent witness to dispute the title either of *H.* or *W.* *Doe* v. *Birchmore*, 1 P. & D. 488.

(*e*) *Doe* v. *Wild*,[1] 5 Taunt. 183. S. P. *Doe* d. *Lewis* v. *Bingham*,[2] 4 B. & A. 672. Where a witness stated on the *voir dire* that the lessor of the plaintiff had formerly assigned the premises to him to protect him from impressment, that he had given back the deed to the lessor of the plaintiff, and had never had any possession or beneficial interest in the premises, he was held to be incompetent, as having a direct interest in supporting the plaintiff's action. *Doe* d. *Scales* v. *Bragg*,[3] 1 R. & M. 87.

(*f*) *Fenn* v. *Granger*, 3 Camp. 177. But the objection was waived.

(*g*) *Longchamp* v. *Fawcitt*, Peake's C. 71. [1 Mass. Rep. 91.] Under the late statute it should appear either that his assignees accepted the lease, or that he delivered it up according to the statute. Vide *supra*, 189.

(*h*) *Anon.* 11 Mod. 354.

(*i*) *Doe* v. *Milburn*, 2 M. & W. 853.

(*j*) Ibid.

(*k*) *Doe* v. *Harbrow*,[4] 3 Ad. & Ell. 67.

(*l*) *Doe* v. *Litherland*,[5] 4 Ad. & Ell. 784.

(*m*) The action for mesne profits may be brought pending a writ of error. Adams on Ejectment, p. 181; 2 Roscoe on Real Actions.

(*n*) It is not necessary to execute a *habeas* where the plaintiff has been let into possession by the defendant. *Calvert* v. *Horsefall*, 4 Esp. C. 167.

(A) (The acts and declarations of a party to an action of ejectment, done or made before or after suit brought, and tending to show that he had not a good title, are competent evidence. *Elder* v. *Galbraith*, 8 Watts, 81. *Reed* v. *Dickey*, 1 Watts, 152. *Jackson* v. *Miller*, 6 Cow. 751. *Jackson* v. *Leek*, 12 Wend. 105. So where the plaintiff derives title from his grandfather, and the action of ejectment is brought subsequent to the death of his father and mother, admissions made by the father and mother during their lifetime, the father having had an interest for life in the premises, against which the admissions were made, as to the existence and loss of a will alleged to have been executed by the grandfather, may properly be received in evidence. *Featherly* v. *Waggoner*, 11 Wend. 599. And in an action of ejectment for dower, the admissions of the husband while living, are as competent evidence in bar of the title of his widow, as they would be in bar of the title of his heir or grantee. *Van Duyne* v. *Thayre*, 14 Wend. 233. Where an ejectment was brought to set aside a conveyance made by an executor to the defendant on the ground of fraud, evidence having been given to show the fraudulent combination, the declarations of the executor in the absence of the defendant were held admissible in evidence against him. *Price* v. *Junkin*, 4 Watts, 85.)

[1]Eng. Com. Law Reps. i. 68. [2]*Id.* vi. 560. [3]*Id.* xxi. 388. [4]*Id.* xxx. 32. [5]*Id.* xxxi. 179.

sion of the defendant, and the value of the profits; and this will entitle the plaintiff to recover from the time of the demise laid in the declaration (*o*). And in such case it seems to be sufficient to prove the judgment, without proving the writ of possession executed; for by entering into the rule to confess lease, entry, and ouster, the defendant is estopped from disputing the entry, both as to the lessor and lessee, so that either may maintain trespass without proving an actual entry (*p*). But where the judgment was against the casual ejector, no rule having been entered into, the lessor must prove the execution of the writ of possession (*q*). Where, in such case, the defendant was landlord of the premises, and the ejectment was served upon the tenant, it was held that the judgment was not evidence against the defendant, without notice of the ejectment, for he could not be bound by a judgment obtained without his privity (*r*).

The plaintiff may prove his possession also by showing that he was let into possession by the defendant's consent (*s*).

Where the plaintiff had recovered, in ejectment against the wife, who had a separate maintenance, and who had lived apart from her husband for many years, and afterwards brought an action of trespass for mesne profits against the husband and wife, and it appeared that the declaration in ejectment had been served upon the wife alone, it was held that the judgment in ejectment *was not evidence against the husband, on the ground that the wife's confession of a trespass committed by her was not evidence against the husband in an action which was to subject him to damages and costs (*t*). *435

But it is in evidence against one who comes into possession after the judgment, under the defendant in ejectment (*u*). It is otherwise if no privity of possession can be proved (*x*).

Where the action was brought by three plaintiffs, *A.*, *B.* and *C.*, and they gave in evidence a judgment in ejectment on a demise by *A.*, and on another demise by *B.* and *C.*, it was held to be sufficient, for the judgment showed that they were all entitled to the possession (*y*).

If the plaintiff can prove that his title accrued before the time of the demise, and also that the defendant was then in possession, he will be entitled to recover antecedent profits, but the defendant will be at liberty to controvert the title, which he cannot do if the plaintiff claim profits from the time of the demise only, for the defendant being tenant in possession must have been served with the declaration, and therefore the record is against him conclusive evidence of title. But the judgment is not evidence of an anterior title, and therefore to entitle himself to damages in respect of such anterior profits, the plaintiff must prove his own title to the previous possession (*z*); and if the action be brought against a precedent occupier, the plaintiff must also prove an actual entry; for trespass being a possesory

(*o*) B. N. P. 87. *Astlin* v. *Parkin*, Mich. 32 Geo. 2, *per omnes Justic.*, on a case reserved. [*Van Aler* v. *Rogers*, 1 Johns. Cas. 281. *Shotwell* v. *Boetin*, 1 Dallas, 172.] *Gulliver* v. *Drinkwater*, 2 T. R. 261. *Doe* v. *Davies*, 1 Esp. C. 358. *Doe* v. *Whitcombe*,[1] 8 Bing. 46. The action lies where one tenant in common recovers against another. *Goodtitle* v. *Tombs*, 1 Wils. 668. But it seems that a tenant whose under-tenant wrongfully retains possession, is not liable for mesne process. *Burne* v. *Richardson*, 4 Taunt. 720.

(*p*) *Thorpe* v. *Fry*, B. N. P. 87; Str. 5. [*Lessee of Brown* v. *Galloway*, 1 Peters Rep. 299].

(*q*) B. N. P. 87.

(*r*) *Hunter* v. *Britts*, 3 Camp. 455. But the defendant having promised to pay the rent and costs to the plaintiff, the admission was held to be evidence of the plaintiff's possession and of the defendant's trespass.

(*s*) *Calvert* v. *Horsfall*, 4 Esp. C. 167.

(*t*) *Denn* v. *White*, 7 T. R. 112. (*u*) *Doe* v. *Whitcomb*,[1] 8 Bing. 46.

(*x*) *Doe* v. *Harvey*,[2] 8 Bing. 239; and it seems that the privity cannot be established by parol where the defendant came into possession under a written agreement; 8 Bing. 46.

(*y*) K. B. Easter Term, 1827. *Chamier* v. *Clingo*,[3] 2 Chitty's R. 410; 5 M. & S. 64.

(*z*) *Decosta* v. *Atkins*, B. N. P. 87; per Eyre, C. J., Hil. 4 Geo. 2. *Doe* v. *Gibbs*,[4] 2 C. & P. 615.

[1]Eng. Com. Law Reps. xxi. 216. [2]*Id.* xxi. 286. [3]*Id.* xviii. 382. [4]*Id.* xii. 289.

remedy, it is essential to prove possession (*a*). And it seems to have been considered to be doubtful whether the plaintiff can recover any profits anterior to the time of actual entry (*b*), or whether a subsequent entry will not have relation to the time when the title accrued. As, however, trespass lies to recover mesne profits antecedent to the demise from the tenant in possession, on his confession of the plaintiff's entry (*c*), it seems, upon the same ground, that an actual entry would have a similar relation. Evidence should be given of the defendant's possession. As the action is against a trespasser in possession, it does not lie against a lessee whose under-tenant holds over after the expiration of the lessee's interest (*d*). The plaintiff is entitled to such profits only as accrue during the possession of the defendant (*e*).

If the action be brought after judgment against the casual ejector, the plaintiff may recover the costs of the ejectment as well as mesne profits (*f*). And he may recover as damages the costs incurred in a Court of Error in reversing a judgment in ejectment obtained by the defendant (*g*). And the defendant will not, under the plea of the general issue, be entitled to prove
*436 an *agreement on the part of the plaintiff to waive the costs, the defendant paying certain rent for the premises (*h*). The defendant, where the judgment is not pleaded, is at liberty, it seems, to controvert the plaintiff's title (*i*) (A) (1).

(*a*) Ibid.
(*b*) See B. N. P. 87. *Stanynought* v. *Cameron*, 2 Barnes, 367.
(*c*) Ibid. and 1 Sid. 239; 2 Roll. Ab. tit. Trespass by relation.
(*d*) *Burn* v. *Richardson*, 4 Taunt. 720. But the defendant cannot defeat the action by showing that he entered by license of the defendant. *Girdlestone* v. *Porter*, Woodf. Land. and Ten. 511.
(*e*) *Girdlestone* v. *Porter*, Woodf. Lan. and T. 511.
(*f*) B. N. P. 89, as agreed by the Judges in *Astlin* v. *Parkin*, *Anon.* Lofft, 451. *Doe* v. *Hicks*, 7 T. R. 433. A party is entitled to recover in the action for mesne profits the costs of the ejectment, although they have never been taxed. *Symonds* v. *Page*, 1 J. & C. 29; and see *Gulliver* v. *Drinkwater*, 2 T. R. 261. *Goodtitle* v. *Toombs*, 3 Wils. 121. He may recover damages for his trouble, &c.; *Ib.* The amount of the taxed costs of the ejectment. *Brooke* v. *Brydges*,[1] 7 Moore, 471. *Doe* v. *Davis*, 1 Esp. C. 358.
(*g*) *Nowell* v. *Roake*,[2] 7 B. & C. 404.
(*h*) *Doe* d. *Hill* v. *Lee*, 4 Taunt. 459.
(*i*) *Doe* v. *Huddart*, 2 C. M. & R. 317.

(A) (In Pennsylvania, in trespass for the mesne profits, after a recovery in ejectment, the defendant cannot set up a title in himself. *Lloyd* v. *Nourse*, 2 Rawle, 49. *Jeffries* v. *Zane*, 1 Miles, 287. And the plaintiff is entitled to recover the profits down to the time of the verdict. *Dawson* v. *M'Gill*, 4 Whart. 230. [But he cannot go back beyond six years, in which case the statute of limitations may be pleaded. *Hare* v. *Furey*, 3 Yeates, 13. But in the case of one joint tenant, or tenant in common recovering against his partner, the plaintiff must obtain possession in a reasonable time after judgment in ejectment, and if he is remiss herein for years, he shall not charge the defendant as a trespasser. *Ibid.* A conveyance of the premises by the plaintiff to the defendant, pending a suit for mesne profits after a recovery in ejectment, with all the right, title, interest, claim, and demand in the same, is not a release of the mesne profits, but the plaintiff may nevertheless recover in the action. *Duffield* v. *Stille*, 2 Dallas, 156. S. C. 1 Yeates, 154.] In Indiana the defendant may show in mitigation of damages, that his possession was under a judgment of a competent tribunal. *Buntin* v. *Duchane*, 1 Blackf. 57. In North Carolina the record of the recovery in ejectment is conclusive evidence of the title of the lessee of the plaintiff at the date of the demise in an action for mesne profits. *Poston* v. *Jones*, 2 Dev. & Bat. 294. [But the defendant is not estopped from pleading *liberum tenementum* to trespass for mesne profits where the term had expired when the judgment in ejectment was entered. *Murphy* v. *Guion*, 2 Hayw. 381. It is not necessary to enter up formal judgment in ejectment to entitle the plaintiff to bring trespass for the mesne profits. *Same parties*, 1 Car. Law Repos. 95.] And it seems that the jury may consider in mitigation of damages permanent improvements honestly made by the defendant and actually enjoyed by the plaintiff. *Dowd* v. *Fawcett*, 4 Dev. 92.)

(1) The right to mesne profits is a necessary consequence of a recovery in ejectment. *Benson et al.* v. *Matsdorf*, 2 Johns. 369: And the defendant cannot set up a title in bar, even if he has a better title. *Ibid.* So where the lessor has taken possession under the judgment in ejectment, and brought his action for mesne profits, and the defendant has, in the mean time, brought ejectment for the same premises, and obtained a verdict; he cannot set up the verdict as a bar to the action for mesne profits. *Ibid.* No defence can be set up in the action for mesne profits, which would have been a bar to the action of ejectment. *Baron* v. *Abeel*, 3 Johns. 481. A recovery of nominal damages in ejectment is no bar to an action for mesne profits, nor is it

[1]Eng. Com. Law Reps. xvii. 86. [2]*Id.* xiv. 61.

VIII. *Effect of a judgment in ejectment.*

In an action of trespass for mesne profits, against the former defendant, the record is evidence of his title at the time of the demise (*k*). So it is also evidence between those who claim in privity with the parties (*l*) (1). And where two recovered judgment in ejectment on several demises, it was held that this was admissible evidence in an action of trespass by them against two of the former defendants (*m*), since the judgment was perfectly consistent with their being tenants in common, and as such they might maintain trespass jointly. It is, however, to be observed, that in addition to the judgment, the plaintiffs proved a delivery of possession under a writ

(*k*) *Astlin* v. *Parkin*, Burr. 668; Ld. Raym. 730; *supra*, Vol. I. tit. JUDGMENT. But it is not conclusive unless it be pleaded. *Doe* v. *Huddart*, 2 C. M. & R. 317.

(*l*) *Supra*, Vol. I. p. 312. The judgment in the preceding ejectment is evidence, in an action for mesne profits, against a defendant who came into possession under the defendant in the ejectment. *Doe* v. *Whitcomb*,[1] 8 Bing. 46.

In an action for mesne profits, it appearing that the party had been put into possession under a written agreement which was not produced; held, that parol evidence was inadmissible to show under whom he held, and that in such an action the judgment in ejectment against a former tenant in possession was not admissible in evidence against the party afterwar ls found in possession, without proving that he came in under the defendant, so to make him privy to the judgment in ejectment. *Doe* v. *Harvey*,[2] 8 Bing. 239. A judgment against a tenant does not bind a landlord without notice. *Hunter* v. *Britts*, 3 Camp. 455.

(*m*) *Chamier* v. *Clingo*, 5 M. & S. 64; the issues were on not guilty, and *liberum tenementum*.

necessary to enter a *remittitur damna*. *Van Alen* v. *Rogers*, 1 Johns. Cas. 281. But as it is an equitable action, it will allow of every equitable defence. *Murray* v. *Gouverneur*, 2 Johns. Cas. 438. If, however, the tenant has made improvements on the land, under a contract with the owner, he will not be allowed for them in this action, *if brought by a devisee*, but must seek compensation from the representatives of the devisor. *Van Alen* v. *Rogers*, ubi sup. See *Maris* v. *Simple*, Addison's Rep. 215. An action for mesne profits lies against a person who has entered under a contract for a deed, and afterwards refuses to perform the contract. *Smith* v. *Stewart*, 6 Johns. 46. After a recovery in ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the mesne profits against the tenant, as well for the use of the land as for the costs of the ejectment. *Baron* v. *Abeel*, ubi sup.

In New Jersey, mesne profits may be recovered in the action of ejectment, and in assessing them, the jury may include all the plaintiff's reasonable and necessary expenses—such as counsel fees, &c. *Denn* v. *Chubb*, 1 Coxe's Rep. 466.

By statute in Virginia, trespass for mesne profits of land recovered in ejectment, survives against the defendant's representatives. *Lee* v. *Cooke*, Gilmer, 331. After judgment for the plaintiff in ejectment, trespass for the mesne profits, without proof of an actual trespass, does not lie against one who was no party to the suit when the judgment was entered. *Alexander* v. *Herbert*, 2 Call. 508.

In Maryland, a recovery in trespass for the mesne profits is only for the use and occupation of land, and does not bar an action of trespass *quare clausum fregit*, for injuries done to the premises during the same period. *Gill* v. *Cole*, 1 Har. & J. 403. If the plaintiff can prove that his title accrued before the time of the demise in the ejectment, and that the defendant has been longer in possession, he may recover antecedent profits: But the defendant in such case, may controvert his title. *West* v. *Hughes*, 1 Har. & J. 574. Though a writ of inquiry of damages will lie in ejectment (*Joan* v. *Shields*, 3 Har. & M'Hen. 7), yet the mesne profits cannot be given in evidence on the execution of such writ. *Gore* v. *Worthington*, 3 Har. & M'Hen. 96.

In South Carolina, a recovery in an action of trespass on land is a bar to an action for the recovery of mesne profits, anterior to the verdict in trespass. *Coleman* v. *Parish*, 1 M'Cord, 264. And an action for mesne profits, does not lie after an action of trespass to try title. *Sumter* v. *Lehie*, 1 Const. Rep. 102.

In Massachusetts, the tenant in a real action, against whom judgment has been rendered, may, after the reversal of such judgment, by writ of error, maintain *assumpsit* for the mesne profits against the original demandant or his representative. *Cummings* v. *Noyes*, 10 Mass. Rep. 433. After a judgment for the demandant in a real action where the jury has inquired of the value of the land and of the improvements pursuant to stat. 1807, c. 75, no action lies for the mesne profits, whether the demandant elected to abandon the premises, or to pay for the improvements. *Jones* v. *Carter*, 12 Mass. Rep. 314. Trespass for mesne profits does not lie after a recovery upon a writ of entry, unless the plaintiff had a right of entry. *Cox* v. *Callender*, 9 Mass. Rep. 533.)

(1) [Where the defendant in ejectment, pending the action, transfers possession to a third person, the latter is concluded by the recovery, and cannot set up a title in himself as a bar to an action for the mesne profits. *Jackson* v. *Stone* 13 Johns. 447.[a] But the defendant is not estopped by the judgment in ejectment from showing that the plaintiff was in possession of the land, between the demise laid in the declaration, and the judgment. *West* v. *Hughes*, 1 Har. & J. 574.]

[a] *Jackson* v. *Hills*, 8 Cowen, 290. *Chirac* v. *Reinecker*, 2 Peters, 622.

[1] Eng. Com. Law Reps. xxi. 216. [2] *Id.* xxi. 286.

to their joint agent. Where the parties are different, the judgment is not evidence of title (*n*).

A judgment in ejectment is not conclusive as to the right, because it does not affect the inheritance (*o*).

ELECTION.

Proof of making an election to purchase, see *R.* v. *Hungerford Market Co.*, 4 B. & Ad. 327; *infra*, tit. Notice. See tit. Bankrupt.

EMBLEMENTS.

See *Graves* v. *Wild*, 5 B. & Ad. 105. Williams on Executors, tit. Emblements; Com. Dig. Biens, G. 1. 2 (A).

EQUITY.

Questions peculiar to Courts of Equity devolve on Courts of Law in cases of bankruptcy (*p*). The rules of evidence are substantially the same in equity as at law (*q*).

ERROR (*r*).

It is a general rule, that error in a record of a judgment does not defeat the judgment, so long as it stands unreversed (*s*). Thus error in a judgment of record is no answer to an action on the judgment (*t*). So a defendant in a criminal case may plead in bar an erroneous judgment of acquittal (*u*).

*437 *A sheriff may justify under an irregular as well as under an erroneous judgment, so as the writ be not void; and a purchaser will, in such case, acquire a title under a sale by him, for they are not privy to the irregularity (*x*) (B). A party may justify under an erroneous judgment, though it be afterwards reversed, for the judgment was the act of the Court; but not under an irregular one which has been vacated, for the irregularity was in the privity of the plaintiff or his attorney (*y*).

ESTOPPEL (*z*).

Estoppels are by record (*a*), specialty (*b*), livery, or by special circum-

(*n*) Vol. I. tit. Judgment.
(*o*) *Lomax* v. *Ryder*, 7 Bro. C. P. 145.
(*p*) *Doe* v. *Steward*,[1] 1 Ad. & Ell. 311.
(*q*) *Glynn* v. *Bank of England*, 2 Ves. 38.
(*r*) It is a general rule that error shall not be assigned in a thing to the advantage of the party. 5 Co. 39, 44; 7 Co. 4; 8 Co. 59.
(*s*) *R.* v. *Scott*, Leach's C. C. L. 445; *supra*, tit. Counter Plea.
(*t*) *Horsly* v. *Daniel*, 2 Lev. 161.
(*u*) 9 H. 5, c. 2. See Starkie's Crim. Pl. 320.
(*x*) Tidd, 924, 3d edit.
(*y*) *Philips* v. *Biron et al.* 1 Str. 509; Ray. 73; Tidd. 924. So in the case of an administrator where the administration is revoked, not reversed. P. C. Str. 509. Where an officer joins in defence with one who has no justification, he loses the benefit of it. Ibid.; and 1 Saund. 28; Cro. Jac. 27.
(*z*) As to the estoppel of a jury, see Vol. I. Ind. tit. Estoppel. (*a*) See tit. Record.—Judgment.
(*b*) See tit. Deed. *A.* having an equitable fee in certain lands, on the 21st of January 1823, conveyed the

(A) (The general rule is, that the tenant is entitled to emblements whenever the determination of the lease is contingent upon the act of the lessor, who actually determines the lease before the time of its natural expiration. *Comfort* v. *Duncan*, 1 Miles 231. *Stewart* v. *Doughty*, 9 John. R. 108. But the tenant is not entitled to any compensation for improvements. *Stewart* v. *Doughty*, *supra*. The tenant is not entitled to emblements where the termination of the lease is fixed. *Whitmarsh* v. *Cutting*, 10 John. R. 360. And where there is a lease for a year, and an agreement for its renewal for another year, provided the lessor did not want the farm for his own use, if the lessee leave the premises at or before the expiration of the first year he is not entitled to emblements. *Bain* v. *Clark*, 10 John. R. 424. In Pennsylvania, for the encouragement of agriculture, a general custom has become general law, that a tenant for a term certain, is entitled to the way-going crop, whether such right be recognized in the contract or otherwise. *Diffendorffer* v. *Jones*, cited 5 Binn. 487. *Stultz* v. *Dickey*, 5 Binn. 285. *Biggs* v. *Brown*, 2 Serg. & R. 14. But the custom is limited to grain sown in the autumn, to be reaped the next harvest. *Demi* v. *Bossler*, 1 Penn. R. 224.)

(B) (*Bank U. S.* v. *Bank of Washington*, 6 Peters, 8. As respects third persons, whatever is done under an erroneous judgment while it remains in force, is valid and binding. *Ibid.* But as to parties, see *United States* v. *Nourse*, 9 Peters, 8.)

[1] Eng. Com. Law Reps. xxviii. 89.

stances, by which a man is excluded from some claim, averment, or proof. Unless a decree would operate as an estoppel if pleaded, it is of no effect in evidence (*c*).

Neither the tenant by the courtesy, nor the lord by escheat, can defeat an estate or freehold without showing the deed, for the act of livery is an estoppel which runs with the land, and bars all persons to claim it by virtue of any condition except such as appears on the deed (*d*); although the estate be created by law, the party has possession of the deed.

A party or privy (*e*) is usually concluded by his contract or admission, where that admission has been acted upon (A). A tenant is estopped from controverting his landlord's title to demise (*f*). A party who induces another to deliver goods to a woman, whom he represents to be his wife, cannot afterwards be admitted to say that she is not his wife. So a man is usually excluded from averment or proof by his own fraud. Where a tenant fraudulently concealed a declaration in ejectment, and the sheriff, with the concurrence of the tenant, on judgment by default seized not only land demised, but also mines not demised, in which the tenant had nothing more than a mere *liberty to dig, it was held that the latter, in an action by the landlord, under the stat. 11 G. 2, c. 19, s. 12, was estopped, by his fraudulent act, from contending that the declaration applied to the land only, and not to the mines (*g*). So one who has conveyed an estate in order to confer a colourable qualification to kill game, cannot allege his own fraud to defeat the conveyance (*h*). But trustees are not estopped by acts done contrary to their duty as public trustees (*i*). Nor is an executor *de son tort*, but who afterwards takes out letters of administration, barred by an agreement in respect of the intestate's property (*k*). *438

EXAMINATIONS IN CASES OF FELONY.

See tit. Admissions and Appendix.

Examinations taken under judicial authority by virtue of different statutes, are in general (unless the statute specially enact the contrary) inadmissible against strangers, even after the deaths of the witnesses: for although they are taken judicially and upon oath, yet inasmuch as they are Admissibility.

same to *B.* by lease and release. The release recited that *A.* was legally or equitably entitled to the premises conveyed, and the releasor covenanted that he was or stood lawfully or equitably seised in his demesne of and in and otherwise well entitled to the same. The legal estate was subsequently conveyed to *A.*, and he afterwards, for a valuable consideration, conveyed the same to *C.* Upon ejectment brought by *B.* against *C.*, held, first, that there being in the release no certain and precise averment of any seisin in *A.*, but only a recital and covenant that he was legally or equitably entitled, *C.* was not thereby estopped from setting up the legal estate acquired by him after the execution of the release.

Held, secondly, that the release did not operate as an estoppel by virtue of the words "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and *A.* had not the legal title in the premises at the time when the release was made.

Held, thirdly, that this case did not fall within the rule that a mortgagor cannot dispute the title of his mortgagee, because *C.* claimed as a purchaser for a valuable consideration without notice a legal interest which was not in *A.* at the time of the mortgage to *B.* *A.* had then only an equitable interest which passed to *B.* whose title as to that was not disputed. *Right* d. *Jeffreys* v. *Bucknell*,[1] 2 B. & Ad. 278.

(*c*) 1 Ad. & Ell. 18. See further *R.* v. *Directors of East India Co.*,[2] 4 B. & Ad. 530.

(*d*) 10 Co. 94; Co. Litt. 226.

(*e*) A party admitted to chambers in Lincoln's Inn merely by order of the benchers, who are trustees in fee, without any formal conveyance from the party who surrenders under a like order, is not estopped as a privy in estate, by the acts of the former tenant. *Doe* v. *Errington*, 6 Bing. N. C. 79.

(*f*) *Supra*, tit. Admission.

(*g*) *Crocker* v. *Fothergill*, 2 B. & A. 652.

(*h*) *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 267.

(*i*) *Infra*, tit. Trustee.

(*k*) *Doe* v. *Glenn*,[3] 1 Ad. & Ell. 49. But he may legalize his own acts. *Curtis* v. *Vernon*, 3 T. R. 587. Per Lord Kenyon, citing *Vaughan* v. *Browne*, 2 Str. 1106.

(A) (But the government is not ordinarily bound by an estoppel. *Johnson* v. *U. S.*, 5 Mason's C. C. R. 593.)

[1] Eng. Com. Law Reps. xxii. 73. [2] *Id.* xxiv. 112. [3] *Id.* xxviii. 33.

taken *ex parte*, the opportunity for cross-examination, which, it is to be remembered, is one of the two great tests of truth, is wanting (*l*). Hence the *ex parte* examination of a pauper, taken judicially (*m*) on oath before two magistrates (*n*), is not evidence in a settlement case; for the appellants had no power to cross-examine. But in the case of *The King* v. *Ravenstone* (*o*) the Court held that the examination of a pregnant woman, under the stat. 6 Geo. 2, c. 31, in the absence of the party upon whom she filiated the child, was evidence after her death, upon which the Court of Quarter Sessions might make an order of filiation. This decision is contrary to general principles; and the cases of depositions before magistrates, under the statutes of Philip & Mary, in felony, upon which the Court are reported to have relied in the above case, are in direct opposition to it.

Evidence of the examination of a prisoner before a magistrate, under the stat. 7 Geo. 4, c. 64, s. 3, has already been considered under the head of ADMISSIONS. It seems that in order to warrant the reading of such an examination in evidence, it is sufficient to prove the magistrate's signature, without calling either the magistrate or his clerk (*p*).

Although the Mutiny Act (*q*) makes an *attested copy* of a soldier's affidavit evidence, the original is, by reasonable intendment, also admissible (*r*),
*439 and *either the original or the attested copy is admissible, although the soldier be dead, or be beyond the realm (*s*). But no other attested copy but that delivered to the soldier is admissible (*t*); and such attested copy does not upon production prove itself, but must be authenticated by evidence of the hand-writing of the magistrates (*u*).

EXECUTORS AND ADMINISTRATORS.

I. EVIDENCE IN ACTIONS BY EXECUTORS AND ADMINISTRATORS.

1. *Proof of title, when necessary.*
2. *Title, how proved.*
3. *Proof of the cause of action.*

II. EVIDENCE IN ACTIONS AGAINST EXECUTORS.

1. *Under the plea of ne unques executor.*
2. *Plene administravit.*
3. *Outstanding bonds, and judgment recovered.*
4. *On nil debet—Non devastavit, &c. to debt on judgment—Scire fieri, inquiry, &c.*

(*l*) *Supra*, Vol. I. tit. JUDICIAL INSTRUMENTS.

(*m*) By virtue of the stat. 13 & 14 Car. 2, c. 12, s. 1, which in giving power to the magistrates to remove, incidentally gives a power to examine upon oath. Per Lord Kenyon, *R.* v. *Eriswell*, 3 T. R. 721.

(*n*) *R* v. *Ferry Frystone*, 2 East, 54. *R.* v. *Nuneham Courtenay*, 1 East, 373.

(*o*) 5 T. R. 373. Vide *supra* tit. DEPOSITIONS.

(*p*) In the case of *R.* v. *Chappel*, Wells Summer Assizes, 1834, Lord Denman refused to receive the examination of the prisoner bearing a mark only but not the prisoner's signature, although signed by the magistrate, without proof, by the magistrate or his clerk, that the examination was truly taken. In a later case (*R.* v. *Smith & another*, 2 Lewin's Cases, 139), Parke, B. was disposed to overrule a similar objection, and Lord Denman doubted as to his former ruling. In *R.* v. *Hope* (Central Criminal Court, 1835), the examination was received, although *marked* only; there, however, the constable who proved the examination was an attesting witness to it; but Patteson, J., said, that he was by no means satisfied that in *any case* it was necessary to call either the magistrate or his clerk.

(*q*) 55 Geo. 3, c. 180, s. 70.

(*r*) *R.* v. *Warley*, 6 T. R. 534. Upon the same principle that the service of notice of distress on a party is good notice, although the statute directs that it shall be left at his house. See tit. DISTRESS; but see *Burdon* v. *Ricketts*, 2 Camp. 121.

(*s*) *R.* v. *Warminster*,[1] 3 B. & A. 321. Contrary to the opinion expressed by Lawrence, J., *R.* v. *Clayton-le-Moors*, 5 T. R. 706.

(*t*) *R.* v. *Clayton-le-Moors*, 5 T. R. 714.

(*u*) *R.* v. *Bilton*, 1 East, 13.

[1]Eng. Com. Law Reps. v. 303.

1. Where an executor or administrator brings an action (*x*) in his representative capacity merely, as where he declares in trover on a possession by the testator (*y*) or intestate, and a conversion in his lifetime (*z*), or upon a contract made by him, he makes a profert of the probate, or of the letters of administration, and if the defendant mean to dispute his right to sue in the representative character which he assumes, he must do so by his plea in abatement, and cannot make the objection by evidence under the plea of the general issue, or of any other plea in bar (*a*); for such a plea puts in issue the cause of action merely, and not the character in which the plaintiff sues (*b*). Proof of title, where necessary.

Thus, if an administrator declare on an *assumpsit* to the intestate, the *defendant cannot, under the plea of *non assumpsit*, dispute the grant of administration to the plaintiff, and if the letters were to be produced, he could not object the want of a proper stamp (*c*). So the plea of *non est factum* on a bond to the intestate, admits that the plaintiff is a good administrator (*d*). But if the plaintiff declare on a cause of action arising in his own time, he must, under the general issue, if it be essential to his claim, prove his title as executor or administrator, and the defendant may controvert it. Thus, if he declares as administrator upon his own possession, the defendant may, under the general issue, impeach his title, and show that there is an executor (*e*); and even if the plaintiff declare in trover upon a possession by the testator, and a conversion in his own time, it seems that the case is just the same as if he had declared, as he might have done, upon his own possession (*f*), and that he must prove himself to be such under the plea of the general issue, which raises the question of the title (*g*) *440

(*x*) By the 3 & 4 Will. 4, c. 42, s. 2, executors may bring actions for injuries to the real estates of the deceased, and actions may be brought against executors for an injury to property, real or personal, by the testator.

(*y*) *Blainfield* v. *March*, 7 Mod. 141.

(*z*) It has been said, that where the goods of the testator were never in possession of the executor, he must sue as executor. *Cockerill* v. *Kynaston*, 4 T. R. 280. And that whether the conversion were before or after the death, if the goods when recovered will be assets, he may sue for them as executor. And Lord Holt, C. J. in *Marsfield* v. *Marsh*, 2 Ld. Raym. 824, held, that if an administrator declared in trover upon a possession by the testatnr, and a conversion after his death, the defendant could not, under the plea of the general issue, show that there was an executor. But see the cases cited below, 440, note (*g*).

(*a*) *Blainfield* v. *March*, 7 Mod. 141. Per Holt, C. J., *Marsfield* v. *Marsh*, 2 Ld. Raym. 824. *Loyd* v. *Finlayson*, 2 Esp. C. 564; 1 Will. Saund. 275, n. 3; Salk. 285; Vin. Ab. Ev. P. b. 7, pl. 5; Peake's Ev. 373. And see *Elden* v. *Keddell*, 8 East, 187. *Newman* v. *Leach*, Barnes, 365. [*Berry* v. *Pullam*, 1 Hayw. 16.]

(*b*) Per Holt, C. J., *Marsfield* v. *Marsh*, 2 Ld. Raym. 824. Under the plea of *non assumpsit*, it cannot be objected that the will has been proved in an improper court. *Stokes* v. *Bate*,[1] 5 B. & C. 491. And by the general rule, 4 Will. 4, in all actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue unless specially raised. The plea of the general issue, however, admits simply the title, not the sufficiency of the title. *Adams* v. *Terre-tenants of Savage*, 6 Mod. 134.

(*c*) *Thynne* v. *Protheroe*, 2 M. & S. 553. *Watson* v. *King*, 4 Camp. 272; Com. Dig. Abatement, [E.] 13. In *Hunt* v. *Stevens*, 3 Taunt. 113, the conversion was alleged to be in the time of the executor.

(*d*) *Gidley* v. *Williams*, 1 Salk. 38, 3d Resol.; Com. Dig. Pleader, [2 D.] 10; [2 D.] 14.

(*e*) Per Holt, C. J., *Marsfield* v. *Marsh*, 2 Ld. Raym. 824; Salk. 285.

(*f*) For the property in goods draws to it the possession in law. *Jenkins* v. *Plombe*, 6 Mod. 182. 2 Will. Saund. 47, k. and the cases there cited.

(*g*) *Hunt* v. *Stevens*, 3 Taunt. 113; and see the observations of Lawrence, J. *Ibid.* 10 East, 293; *Grimstead* v. *Shirley*, 2 Taunt. 116; and see *Bollard* v. *Spencer*, 7 T. R. 358, and the cases cited there; and 2 Will Saund. 47, k. to show that where the conversion was in the time of the executor, he is liable to costs. *Contra*, *Cockerill* v. *Kynaston*, 4 T. R. 280. So, if an executor declare on an account stated with him as executor, without saying concerning monies due from the defendant to the testator; *Jones* v. *Jones*,[2] 1 Bing. 249. See *Hollis* v. *Smith*, 2 Taunt. 119. The promises in the declaration were all laid to the plaintiff as executor; pleas, the general issue and the statute of limitations; the plaintiff was nonsuited; it was held that it was so far an action on a contract between the plaintiff and defendant, as to entitle the defendant to his costs under 23 Hen. 8, c. 15. *Slater* v. *Lawson*,[3] 1 B. & Ad. 893.

So where, in *assumpsit* by an administrator, the declaration containing a count upon an account stated with and promises to the administrator, the verdict upon the general issue being for the defendant, held that

[1] Eng. Com. Law Reps. xi. 282. [2] *Id.* viii. 312. [3] *Id.* xx. 504.

(A). Where the plaintiff has not had the actual possession of the testator's goods, proof of his executorship seems to be essential to the proof of property in the goods; but where he has taken actual possession, evidence of this nature, as against a wrong-doer, is unnecessary, for bare possession is *primâ facie* evidence of property (*h*). Where the money of the testator is
*441 received by the defendant, *after the death of the testator, the executor may maintain an action in his own name (*i*), though he must make out his title by proof of his executorship. Where proof of the title as executor is necessary, they will fail unless all the executors are joined, though those who are omitted have not proved the will (*k*). Where the plaintiff is bound to prove himself executor or administrator, it is competent to the defendant to repel the proof by evidence. Thus he may show that the letters of administration are not stamped with a sufficient stamp (*l*).

2. The title of the executor is established, as has already been seen, by proof of the death of the testator, and by the production of the probate (*m*), which is the only mode of proving the title to personal property under a will (*n*), but the right of the executor is derived from the will, and accrues immediately upon the death of the testator; the probate is but the evidence of his title (*o*); consequently the grant of a probate subsequently to the

he was entitled to the costs, but as to the pleadings, to the costs of that count only in which the promises were laid as made to the plaintiff. *Jobson* v. *Forster*,[1] 1 B. & Ad. 6; and see *Dowbiggin* v. *Harrison*,[2] 9 B. & C. 666.

Where the cause of action arises in the lifetime of a testator, or intestate, and the executor or administrator cannot bring the action in his own name, he is not liable for costs. *Jones* v. *Wilson*, 6 M. & S. 178.

In *assumpsit* against an executor on promises by the testator, the defendant pleaded first, the general issue, and secondly, *plene administravit;* the plaintiff joined issue on the first, and took judgment of assets *quando acciderint* on the second plea; held in error that the defendant having, by pleading that the testator never promised, compelled the plaintiff to incur the costs of a trial, he was entitled to judgment as to those costs *de bonis testatoris et si non de bonis propriis. Marshall* v. *Wilden*,[3] 9 B. & C. 655.

And now by the statute 3 & 4 Will. 4, c. 42, s. 31, in any action by an executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Judge of the court in which such action is brought, or a Judge of any of the superior courts, shall otherwise order, shall be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff; and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself. The clause is retrospective. *Freeman* v. *Moyes*,[4] 1 Ad. & Ell. 338.

(*h*) *Blackham's case*, 1 Salk. 290. *Basset* v. *Maynard*, Cro. Eliz. 819. 5 Rep. 24. Moor, 691, 2. 2 Will. Saund. 47, c. *Watson* v. *King*, 4 Camp. 272. 2 Will. on Executors, 5. Where the conversion was after the death, the executor may declare on his own possession, whether ever actually possessed or not. *Hollis* v. *Smith*, 10 East, 293. A judgment recovered by an administrator belongs to himself personally; therefore he need not declare in his representative character, in an action either upon the judgment, or for the escape of the debtor taken in execution thereon. *Bonafous* v. *Walker*, 2 T. R. 126.

(*i*) Per Ashurst, J., 2 T. R. 477. *Smith* v. *Barrow*. So an administrator having recovered a judgment for a debt due to the intestate, needs not declare as administrator in an action on the judgment. *Crawford* v. *Whittal*, Doug. 4, n.

(*k*) *Munt* v. *Stokes*, 4 T. R. 561. (*l*) *Hunt* v. *Stevens*, 3 Taunt. 113.

(*m*) An executor has a right of action against the Bank for not permitting the transfer of stock by him, although such stock may have been specifically bequeathed. *Franklin* v. *Bank of England*,[5] 9 B. & C. 156; and see *Mead* v. *Lord Orrery*, 3 Atk. 239.

Where one only of three executors took probate, liberty being reserved to the others to come in, &c., held that an action to their reversionary interest in the premises was well brought in the names of all in whom the legal property was vested. *Walters* v. *Pfiel*,[6] 1 M. & M. 362.

Executors are not entitled to residue undisposed of, unless it appear to be intended so by the will or codicil. 1 Will. 4, c. 40.

(*n*) *R.* v. *Inhab. of Netherseal*, 4 T. R. 258. *Smith* v. *Milles*, 1 T. R. 480; *Penney* v. *Penney*,[7] 8 B. & C. 335; *supra*, tit. EJECTMENT: and Vol. I. tit. JUDGMENT.

(*o*) *Smith* v. *Milles*, 1 T. R. 480.

(A) (A declaration by a plaintiff as administrator, containing counts for goods sold, work done, and the common money counts, without stating any indebtedness to the intestate, or referring to the plaintiff, in his representative character in any subsequent part of the declaration, except in a profert of letters of administration, is bad on demurrer. *Christopher, Administrator, &c.* v. *Stockholm*, 5 Wend. 36.)

[1] Eng. Com. Law Reps. xx. 331. [2] *Id.* xvii. 470. [3] *Id.* xvii. 467. [4] *Id.* xxviii. 103. [5] *Id.* xvii. 347. [6] *Id.* xxii. 334. [7] *Id.* xv. 230.

commencement of the action, but previous to the declaration, will be sufficient (*p*).

If the probate has been lost, an exemplification under the seal of the court, or an examined copy of the act-book (*q*), or the original will, properly authenticated, and indorsed as the instrument on which probate has been granted, will be admissible to prove it (*r*).

The defendant on the other hand may, on issue taken on a plea sufficient for the purpose (*s*), impeach the plaintiff's title as executor or administrator, *by showing either that the grant was void *ab initio*, as by evidence that *442
the probate was forged; or (*t*) where letters of administration have been granted by a bishop or other inferior judge in another diocese, that the deceased had *bona notabilia* in another diocese (*u*); that he is still living,

(*p*) Salk. 301. As to the relation of an administrator's right, see 1 Com. Dig. tit. Administration [B.] 10. 2 Roll. Ab. 554, l. 15 & 25; and *R.* v. *Inhab. of Horseley*, 8 East, 405. The grant of administration as to title to personalty, and the liability of the administrator, relate to the death of the intestate. *Ibid.*

(*q*) Ca. tem. Hardw. 108. 8 East, 187; *et supra*, Vol. I. tit. JUDGMENT; Ind. tit. PROBATE.

(*r*) *Supra*, Vol. I. tit. JUDGMENT. *Gorton* v. *Dyson*,[1] 1 B. & B. 219.

(*s*) When the defendant insists that the letters of administration are void by reason of extrinsic matter, or inapplicable to the purpose for which the plaintiff uses them, he must plead the facts specially; he cannot go into such evidence on issue taken on a plea merely denying that the plaintiff is administrator. And, therefore, if the plaintiff allege administration by the bishop of Chester, and the defendant deny that he was administrator, in manner and form, &c., the plaintiff cannot, under this issue, show *bona notabilia* in another diocese or province, by reason of his, the debtor's, residence there at the time of the death. *Stokes* v. *Bate*,[1] 5 B. & C. 491; and see *Yeomans* v. *Bradshaw*, Carth. 373. *Hilliard* v. *Cox*, 1 Salk. 37. *Griffith* v. *Griffith*, Sayer, 83. The power of the bishop to grant administration is founded, not on the fact that the deceased died within the diocese, but on that of his having left goods there, per Lee, C. J., in *Griffith* v. *Griffith*, Sayer, 83; and it will be presumed, in the absence of proof to the contrary, that there were not *bona notabilia* in another diocese. *Ibid.* and per Bayley and Holroyd, Js.,[1] 5 B. & C. 498, 9; contrary to the ancient practice, when it was held to be necessary to aver that there were not *bona notabilia* in another diocese, per Holt, C. J., in *Denham* v. *Stephenson*, Salk. 40; *contra*, *Woodward* v. *Thomson*, Cro. Eliz. 907. *Skidmore* v. *Winston*, *ibid*, 879. Probate granted by an archdeacon under authority from the diocesan, is valid, where the party died within the archdeaconry, although he was possessed of a term lying within another archdeaconry within the same diocese. *R.* v. *Yonge*, 5 M. & S. 119. The authority of an administrator appointed according to the provisions of the stat. 38 Geo. 3, c. 87, during the absence of an executor from this country, does not become actually void, but merely voidable. *Paynton* v. *Hannay*, 3 B. & P. 26.

(*t*) Note, that if letters of administration are granted by a bishop or other inferior judge, where the deceased had *bona notabilia* in another diocese, they are wholly void. *Prince's Case*, 5 Rep. 30. *Blackborough* v. *Davis*,[1] 1 P. Wms. 43. *R.* v. *Loggen*, 1 Str. 73; 2 Bing. N. C. 495. But in such case a probate is not void, but merely voidable, 1 Will. Saund. 274, note (3), per Ld. Macclesfield, 1 P. Wms. 767, 8; and per Thompson, L. C. B., *R.* v. *Whitaker*, Lanc. Sum. Ass. 1810. Where there are not *bona notabilia* within the province, the grant of administration by the archbishop is void. *Shaw* v. *Stoughton*, 2 Lev. 86; Com. Dig. Adm. B. 3. Where there are, however, *bona notabilia* in a diocese within the province, the grant by the metropolitan is voidable only. 2 Bing. N. C. 495; Com. Dig. Adm. B. 3. For the metropolitan has a jurisdiction throughout his province. A plea of *bona notabilia* in another diocese, is a plea in bar and not in abatement, for it does not give the plaintiff a better writ. In the case of an infant sole executor, administration is to be granted to the guardian till the infant attain his age. 38 G. 3, c. 87, s. 6.

(*u*) If a man have *bona notabilia* (*i. e.* to the value of 5*l.*) in several dioceses of the same province, there must be a prerogative administration; if in two of Canterbury and two of York, there must be two prerogative administrations; and if in one diocese of each province, each bishop must grant one; B. N. P. 141; Salk. 39;[1] 5 B. & C. 493. Debts due by specialty are deemed to be the deceased's goods in the diocese where the securities happen to be at the time of his death; 1 Will. Saund. 274, note (3); and this is so in the case of a covenant to pay money out of the funds of a company whose stock lies out of the diocese. *Gurney* v. *Rawlins*, 2 M. & W. 87. A lease for years is *bona notabilia* where the lands lie; Com. Dig. Adm. B. 4. Foreign bonds, and securities of foreign debtors, cannot be administered here without letters of administration in this country. *Attorney-general* v. *Bouwens*, 4 M. & W. 171. But debts by simple contract follow the person of the debtor, and are esteemed goods in that diocese where the debtor resides at the time of the creditor's death. Ibid.; and Cro. Eliz. 472. Off. of Ex. 46. Godolph. 70. [*Thompson* v. *Wilson*, 2 N. Hamp. Rep. 292.] Judgment and statutes and recognizances are *bona notabilia* in the place where they are given or acknowledged. Ibid. Dyer, 305. *Kegg* v. *Horton*, 1 Lutw. 401. *Gold* v. *Strode*, 3 Mod. 324. *Adam* v. *Savage*, 2 Ld. Raym. 855. The goods which a testator, dying in *itenere*, has with him, do not make his testament liable to the Prerogative Court. *Doe* v. *Ovens*,[2] 2 B. & Ad. 423. A metropolitan administration of goods within a peculiar is not void (and *qu.* whether voidable). *Lysons* v. *Barrow*,[3] 2 Bing. N. C. 486.

[1]Eng. Com. Law Reps. xi. 282. [2]*Id.* xxii. 115. [3]*Id.* xxix. 402.

or that the will was forged (*x*); or that the grant of administration has been revoked (*y*), of which the act-book would be good evidence.

Title of administrator.

The title of an administrator is proved, as has been seen, by the production of the letters of administration (*z*).

The defendant cannot, under the general issue, object that there is another executor who is not joined; he cannot make such an objection, except by plea in abatement after *oyer* of the probate, that the other executor is still alive (*a*). Neither can advantage be taken of the non-joinder of a co-executor as defendant, except by a plea in abatement, which must allege that the party not joined has administered, which must of course be proved on issue taken on such a plea (*b*).

*443 *If administration granted to a creditor be afterwards repealed at the suit of the next of kin, the creditor may still retain against the rightful administrator; for where administration is granted to a wrong person, it is only voidable; but where it is granted in a wrong diocese, it is wholly void, and there can be no retainer (*c*). So a payment to one who has obtained probate under a forged will is good against a subsequent rightful administrator (*d*) (1).

Where the widow of an intestate delivered goods of the intestate to a creditor of the intestate, in satisfaction of the debt, and the lawful administrator brought trover against the creditor, it was held that this single act of intermeddling by the widow did not constitute her an executrix *de son tort* (*e*), so as to legalize the delivery; and even if the widow had by her acting rendered herself liable as executrix *de son tort*, it would be very doubtful whether such a delivery could be set up in defence to an action by the lawful administrator (*f*). At all events, it seems that a payment by an executor *de son tort* will not be available either to himself or to the creditor, unless it be made in the due course of administration, and that the payment will not be allowed to the executor *de son tort*, even in mitigation of damages, where there is a deficiency of assets whereby the rightful executor is prevented from satisfying his own debt (*g*).

Cause of action(A).

3. A count by an administrator, on a promise to the intestate, will not be supported by proof of a promise to the administrator (*h*). And where

(*x*) *Supra*, Vol. I. tit. JUDGMENT. (*y*) *Supra*, Vol. I. Ib.
(*z*) *Supra*, 407. [See *Walker* v. *Hill*, 17 Mass. Rep. 380.]
(*a*) Com. Dig. Abatement [E.], 13; 1 Will. Saund. 291, g, and the cases there cited.
(*b*) *Swallow* v. *Emberson*, 1 Lev. 161; and 3 T. R. 560. [*Burrow* v. *Sellers*, 1 Hayn. 501.] Where a creditor is made a co-executor, but neither proves the will nor acts, he may maintain an action against the other for his demand. *Rawlinson* v. *Shaw*, 3 T. R. 557.
(*c*) B. N. P. 141.
(*d*) *Allen* v. *Dundas*, 3 T. R. 125. Vide *infra*, note (*n*).
(*e*) *Mountford* v. *Gibson*, 4 East, 441. (*f*) *Ibid.*; and see Bl. Comm. 507, 8.
(*g*) *Ibid.*; and see the observations of Lawrence, J., 3 East, 453-4. And see 1 Will. Exors. P. 1, B. 3. C. 5; *Layfield* v. *Layfield*, 7 Sim. 172.
(*h*) *Sarell* v. *Wine*, 3 East, 409. [[1] 3 B. & A. 632.]

(1) [A sale by an administrator is valid, though a will be afterwards discovered and the administration revoked. *Benson* v. *Rice*, 2 Nott and M'Cord, 577. And a repeal of letters of administration, given to one person, gives no right to a subsequent administrator to sue a bond given to the first. *Gordon* v. *Woods*, 4 Bibb, 476.]

[Proof of a promise to an executor will not support an averment of a promise to the testator. *Glenn* v. *M'Cullough*, 2 M'Cord, 212.]

(A) (In an action against administrators, where there are several, the admission of indebtedness by one, it seems, will not entitle the plaintiff to recover. *Forsyth* v. *Ganson*, 5 Wend. 558. And the confession by an executor, of a debt due from his testator, is not admissible as evidence in a suit for the debt against his co-executor to establish the original demand. *Hammon* v. *Huntley*, 4 Cow. 493. Administrators who have given a note for the debt of their intestate, cannot be made personally responsible for the payment thereof, unless it be shown that they have assets, or that forbearance was the consideration of the note. *Bank of*

[1] Eng. Com. Law Reps. v. 406.

the executor declared on a promise to the testator, in a note made to the testator six years before the action, and upon the plea of *non assumpsit infra sex annos*, the plaintiff proved a promise to himself within the six years, it was held, on a conference by all the Judges, that the evidence did not maintain the declaration (*i*) (1).

Executors may sue as such on promises to themselves as executors (*k*).

(*i*) *Dean* v. *Crane*, 6 Mod. 309; and see 2 Ld. Raym. 401; Willes, 27.

(*k*) One of two executors having alone proved the will, had received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereof; and afterwards permitted the money to be lent out by a third person, by whom it was paid to *A.*; *A.* on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor. Held that both executors might join in an action brought to recover the money against *A.* Held also, that it does not amount to a *devastavit* if an executor lends out, on private security, money belonging to the testator, but not wanted for the immediate uses of the will, provided he exercises a fair and reasonable discretion on the subject. *Webster* v. *Spencer*,[1] 3 B. & A. 360. A note indorsed to an executor as such, belongs to him in his representative character; therefore he may join a count upon such note with counts on promises to his testator. *King* v. *Thorn; Same* v. *M'Linnan*, 1 T. R. 487. Where a bill of exchange was indorsed generally to *A.* as administratrix, for a debt due to *B.* the intestate, and *A.* died after the bill became due, but before payment, it was held that the administrator *de bonis non* of *B.* was entitled to recover. *Catherwood* v. *Chabaud*,[2] 1 B. & C. 150. For it is now settled, contrary to the old cases, that an administrator may sue in his representative capacity, on a contract made with him as such. A count for money paid by the plaintiff, as executrix, may be joined with a count for money paid by the testator. *Ord* v. *Fenwick*, 3 East, 104. So an executor may join a count, on promises to himself as executor, with counts on promises to the testator, whenever the sum recovered will be assets in his hands. *Powley* v. *Newton*,[3] 2 Marsh. 147; 6 Taunt. 453. He may join a count for money received to his use as such, with counts on promises to the testator. *Petrie* v. *Hannay*, 3 T. R. 659. A count for goods sold by *A.*, as administrator of *B.* to *C.* may be joined with an account stated between *C.* and *A.* as administrator, whether the sale or the account be in the personal or representative character. *Cowell* v. *Watts*, 2 Smith, 410; 6 East, 405. So an administrator may join a count on goods of the intestate, sold by him after the decease, with counts on promises to the intestate. *Thompson* v. *Stent*, 1 Taunt. 125. Counts on promises to an intestate may be joined with counts on promissory notes given to the administrator since the death of the intestate, as administrator. *Semble secus*, if a bond or other higher security had been given, because the effect of such new and higher security would be an extinction of the simple contract debt. Counts on promises made to an intestate may be joined with counts on promissory notes given to the administrator, as administrator, since the death of the intestate, because, when recovered, the amount would be assets. Judgment on that ground was affirmed in error. *Robinson* v. *Lyall*, 7 Price, 591. And in general, an executor, suing as such, is not liable to costs where his demand, when recovered, will be assets. *Thompson* v. *Stent*, 1 Taunt. 322. In the above case of *Catherwood* v. *Chabaud*, it was held to be sufficient to make profert of the letters of administration *de bonis non*, *Ibid*, for they prove both administrations, *Ibid.* Administration *de bonis non* is essential to enable the administrator of an executor to sue a tenant for holding over in his own time, notwithstanding the tenant may have attorned to him. *Tingrey* v. *Brown*, 1 B. & P. 310. An administrator *de bonis non* cannot maintain an action to recover equitable assets in the hands of an agent to trustees, and a promise by such agent to pay is a mere *nudum pactum*. *Clay* v. *Willis*,[4] 1 B. & C. 164. An administrator who has made a wrongful payment (induced by misrepresentation, out of the assets, may recover in his representative character. *Clarke* v. *Hougham*,[5] 2 B. & C. 149. But counts on promises by a testator cannot be joined with counts which show a personal liability. *Rose* v. *Bowler*, 1 H. B. 108. *Secus*, where the count states an account stated by the defendant as executor, of monies due from him as such. *Powell* v. *Graham*,[6] 7 Taunt. 580. And he is not personally liable on such a count to judgment *de bonis propriis*. *Ibid.* *Secar* v. *Atkinson*, 1 H. B. 102; *Powley* v. *Newton*,[3] 6 Taunt. 453; *Ellis* v. *Bowen*, Forest, 98. But a count for money had and received by the defendant as executor to the use of the plaintiff, cannot be joined with a count on account stated by the defendant as executor. *Jennings* v. *Newman*, 4 T. R. 347; *Ashley* v. *Ashley*,[7] 7 B. & C. 444. An administrator *de bonis non* may, under equity of the stat. 17 Car. 2, c. 8, sue on a promise to the former representative. *Hirst* v. *Smith*, 7 T. R. 182. The executor residing abroad, administration was granted to *M.*, his attorney, with the will annexed, for the benefit of the executor; held, that upon the death of the executor the grant to *M.* was at an end, and that administration *de bonis non*, subsequently granted to the plaintiff, was good; but that he could not recover upon a count stating the promise to have been made to the executor. *Sewercrop* v. *Day*, 3 N. & P. 670.

Troy v. *Topping*, 9 Wend. 273. So where the defendant, as administrator, promised to pay the amount of the note for value received, by J. B. and his heirs; it was held on demurrer that there was no consideration for the promise. *Ten Eyck* v. *Vanderpool*, 8 John. R. 120. See also *Schoonmaker* v. *De Wit*, 17 John. R. 304.)

(1) [This rule is adopted in Virginia, Pennsylvania, and Maryland, *Fisher's Ex'r* v. *Duncan & al.* 1 Hen. & Mun. 563. *Quarles's Adm'x* v. *Littlepage & Co.* 2 ib. 401. *Jones* v. *Moore*, 5 Binney, 573. *Beard* v. *Cowman*, 3 Har. & M'Hen. 152. *Aliter*, in Massachusetts. *Baxter* v. *Penniman*, 8 Mass. Rep. 133.]

[1]Eng. Com. Law Reps. v. 316. [2]*Id.* viii. 45. [3]*Id.* i. 449. [4]*Id.* viii. 103. [5]*Id.* ix. 47. [6]*Id.* ii. 223. [7]*Id.* xiv. 77.

Proof of cause of action.

*Where an executor sues on a promissory note, laying a promise to himself, the plea of non-assumpsit puts in issue the promise so laid, but not the making of the note (*l*).

An administrator to the effects of the husband may maintain an action against a second husband of the widow to obtain possession of premises rented by the deceased, without giving any notice to quit, although the defendant has for several years paid the rent to the landlord (*m*). The right of an executor is derived from the will, and he is in legal possession from the time of the death, even before probate granted (*n*), though the probate is the only legal evidence of his title.

*445 *An administrator of one who held as tenant from year to year holds as his testator did, and may recover on his own demise in ejectment (*o*).

In general an executor or administrator may recover in respect of any breach of contract by which an injury has been done to the estate of the testator or intestate, although the latter might at his election have sued in contract or in tort. He may maintain an action against an attorney for negligence in transacting the business of the deceased (*p*); or against a coach proprietor on a contract for safe conveyance, in respect of an injury to the person, occasioned by negligence in driving (*q*).

The administrator of a mortgagee of colliery may maintain trover for coals raised after he had taken out administration, although he had not and the mortgagor had not taken possession (*r*). (A.)

A creditor cannot defend an action by the legal representative by a delivery made by an executor *de son tort* (*s*).

If a stranger receive rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground-rent, due at the same time, for the same premises, he may deduct such payment, in an action by the executor, for the rent; but not a payment of ground-rent, arising after the death of the testator (*t*).

If an executor or an administrator unnecessarily declare as such, it is mere surplusage, and no profert or proof is necessary (*u*). (B.)

(*l*) *Timms* v. *Platt*, 2 M. & W. 720.

(*m*) *Doe* v. *Bradbury*,[1] 2 D. & R. 706. The administrator of the husband who survived his wife and died without taking out administration of her effects, cannot recover her choses in action; for that purpose administration must be taken out to the wife. *Betts* v. *Kimpton*,[2] 2 B. & Ad. 273.

(*n*) *Smith* v. *Mills*, 1 T. R. 480. The property vests in an executor from the time of the death; in an administrator from the time of the grant of the letters of an administration; and therefore where *A.* took out letters of administration under a will, by which he was appointed executor, and after notice of a subsequent will sold the goods of the testator; held, that the rightful executor, in an action of trover, was entitled to recover the full value of the goods sold; and that *A.* was not entitled, in mitigation of damages, to show that he had administered the assets to that amount. *Woolley* v. *Clark*,[3] 5 B. & A. 744.

(*o*) *Doe* v. *Porter*, 3 T. R. 13. And see *R.* v. *Inhabitants of Stone*, 6 T. R. 295; 1 C. M. & R. 834.

(*p*) *Knights* v. *Quarles*,[4] 2 B. & B. 102. He may sue for holding over contrary to stat. 4 Geo. 2, c. 28. *Tingrey* v. *Brown*, 1 B. & P. 310. But he cannot sue for a breach, since the death, of a covenant for further assurance of an estate in fee made with testator, unless in respect of an injury which has thereby accrued to the personal estate. *Kingdon* v. *Nottle*, 1 M. & S. 355. A personal representative cannot sue for the breach of a promise of marriage made with the deceased, unless perhaps in respect of some loss which the personal estate has thereby sustained. *Chamberlain* v. *Williamson*, 2 M. & S. 408. An executor cannot, under the equity of the statute *de bonis asportatis*, have trespass for cutting down trees in the testator's lifetime. *Williams* v. *Breedon*, 1 B. & P. 329. Nor can an executor sue under stat. 9 Anne, c. 14, for money lost by his testator at play. *Brandon* v. *Pate*, 2 H. B. 311.

(*q*) Ibid.

(*r*) *Fraser* v. *Swansea Canal Comp.*,[5] 1 A. & E. 354.

(*s*) *Mountford* v. *Gibson*, 4 East, 441.

(*t*) *Wilkinson* v. *Cawood*, 3 Anst. 905.

(*u*) *Crawford* v. *Whittal*, Doug. 4.

(A) (Executors may declare in their own right in trover on a conversion after the death of the testator. *Mann* v. *Baker*, 5 Cow. 265.)

(B) (*Kline* v. *Guthart*, 2 Penns. Rep. 490.)

[1]Eng. Com. Law Reps. xvi. 115. [2]*Id.* xxii. 71. [3]*Id.* vii. 249. [4]*Id.* vi. 34. [5]*Id.* xxviii. 105.

II. Upon the plea of *ne unques* executor (*x*), which must be specially pleaded if the defendant mean to deny that he is such (*y*), the plaintiff must prove the affirmative. Direct evidence is by the probate, or letters of administration, but as these can seldom be in the power of the plaintiff, *notice should be given to the defendant to produce them. It must be presumed that the document, if it exist, is in the defendant's possession, and therefore it seems that the ordinary proof of possession, as preparatory to the admission of parol evidence, is here unnecessary. Actions against executors.—Ne unques executor. *446

It has already been seen that an examined copy of the act-book, stating that letters of administration were granted to the defendant, as proof that she is administratrix, although no notice has been given to produce the letters of administration (*z*). So it seems that the original will, produced by an officer of the ecclesiastical court, bearing the seal of the court, and indorsed as the instrument on which probate was granted, with the value of the effects sworn to, and on which probate was obtained, is original evidence to prove the probate (*a*).

The most usual proof that a party is executor, arises from his acts of intermeddling with the property of the deceased, which in law constitutes him executor *de son tort* (A.) Executor de son tort.

What acts will make a man executor *de son tort* is a question of law, but it is for the jury to say whether the facts are sufficiently proved (*b*); but it is said that slight circumstances of intermeddling are, in point of law, sufficient for the purpose (*c*), such as the receiving money of the testator's after his death, although it was received according to an order in his lifetime (*d*).

Where a creditor took a bill of sale of the debtor's goods, and allowed them to remain in his possession, and after the death of the debtor took possession of the goods and sold them, it was held that he thereby made

(*x*) An executor is usually liable personally on contracts which he himself makes, though they are made in his representative capacity. A bond by an executor, by which he, as executor, binds himself, his heirs, &c. makes him personally liable; so that he cannot plead *plenè administravit*, when sued thereon. *Barry* v. *Rush*, 1 T. R, 691. So if executors make a promissory note, by which they, as executors, jointly and severally, promise to pay on demand. *Childs* v. *Monins*,[1] 2 B. & B. 460. So an executor of a deceased partner who continues the trade, though for the benefit of the infant children, is liable personally as a partner. *Wightman* v. *Townroe*, 1 M. & S. 412. A testator directs that his business shall be carried on by *E. P.* The executors permit *E. P.* to get in the outstanding debts. There being no such direction in the will, the executors are liable. *Pistor* v. *Dunbar*, 1 Anst. 107. As to their liability to funeral expenses, see 3 Y. & J. 25.

(*y*) And therefore under the plea of *plenè administravit*, the defendant cannot show that he acted merely as agent to the executor. B. N. P. 143. The effects of an intestate having vested in the king by a forfeiture for felony, if the ordinary grant letters of administration to *A.* in consequence of a warrant from the king, and they run in the usual form, viz. "To pay debts, &c." though with this additional clause,—"For the use and benefit of his Majesty;"—*A.* may be sued by the intestate's creditors, and shall not be permitted to impeach the validity of the letters of administration. *Megit* v. *Johnson*, Doug. 542.

(*z*) Vol. I. tit. Judgment.—Probate. *Davis* v. *Williams*, 13 East, 231. And see *Elden* v. *Keddel*, 8 East, 187. See also *R.* v. *Barnes*,[2] 1 Starkie's C. 243, and *Gorton* v. *Dyson*,[3] 1 B. & B. 219. In the latter case, it seems that the original will was indorsed.

(*a*) *Gorton* v. *Dyson*, 1 B. & B. 219. And see the observations of Richardson, J. *Ibid.* 221.

(*b*) *Padgett* v. *Priest*, 2 T. R. 97. The authority of a servant, employed in selling his master's property, is determined by the death of the master. By continuing the sale, therefore, he becomes executor *de son tort*. *Ibid.*

(*c*) *Edwards* v. *Harben*, 2 T. R. 597. In one case the merely taking a book, and in another a bedstead, was held to be sufficient; Noy. 69. The entering on a lease for years, Bac. Ab. Exors. B. 3; or pleading any other plea than that of *ne unques* executor, Ib.; or the suing for, receiving or releasing debts due to the estate, will be evidence to prove the fact: Com. Dig. Adm. C. 1.

(*d*) 2 T. R. 597.

(A) (The laws of Ohio do not recognizean executor *de son tort*, and no action lies against such an executor. *Dixon* v. *Cassell*, 5 Ohio R. 533.)

[1]Eng. Com. Law Reps. vi. 200. [2]*Id.* ii. 374. [3]*Id.* v. 63.

himself executor *de son tort*, since the continuance of the debtor's possession was inconsistent with the deed, which was therefore fraudulent against creditors (*e*). But the interfering for purposes of decency, charity, or kindness, as in ordering the funeral of the deceased, paying his debts or legacies out of the party's own pocket, or taking an inventory of his effects, is not such an intrusion as will render the party liable (*f*). An executor who has not proved the will, does not make himself liable by assisting a co-executor who has proved (*g*).

Answer. The defendant may prove in answer that he acted under the authority of
*447 *the rightful administrator (*h*), or as agent to an executor, who, though he never proved the will, yet acted as such (*i*), or that he had a claim upon the goods of the deceased (*k*) (A).

Where *A.* and *B.* are the executors of *C.*, and on the death of *A.*, *D.* his executor, possesses himself of the effects of *C.*, it seems that he is not liable as the executor of *C.* (*l*). An executor *de son tort* cannot discharge himself from an action by the creditor by delivering over the effects in his possession to the rightful owner after action brought (*m*). The plaintiff on issue taken on this plea may have a verdict against the real executors, on counts alleging promises by the testator (*n*).

Plene administravit. 2. Upon issue of the plea of *plenè administravit*, it lies on the plaintiff to prove affirmatively that the defendant had assets (*o*). On this issue no evidence can be given of assets after the writ sued out (*p*). And if assets have in fact accrued since the issuing the writ, the plaintiff may, it seems, reply the fact (*q*).

In proof of assets the plaintiff may give in evidence the inventory of the

(*e*) *Edwards* v. *Harben*, 2 T. R. 595.

(*f*) 3 Bac. Ab. tit. Executor, 21. *Denman* v. *Hampton*, K. B. Sitt. after T. T. 1830. So in locking up the goods of the deceased, directing the funeral, feeding his cattle, providing necessaries for his children; Will. on Ex. P. 1, B. 3, C. 5. Proof that the defendant, being the widow of the deceased, a hair-dresser, continued to live in the house, and opened the shop, the entrance to the house, but there was no evidence of any sale of goods by her, or of doing more than giving the note, and of having the goods valued, preparatory to taking out administration; held that these acts were not sufficient to constitute her executrix *de son tort*. *Serle* v. *Waterworth*, 4 Mees. & W. 9; and 7 Dowl. 684; but judgment reversed on error, 4 Mees. & W. 795.

(*g*) 2 Cox's C. C. 274. (*h*) Peake's C. 86; Cro. Eliz. 472.

(*i*) *Cottle* v. *Aldrich*, 4 M. & S. 175. *A.*, *B.* and *C.* are appointed executors, of whom *C.* alone proves the will. *C.* makes *D.* jointly with *B.* his agent in the administration, who accordingly administers during *C.*'s lifetime under his authority. *C.* dies, leaving *A.* and *B.* surviving. *D.* continues to administer, consulting with *B.* from time to time; and acting under his advice. Held, that *D.* was chargeable as executor *de son tort* for the intermeddling since *C.*'s death. Had *B.* acted as executor, *D.* would not have been so chargeable; but this he did not, since the advice he gave was not an acting as executor. *Ibid.* Living in the house and carrying on the trade of deceased (a victualler), is sufficient intermeddling to make a defendant executor *de son tort*, and as such liable *de bonis propriis;* notwithstanding his wife proved the will after the action was commenced. *Hooper* v. *Summersett*, Wightw. 16.

(*k*) One who takes possession under a fair claim of right, is not chargeable as executor *de son tort*. *Femings* v. *Jarratt*, 1 Esp. C. 335.

(*l*) *Hall* v. *Elliott*, Peake's C. 86; but see 5 Co. 33.

(*m*) *Curtis* v. *Vernon*, 3 T. R. 587; 2 H. B. 18. *Secus*, *semble*, if he deliver the goods to the rightful executor before action brought. *Ibid.* *Padget* v. *Priest*, 2 T. R. 97.

(*n*) *Griffiths* v. *Franklin*,[1] M. & M. 146. He cannot recover on counts on promises by all as executors. *Ib. Qu.* Whether there can be an executor *de son tort* where there is a lawful executor. *Hall* v. *Elliott*, Peake's C. 87. *Read's Case*, 5 Co. 34.

(*o*) The produce of the sale of the good-will of a house held for some time by the administratrix as tenant at will, is assets. *Worral* v. *Hand*, Peake's C. 74. See *Jury* v. *Woodhouse*, Barnes, 333.

(*p*) Per Ld. Kenyon, C. J., in *Mara* v. *Quin*, 6 T. R. 10.

(*q*) Per Ashurst, J., *Mara* v. *Quin*, 6 T. R. 11.

(A) (The granting letters of administration to one who has made himself liable as executor *de son tort*, will legalize his tortious acts. *Shillaber* v. *Wyman*, 15 Mass. R. 322. *Andrew* v. *Gallison*, *id.* 325. An executor *de son tort* is liable only to the amount of the assets which come into his hands. He may be declared against and protect himself by plea as the rightful executor. *Stockton* v. *Wilson*, 3 Penns. R. 130.)

[1] Eng. Com. Law Reps. xxii. 270.

personal estate of the deceased, delivered by the defendant in the ecclesiastical court; but a copy of the inventory is not admissible, unless it be signed by the defendant, although it has been signed by the appraisers (*r*); and he may show that the goods have been undervalued (*s*) (A). A leasehold estate is assets to the value of the term (*t*). Evidence of such an inventory is sufficient to throw it on the executor, to show how he has disposed of the goods and money specified in the inventory (*u*). But if it be *primâ facie* evidence of effects or assets with which the executor is acquainted, it is *rebutted by showing that no effects actually came to his hands (*x*). Proof that articles of furniture were bought by the deceased and seen in his house shortly before his death, is evidence of assets (*y*). Proof of assets. *448

It has been held, that if the defendant in his inventory does not distinguish between sperate and desperate debts, it is *primâ facie* evidence to charge the defendant with all which are not actually stated to be desperate (*z*); but in a later case Lord Ellenborough required further and reasonable evidence to be given, in order to show that the debts had actually been received by the defendant (*a*). In principle, it seems to be rather unreasonable to construe an admission that a debt is due, and that it is not desperate, into an acknowledgement that it has been received, unless there be some ground for suspecting fraud; and the *onus* of proof, it is to be recollected, lies on the plaintiff. At all events the defendant may rebut the presumption by proving a demand of the debt, and a refusal to pay it (*b*), even in the case of sperate debts. If an executor submit to arbitration, agreeing to pay what shall be awarded, he admits that he has assets (*c*);

(*r*) B. N. P. 140. *Welbourne* v. *Dewsbury*, per Eyre, C. J. H. 12 Geo. 1.

(*s*) B. N. P. 140.

(*t*) *Ibid.* And where the plaintiff, in an action against the administratrix, held a lease in his hands, upon which he had a lien, it was held that the lease was to be considered as assets in the hand of the administrator, who had power to redeem it. *Vinsent* v. *Sharp*,[1] 2 Starkie's C. 507. And assets in Ireland are assets here. *Ibid.*; and 1 Barnes, 240.

(*u*) *Ayliff* v. *Ayliff*, B. N. P. 142. *Gyles* v. *Dyson*,[2] 1 Starkie's C. 32. In an action against several executors who all proved, and pleaded, *plene adm.*, it was held that two only having signed the inventory, it could not be taken as evidence against the third, who was therefore entitled to a verdict. *Parsons* v. *Hancock*,[3] 1 Mood. and M. C. 330.

(*x*) *Steam* v. *Mills*,[4] 4 B. & Ad. 657. And the case of *Foster* v. *Blacklock* was not assented to.

(*y*) *Mann* v. *Long*,[5] 2 Ad. & Ell. 699. There Pattison, J., intimated that he dissented from the opinion expressed by Lord Tenterden in *Foster* v. *Blacklock*.

(*z*) B. N. P. 140. *Smith* v. *Davis*, M. 10 Geo. 2. Per Hardw. C. J., *Shelley's Case*, Salk. 296. Per Holt, C. J., Went. Off. Ex. 160.

(*a*) *Gyles* v. *Dyson*,[2] 1 Starkie's C. 32. And in a subsequent case, Parke, B., said, that he assented to Lord Ellenborough's doctrine.

(*b*) *Shelley's Case*, Salk. 296, and B. N. P. 240.

(*c*) *Barry* v. *Rush*, 1 T. R. 691. The question as to assets is concluded against the executor, by the arbitrator directing him to pay the sum awarded. *Worthington* v. *Barlow*, 7 T. R. 453. Debt against an executrix on an award on her own submission; plea, first, *plene administravit;* secondly, that no evidence was offered before the arbitrator of her having assets at any time before the making of the award. Held on demurrer, that the action of debt lies against the representative on an undertaking originating with him; secondly, that by submitting to the reference without protesting that she had no assets, she could not afterwards be permitted to say so: submitting to a final settlement could only be by paying what should be found to be due. *Riddle* v. *Sutton*[6], 5 Bing. 200; and 2 M. & P. 245.

(A) (An executor is liable for the amount of assets in his hands and no more. *Fairfax's Ex'rs* v. *Fairfax*, 5 Cranch, 19; 2 Cond. Rep. 178. In any action against executors or administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, shall come in issue, and the inventory of the deceased, made and filed by them, shall be given in evidence, the plaintiff or defendant may rebut the same by proof: 1. That any property or effects have been omitted in such inventory, or were not returned therein at their true value: 2. That such property has perished or been lost, without the fault of such executor or administrator, or that it has been fairly sold by them at public or private sale, at a less price than the value so returned; or that since the return of the inventory, such property has deteriorated or enhanced in value. (2 R. S. s. 14.) *Willoughby* v. *M'Cluer*, 2 Wend. 608.)

[1]Eng. Com. Law Reps. iii. 451. [2]*Id.* ii. 282. [3]*Id.* xxii. 326. [4]*Id.* xxiv. 133. [5]*Id.* xxx. 188. [6]*Id.* xv. 416.

but a mere submission to arbitration is not an admission of assets (*d*); neither does the payment of interest on a bond amount to such an admission; for it is unreasonable to conclude, from his having enough to pay the interest, that he has also enough to satisfy the principal (*e*). So, proof that an administrator admitted that the debt was just, and should be paid as soon as he could pay it, is not evidence to charge the defendant with assets, for he could not be understood to pledge himself to commit a *devastavit*, by paying that debt before others of a higher nature (*f*) (A). But where an executor on being applied to for payment referred the creditor to *A. B.* for information as to assets, it was held that the admission of assets by *A. B.* was equivalent to an admission by the defendant (*g*). If the executor compound with creditors, and in a suit by one plead *plenè administravit*, *449 such composition will be evidence against him of assets (*h*) (B). Proof *of the stamp on the probate is evidence of assets (*i*). But it is doubtful whether it be evidence as to the amount of assets (*k*).

Proof of due administration.

After proof of assets in the hands of the defendant, it is incumbent on him to discharge himself by proof of the due administration of such assets, which he may do under this issue (*l*). He may prove the existence and payment of debts of as high a degree, or of debts of inferior degree, without notice (*m*); but he cannot under this issue give in evidence the payment even of judgment debts made subsequently to the purchase of the writ; for the question is, whether the defendant had fully administered at the time when the action (*n*) was commenced. If the plaintiff reply specially, that

(*d*) [*Hoare* v. *Muloy*, 2 Yeates, 161.] *Pearson* v. *Henry*, 5 T. R. 6. And a promise by the administrator to pay the debt of the intestate where there are no assets, is *nudum pactum*. Per Buller, *Ibid.* [But if he have assets, he is personally bound. *Sleighter* v. *Harrington*, 2 Taylor, 249. Yelv. 11, note (2) and cases there collected.]

(*e*) *Cleverly* v. *Brett*, 5 T. R. 8, in n. But see the *Corporation of Clergymen's Sons* v. *Swainson*, 1 Ves. 75.

(*f*) *Hindesley* v. *Russel*, 12 East, 232. An undertaking by an executor, on accepting a bill for a demand on the estate, to pay on receipt of sufficient effects, means effects received after demands entitled to priority are satisfied. *Bowerbank* v. *Monteiro*, 4 Taunt. 844.

(*g*) *Williams* v. *Innes*, 1 Camp. 364. (*h*) B. N. P. 145. Per Holt. C. J.

(*i*) *Foster* v. *Blaklock*,[1] 5 B. & C. 328; 8 D. & R. 48. But it is evidence only of the smallest amount which the stamp would cover. *Curtis* v. *Hunt*,[2] 1 Carr. & P. 180. S. P. *Duncan* v. *Hampton*, Sitt. after T. T. 1830. (*k*) *Britton* v. *Jones*,[3] 3 Bing. N. C. 676.

(*l*) He is liable to the amount only of assets in his hands. *Harrison* v. *Beecles*, 3 T. R. 688. On a plea of judgment recovered, and *plenè administravit præter*, and replication of assets ultra, if assets are proved in the defendant's hands, he may give evidence of the payment of other debts with those assets previous to the action brought. *Smedley* v. *Hill*, 9 Blk. 1105.

(*m*) B. N. P. 143; 2 Show. 81; 1 Raym. 745. Even debts on simple contract may be paid before specialties, unless timely *notice* be given. *Sawyer* v. *Mercer*, 1 T. R. 690; 1 Mod. 174; 3 Mod. 115. *Shetelworth* v. *Neville*, 1 T. R. 454. [See *United States* v. *Hoar*, 2 Mason's R. 317, 318.].

(*n*) *Anon.* Salk. 153. Such payment should be pleaded. *Ibid.* Dyer, 32, a. Where the issue was whether there were assets in the hands of the defendant on the *day* when the writ was sued, and it appeared that he

(A) (Where a promissory note was given by an executor or administrator, it is *prima facie* evidence of assets, because they are the legal consideration upon which the promise ought to be founded: the note however does not conclude the defendant from showing that in fact there was a deficiency of assets. The burden of proof, however, in such case is on the defendant. *The Bank of Troy* v. *Topping*, 13 Wend. 557. And a judgment against executors or administrators by confession, is conclusive proof that they have assets sufficient to satisfy it. *The People* v. *Judges of Erie*, 4 Cow. 445. See also *Griffith* v. *Chew*, 8 Serg. & R. 17. But submission to a reference is no admission of assets. *Hoare* v. *Muloy*, 2 Yeates, 161.—*Dubitatur* in *M'Kee* v. *Thompson*, Addis. 24.

(B) (If an executor compound debts or mortgages, or buy them in for less than is due, with his own money, yet he shall not have advantage thereby. So if he redeem a pledge of the testator it will be assets in his hands for debts and legacies. *Dawes* v. *Boylston*, 9 Mass. R. 337. It is generally true that n executor extending the time of payment unreasonably, or taking inferior security, thereby bringing a loss to his testator's estate, shall be liable. *Hunter* v. *Bryant*, 2 Wheat. 32. But some latitude will be allowed for discretion to an executor who takes charge of the affairs of a man who was engaged in trade, and the Court will reluctantly enforce rigid rules in such case against him. *Ibid.* And so long as executors manage the estate of the testator in accordance with the views he had entertained of it, and do what there is reason to believe he would have approved of, could he have been consulted, it would seem to be unreasonable to make them responsible for losses as respects legatees. *M'Nair's Appeal*, 4 Rawle, 148.)

[1]Eng. Com. Law Reps. xi. 246. [2]*Id.* xi. 358. [3]*Id.* xxxii. 277.

he sued out his original on a particular day, and that the defendant had then assets, and the defendant rejoin that he had no assets then, he thereby admits the day of suing out the original as alleged by the plaintiff; but if the plaintiff in his replication allege assets at the time of exhibiting the bill on a day specified under a *videlicet*, and conclude to the country, then, although that day be the first day of the term, the defendant may show that the bill was exhibited afterwards, for he could not in the latter case, as in the former, put the time in issue by his rejoinder (*o*), and the day mentioned in the replication is not material. By this plea the defendant alleges that he has administered the effects of the deceased, paying his debts according to the course and order which the law prescribes (*p*). He must prove the *existence of the debt, as well as the payment, and for that purpose the *450
creditor himself to whom the debt has been paid is a competent witness (*q*). Where the payments have been made upon the testator's bonds they should be produced and proved in the usual way, by means of the attesting witnesses; and though upon payment, they have been destroyed, evidence cannot be received of their existence, except by means of the attesting witnesses (*r*).

Where the action is on a specialty, he must prove that he paid the debts on bonds or other specialties sealed and delivered; but where the present action is on a debt by simple contract, he may prove the payment of a debt, without proof of the bond by which it is secured; for although there was no bond, it was still a good payment in the course of administration (*s*). A debt for rent *arrere* is equivalent to a debt by specialty (*t*). A judgment

received money on that day, but paid it over by order of the court on the same day, before the writ was sued out, it was held to be insufficient, and the jury found assets; but the defendant might have protected himself by pleading the fact specially. *Preston* v. *Hall*, Clay, 66; Vin. Ab. Ev. P. b. pl. 3.

(*o*) B. N. P. 144. *Corbet's Case*, 1 Leon. 312. These provisions were previous to the alterations as to process.

(*p*). See 2 Bl. Comm. 511. According to the rule of priority he must pay, 1st, all funeral charges, and the expenses of proving the will, and the like; and none but necessary expenses of a funeral are allowed against creditors, nor usually more than 5*l*. See B. N. P. 143. In an action against an executor of a party who had been a captain in the army; issue taken upon the plea of *plenè adm.*; the Judge had allowed 79*l*. for funeral expenses, and the plaintiff being nonsuited, the Court thinking it too large a sum, directed a new trial, unless the defendant would permit the plaintiff to enter up judgment for such sum as, after allowing 20*l*. for the funeral expenses and the probate duty, would remain in the defendant's hands. *Hancock* v. *Podmore*,[1] 1 B. & Ad. 260; and see *Stag* v. *Punter*, 3 Atk. 119. It seems that the expenses of proving the will are to be allowed under this plea, although not actually paid, the executor being personally liable to them.[2] 2 Starkie's C. 528. 2dly. Debts due to the king on record or by specialty. 3dly. Debts which by particular statutes are to be preferred to all others, as for poor's rates. 4thly. Debts of record, as judgments (if docketed according to the stat. 4 & 5 Will. & Mary, c. 20), but otherwise not. See *Hickey* v. *Hayter*, 6 T. R. 384. *Steele* v. *Rorke*, 1 B. & P. 307. 5thly. Debts due on special contracts, as for rent; *Thompson* v. *Thompson*, 9 Price, 464; or on bonds, covenants, and the like, under seal. Lastly, debts on simple contracts; viz. notes unsealed, and verbal promises; and amongst these simple contracts, servants' wages have by some been preferred to any other. 2 Comm. 511. An executor *de son tort* is entitled to avail himself of payments duly made in the course of administration. The reasonable expenses only of the funeral will be allowed. *Edwards* v. *Edwards*, 2 C. & M. 612. If unreasonable, the administrator will be liable, even although he sanction them before taking out letters of administration. *Lucy* v. *Walrond*,[3] 3 Bing. N. C. 841. He will be liable to reasonable expenses although he did not order the funeral, if credit were not given to another. *Brice* v. *Wilson*, 3 N. & M. 512.

(*q*) B. N. P. 143. *Kingston* v. *Grey*, 1 Ld. Raym. 745; 1 Show. 81. In *Campion* v. *Bentley*, 1 Esp. C. 343, it is said, that on issue joined on a replication of *per fraudem* to a plea of judgment recovered, the conusee is not competent to prove that it was obtained *bona fide; sed quære.*

(*r*) *Gillies* v. *Smithers*,[4] 2 Starkie's C. 528. But where the suit is on a simple contract, and the defendant relies on the payment of bonds of the deceased, it is (as is said) sufficient to prove payment, for although they be not bonds, it is a good administration. See B. N. P. 143. Interest on a bond incurred by the laches of the executor will not be allowed. *Saunderson* v. *Nichol*, 1 Show. 81.

(*s*). B. N. P. 143, cites *Kingston* v. *Grey*, 1 Ld. Raym. 745. In that case it does not appear whether the action was on a bond or simple contract, but probably the latter; and from the terms of the short report of this case, it seems that the creditor proved the *debt*.

(*t*) Bac. Ab. Ev. L. Roll. Ab. 927. Off. of Ex. 145. The executor is liable in debt and *detinet* where land demised to his testator is of the value of the rent, and *pro tanto*, when of less value, *Rubery* v. *Stevens*,[5] 4 B.

[1] Eng. Com. Law Reps. xx. 382. [2] *Id.* iii. 460. [3] *Id.* xxxii. 349. [4] *Id.* iii. 460. [5] *Id.* xxiv. 50.

against the testator not docketed, is to be considered as a debt on simple contract only, and therefore the defendant, under this plea to an action of debt on a judgment against the testator, may give in evidence the payment of bond debts (*u*). An administrator may prove payment of a simple contract debt without notice of the specialty debt on which the action is founded (*x*). On issue on a plea of *plenè administravit* before notice, it was held that the defendant having invested the residue of the funds in his own name, although for the benefit of the legatees, to whom he had paid the dividends for many years, was still liable as for assets in hand (*y*). It is no defence to an action on a bond, that the defendant paid the money over to a co-executor, in order to satisfy the bond, and that he applied the money
*451 to the satisfaction of his *own simple contract debts (*z*). He may give in evidence a retainer for his own debt of equal degree (*a*); that the intestate before marriage with the defendant, gave a bond to *J. S.* conditioned to leave the defendant 500*l.*, and that she retained to satisfy the obligation (*b*); that he has paid debts out of his own money, to the amount of the assets (*c*); that he has redeemed part of the testator's goods, which had been pawned to their full value, with his own money, and has paid the value of the residue in discharge of his debts (*d*). So he may show that he has retained money to pay the expenses of administration, to which he has made himself liable, although the money has not been actually paid (*e*) (A).

An executor *de son tort* (*f*) is not entitled to retain for his own debt, though of higher degree, even although the rightful executor (after action brought) consent to the retainer (*g*); but if, under this plea, he give in evi-

& Ad. 241; and see the rule, Pollexfen's Rep. 192. A representative cannot get rid of a liability to rent without assent, as he must assign to a beggar. Per Wood, B. *Thompson* v. *Thompson*, 9 Price, 471. And the administrator may retain for a half-year's rent, during which the intestate died. *Ibid.* And such rent is equal to a specialty debt, *Ibid.* A chattel interest vests in the representative, in the same manner as in the testator. *Doe* v. *Porter*, 3 T. R. 13. He cannot waive for the term, he must waive *in toto* or not at all. *Billinghurst* v. *Spearman*, 1 Salk. 297. An administrator who has occupied the premises, cannot plead to an action of covenant for non-repair, and not paying rent and taxes, that the premises yield no profit. *Tremeere* v. *Morison*,[1] 1 Bing. N.C. 89.

(*u*) *Hickey* v. *Haytor*, 6 T. R. 384; *Steele* v. *Rooke*, 1 B. & P. 307. 3 Saund. 7, n.; Tidd. 919, 3d edit.

(*x*) Com. Dig. Administration, C. 2d edit. by Kyd.; 2 Cro. 535; 3 Lev. 115; 3 Mod. 115; 1 T. R. 690. *Supra*, 323 (*a*).

(*y*) *Smith* v. *Day*, 2 M. & W. 684; and *qu.* whether such payment before notice could be proved.

(*z*) *Cross* v. *Smith*, 7 East, 246.

(*a*) *Plumer* v. *Marchant*, 3 Burr. 1380. It is a general rule, that wherever the executor might have sued for the debt, or might have paid it, he may retain for it. And see *Bond* v. *Green*, Brownl. 75; Bro. Ex. 18. On the plea by an administrator of a retainer, it is sufficient to show a legal contract and liability. *Harry* v. *Jones*, 4 Price, 89. One of two executors may retain for his own debt out of a balance due from both to the estate. *Kent* v. *Pickering*, 2 Keene, 1.

(*b*) She is entitled to retain out of the personal assets so much as is equal to the damages which she has sustained by breach of the covenant. *Loane* v. *Casey*, executrix, 2 Bl. 965; B. N. P. 140–1; 3 Burr. 1380. But where the husband covenanted to pay the wife an annuity of 20*l.*, or that his heirs, executors, &c. should pay the sum of 400*l.* *to the trustees*, to remain vested in them; it was held, that the widow, being administratrix, could not retain the 400*l.* *Thompson* v. *Thompson*, 9 Price, 464. *A.* having lent money to *B.* on a bond, takes out administration *de bonis non*, he may retain for the bond debt. *Weekes* v. *Gore*, 3 P. Wms. 184; and after his death it will be presumed that he elected to pay his own debt first.

(*c*) B. N. B. 140. Co. Litt. 123. (*d*) *Ibid.*

(*e*) *Gillies* v. *Smithers*,[2] 2 Starkie's C. 528; Cor. Abbott, L. C. J.

(*f*) But if an executor *de son tort* take out administration, his previous acts are good by relation. Mo. 126; Com. Dig. Administration, C. 3.

(*g*) *Curtis* v. *Vernon*, 3 T. R. 587; 2 H. B. 18.

(A) (If an executor has been robbed of money belonging to his testator's estate, he will be exonerated from accounting for it. *Farman* v. *Coe*, 1 Caines C. 96. And after his death, his personal representative may avail himself of the excuse, though uncorroborated by the oath of him whom he represents. *Ib.* Where an executor does an act in good faith, but under a mistake, he will not be liable; as for making a surrender of a term, on the supposition that it was forfeited for a less consideration than it was worth. *The People* v. *Pleas*, 2 John. C. 376.)

[1]Eng. Com. Law Reps. xxvii. 315. [2]*Id.* iii. 460.

dence a retainer, the plaintiff cannot object, that as executor *de son tort* he cannot retain, without showing the will, and who are rightful executors (*h*). He may, after action brought by a simple-contract creditor, pay a specialty debt, and plead the payment of that debt in bar of action (*i*). An executor may also, it seems, give in evidence the payment of the residuary effects to the legatee, after the expiration of a year from the testator's death, without notice of the plaintiff's demand (*k*); so he may show that he was but executor *durante minore ætate*, and that he paid particular debts and legacies, and delivered over the residue of the testator's personal estate to the infant when he came of age (*l*); for his power then ceases, and the new executor is liable to all actions (*m*). But he will be liable for as much as he has wasted (*n*), to creditors, it seems, as well as to the new executor.

Under a plea simply of no assets, the defendant must still show payment in due course of administration (*o*).

The plea of *plenè administravit* admits the debt, but not the *amount* of it, and therefore, unless the action be of debt for a sum certain, the plaintiff must prove his debt, and the amount of his damages (*p*).

*On issue taken on the plea of *plenè administravit præter*, the defend- *452
ant may prove payment of debts before action brought, as well as under the general plea (*q*).

An executor cannot, under the plea of *plenè administravit*, give in evidence the existence of outstanding debts of a higher nature, without pleading them (*r*) (1).

3. Where the day of payment on a bond is past, although the defendant sets out the condition in his plea, he will thereby cover assets to the amount of the penalty, unless the plaintiff reply *per fraudem;* and on issue joined on such replication, proof that the obligee would have taken less than the penalty, and not exceeding the sum which the executor had to pay, will be evidence of fraud (*s*). Outstanding bonds.

Upon a replication *per fraudem* to a plea of judgment recovered, evidence that the creditor would have taken less than the sum, is evidence of fraud, unless the executor show that he had not assets to pay that amount (*t*). Evidence in such case, that the judgment was confessed for more than Judgment recovered.

(*h*) B. N. P. 143. But see Peake's Ev. 349, 3d ed.

(*i*) *Oxenden, gent., one, &c.* v. *Clapp, executrix*,[1] 2 B. & Ad. 309.

(*k*) 1 Esp. C. 276. Cor. Ld. Kenyon, C. J. The payment of legacies six months after probate does not discharge the executor's liability on a covenant, although he paid them without notice, *Davis* v. *Blackwell*,[2] 9 Bing. 5.

(*l*) 1 Mod. 174. He should produce the letters of administration.

(*m*) *Ibid.*

(*n*) *Ibid.* And 6 Co. *Packham's Case;* and Latch. 160. But see 1 Mod. 175.

(*o*) *Reeves* v. *Ward*,[3] 2 Bing. N. C. 235. (*p*) Salk. 296; B. N. P. 140.

(*q*) *Smedley* v. *Hill*, Bl. 1105. (*r*) B. N. P. 141.

(*s*) 1 Saund. 334 (*n*); B. N. P. 141. If issue be taken on the existence of the bonds, the defendant must prove them, and if he fail as to one he will fail to all. Salk. 312.

(*t*) Salk. 312; B. N. P. 141. If a judgment, confessed by an executor, for more than the sum due, is pleaded, the plaintiff may either reply, showing specially what sum is due, &c. or *per fraudem* generally; if the latter, and the issue thereon is found for the defendant, he is entitled to a general judgment. *Pease* v. *Naylor*, 5 T. R. 80. The plaintiff ought to reply the sums really due. *Ib.* An executor may plead as an outstanding debt, the penalty of a bond of indemnity given by the testator to the obligee who is surety for him in another bond, both of which were forfeited in his lifetime, and still unpaid, though the surety has not yet been damnified. And an averment that the bond was forfeited in the testator's lifetime, not showing

(1) [In what cases a special plea of *plene administravit* is necessary at the common law, and under statutes in Massachusetts, see *United States* v. *Hoar*, 2 Mason's Rep. 211.] {Where an executor has assets, but not sufficient to pay all the debts, he can only protect himself by pleading a special *plene administravit* of all beyond a sum sufficient to satisfy debts of a higher nature, and to pay other debts of an equal degree their proportions. *Shaw* v. *M'Cameron*, 11 Serg. & Rawle, 252.}

[1]Eng. Com. Law Reps. xxii. 84. [2]*Id.* xxiii. 243. [3]*Id.* xxix. 316.

the true debt, is strong, but not conclusive, evidence of fraud, and the defendant may show in answer that the judgment was entered for more than was due by mistake, and that the fact was known to the plaintiff before action brought (*u*). If several judgments be pleaded, and any one be proved to be false and fraudulent, the plaintiff will succeed as to all (*v*).

Where the defendant pleads a judgment for 100*l.*, and goods to the amount of 5*l.* only, the substance of the issue is that the defendant has no more than will satisfy the judgment (*w*).

He may show that payments relied on, were out of trust funds, no part of assets (*x*).

Outstanding bonds, &c.

It will be presumed that an obligation entered into by the testator is *founded on a just debt, unless the contrary be averred in pleading, and issue taken upon it (*y*).

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Upon the plea of a retainer and judgment recovered, it is sufficient for the plaintiff to falsify either claim (*z*).

A letter written by a creditor to an executor intimating the intention of the creditor to charge the executor personally and not as executor, does not preclude the creditor from objecting to the course of administration (*a*).

Cause of action.

The proof of the cause of action is usually the same as it would have been against the testator or intestate himself (*b*).

Debt suggesting a devastavit.

4thly. If an executor suffer judgment by default, or judgment be given against him on a demurrer to the declaration; or if he plead payment of a

how, is sufficient. *Cox* v. *Joseph*, 5 T. R. 307. Where to a declaration on the testator's covenant, after pleas of *plene adm.* and retainer for a simple contract, the executor at the assizes pleaded *puis darrein cont.* a judgment recovered on a bond "after the last continuance" (the last day of Trin. term), to wit, on 2d Aug. "as of the Trinity term preceding," to which the plaintiff replied, that the defendants had notice of the bond before the commencement of the action; held that the replication was bad on demurrer, and that the plea was properly pleaded, for although the judgment was alleged to have been recovered of the term, which by fiction of law, therefore, related back to the first day of the term, and so was strictly before the last continuance; yet the defendants might be permitted by averment to show, that in fact the judgment was recovered after that continuance, in order that they might not be deprived of the privilege allowed by law. *Lyttleton* v. *Cross*,[1] 3 B. & Cr. 317; and 5 D. & R. 165. A judgment cannot be pleaded for the benefit, not of the individual, but for the *general benefit of creditors*. *Gorst* v. *Hutton*, York Sum. Ass. 1834.

(*u*) *Pease* v. *Naylor*, 5 T. R. 80.

(*v*) Salk. 312; B. N. P. 142. See *Chamberlaine* v. *Pickering*, 1 Freem. 28; *Gilbert* v. *Dee*, Ib. 537.

(*w*) *Moore* v. *Andrews*, Hob. 133; 1 Saund. 333, (*n*).

(*x*) *Marston* v. *Downes*,[2] 1 A. & E. 31.

(*y*) Cro. Jac. 35; B. N. P. 142. *A.* being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenants to pay the firm all his then debts, and such other debts as should subsequently accrue. *A.* dies without having satisfied the original debt, and having contracted further debts subsequent to the execution of the deed. Held, that his executors, two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt. *De Tastet* v. *Shaw*, 1 B. & A. 664.

(*z*) *Campion* v. *Bentley*, 1 Esp. C. 343.

(*a*) *Richards* v. *Brown*,[3] 3 Bing. N. C. 493.

(*b*) A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in *assumpsit* against the executor. And in such action it is neither necessary to aver assets, nor a promise by the executor. By three; Burrough, J. *dissentiente*. *Powell* v. *Graham*,[4] 7 Taunt. 580. An executor is bound by his testator's agreement not to bring error; such an agreement precludes him from bringing error on a judgment in *scire facias* brought to make him party to the former judgment, since that is not a new action, but a continuation of the old one. *Executors of Wright* v. *Nutt*, 1 T. R. 388. The personal representative of a tenant may be charged, in his representative character, for breaches of covenant, by one to whom the premises have come by assignment since the death. *Lady Wilson* v. *Wigg*, 10 East, 313. The general rule is *actio personalis moritur cum persona*. Where the cause of action is money due, or a contract to be performed, gain or acquisition by the labour or property of another, or a promise by the testator expressed or implied, the action survives against the executor. *Secus*, if it be a tort, or arise *ex delicto*, supposed to be by force, and against the peace. *Hambly* v. *Trott*, Cowp. 375. An action, *ex contractu*, lies against an executor for the value of timber wrongfully cut down by the testator. *Utterson* v. *Vernon*, 3 T. R. 549. Trover does not lie against an executor for a conversion by his testator. *Hambly* v. *Trott*, Cowp. 371. Debt is not maintainable against a personal representative, on the simple contract of the deceased. *Barry* v. *Robinson*, 1 N. R. 293.

[1]Eng. Com. Law Reps. x. 93, 385. [2]*Id.* xxviii. 24. [3]*Id.* xxxii. 219. [4]*Id.* ii. 223.

bond, and omit to plead *plenè administravit*, or *plenè administravit præter*, it will operate as an admission of assets in an action against him on the judgment, suggesting a *devastavit* (*c*); for it is an universal principle of law, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it in another action founded upon it, or in a *scire facias* (*d*). And, therefore, in an action against an executor on a judgment suggesting a *devastavit*, on issue taken on the plea of *non devastavit*, it is sufficient to prove the judgment, and the return of *nulla bona* to the *fieri facias* (*e*).

Whether the defendant plead *non devastavit* to a *scire fieri* inquiry, or *nil debet*, or not guilty, or *non devastavit* to an action of debt against him, suggesting *a *devastavit*, he cannot give in evidence the want of assets (*f*); nor can he do so upon a writ of inquiry after judgment by default in the original action (*g*); nor would a previous judgment be evidence for him (*h*), for although under the issue of *non devastavit* the defendant may give in evidence any matter which would have been a discharge to him under the plea of *plenè administravit* (*i*), yet under the latter plea the former judgment would not be evidence. *454

On the issue taken on the plea of *non detinet* to an action of debt, suggesting a *devastavit*, the issue is on the defendant, the judgment being conclusive as to assets (*k*).

A promise by an executor to pay a debt of the testator, where there are no assets, is a mere *nudum pactum* (*l*), even although he has given a written promise (*m*) (A); but *assumpsit* will lie against an executor on a promise made by the testatrix to pay a debt for which she gave her bond during coverture (*n*). Promise by an executor.

An executor is liable for the expenses of the testator's funeral, if on his omission another order it, if he has assets (*o*).

An executor of a joint contractor may show, under the general issue, that another joint contractor still survives (*p*).

No action lies to recover a party's distributive share of a legacy, though the administrator has expressly promised to pay it (*q*). It is otherwise Legacy.

(*c*) *Erving* v. *Peters*, 3 T. R. 685. *Ramsden* v. *Jackson*, 1 Atk. 292. *Rock* v. *Leighton*, Salk. 310; 1 Ld. Raym. 589; Hob. 199.

(*d*) Per Buller, J. 3 T. R. 689. The pleas of non est factum, release, payment, non assumpsit, &c. admit assets. 1 Saund. 335, (*n*). Judgment for the plaintiff by default, or on demurrer, is evidence of assets, although no *devastavit* has been returned by the sheriff. *Leonard* v. *Simpson*,[1] 2 Bing. N. C. 176. *Rock* v. *Leighton*, 1 Salk. 310. *Palmer* v. *Waller*, 1 M. & W. 689.

(*e*) *Erving* v. *Peters*, 3 T. R. 685. *Skelton* v. *Hawling*, 1 Wils. 259. *Chaloner* v. *Chaloner*, cited *ibid.*

(*f*) 3 T. R. 693; 1 Will. Saund. 219, c.

(*g*) *Treil* v. *Edwards*, 6 Mod. 308; 2 Str. 1075.

(*h*) *Rock* v. *Layton*, 1 Ld. Raym. 591.

(*i*) Per Gould, J. *Rock* v. *Layton*, 1 Ld. Raym. 591.

(*k*) *Hope* v. *Bague*, 3 East, 2.

(*l*) *Pearson* v. *Henry*, 5 T. R. 6. [Yelv. 11, note (2).] *Rann* v. *Hughes*, 7 T. R. 350. But a promise founded on a new consideration, as forbearance, is binding. 1 Will. Saund. 210, note (1). A promise by *A.* to *B.* that in consideration of his procuring, at his own expense, administration to the estate of *C.* to be granted to *A.*, he would pay over to him dividends due, since the death, upon stock which *C.* held in trust for *B.*, is not binding on the estate. *Parker* v. *Baylis*, 2 B. & P. 73.

(*m*) *Rann* v. *Hughes*, 7 T. R. 156. See *Parker* v. *Baylis*, 2 B. & P. 73.

(*n*) *Lee* v. *Muggridge*,[2] 5 Taunt. 36.

(*o*) *Tugwell* v. *Hayman*, 3 Camp. 298.

(*p*) 5 East, 261.

(*q*) *Jones* v. *Tanner*,[3] 7 B. & C. 542. It seems to be a settled rule of law, that no action at law lies to recover a legacy. *Ib.* per Littledale, J. the judgment of Lord Kenyon in *Decks* v. *Strutt*, 5 T. R. 690, has always been considered as an unqualified decision, that an action at law does not lie for a legacy.

(A) (Administrators who have given a note for the debt of their intestate, cannot be made personally responsible for the payment thereof, unless it be shown that they have assets, or that forbearance was the consideration of the note, and such forbearance will not be inferred merely from the note being drawn at sixty days. *Bank of Troy* v. *Topping*, 9 Wend. 273. But the giving of the note is *prima facie* evidence of assets. *Same Case*, 13 Wend. 557.)

[1]Eng. Com. Law Reps. xxix. 297. [2]*Id.* x. 10. [3]*Id.* xiv. 97.

where the executor has agreed to retain the stated amount for the legatee (*r*).

After the executor's assent to a legacy of a specific chattel, an action lies against him to recover it (*s*). The proof of title will be similar to that already stated in the action of ejectment (*t*); if the plaintiff bring trover he should prove a demand and refusal, subsequent to the assent, and before the commencement of the action.

A release by one of several executors binds the rest (*u*).

*455 *The declarations of the wife are not evidence against the husband, in a joint action by them in right of the wife as executrix; for the husband being a party to the record, has an interest in the cause, and that cannot be prejudiced by any act or by the *evidence of his wife* (*x*).

EXTINGUISHMENT.

Things out of the land due only in respect of the land, and part of the profits of the land are extinguished by unity of possession, if a man hath an equal estate in both; *e. g.* as in the case of a way common, and what has no existence during the unity. Vin. Ab. Extin. (G). *Secus* of things done in another respect, *e. g. Franchises*, or where the person, not the land, is chargeable. Dav. 5, Vin. Ab. Extin. (G.) Or of a thing natural, *e. g.* a water-course. *Jury* v. *Pigot*, Poph. 170. 3 Buls. 340. A gutter is not extinguished, but the mending of a gutter is. Bro. Ent. pl. 60. An easement running with a house is not extinguished. Vin. Ab. Ext. (D.)

FALSE PRETENCES.

It is necessary to prove (*y*), 1st, The pretence as laid in the indictment (*z*); 2dly, Its falsity; 3dly, The obtaining the goods or money as alleged; 4thly, By means of the false pretence; 5thly, With the intent specified.

(*r*) *Hart* v. *Minors*, 2 Cr. & M.

(*s*) *Williams* v. *Lee*, 3 Atk. 223. An assent to a life interest in a chattel enures as an assent to a bequest in remainder, but if in such case the life interest be given to the executor, he shall be presumed to take possession as executor and not as legatee, where the assent would amount to a *devastavit*. *Richards* v. *Brown*,[1] 3 Bing. N. C. 493.

(*t*) *Supra*, 409.

(*u*) Executors have a joint and several interest, which cannot be divided. Each may dispose of the goods, surrender or release, and the power survives. Com. Dig. Administration [B.] 12. It is, therefore, unnecessary for co-executors to join in a receipt, each has a power over the whole funds; *secus* as to co-trustees. *Chambers* v. *Minchin*, 7 Ves. 9, 186. *Bull* v. *Stokes*, 11 Ves. J. 323, 324. An executrix who has treated the testator's goods as her husband's cannot object to their being taken in execution for the husband's debt. *Quick* v. *Staines*, 1 B. & P. 293. An executor may dispose of the assets of the testator, so that the testator's creditors cannot follow them in the hands of a *bona fide* purchaser. *Whale* v. *Booth*, 4 T. R. 625, n. (a). The sale or disposition of the testator's or intestate's goods by one of two executors or administrators, binds the other. *Pannell* v. *Fenn*, 1 Rol. Ab. 924; 1 Gouls. 185; Dyer, 23, b. So either an executor, 2 Ves. 267; or an administrator, *Willand* v. *Fenn*, 11 Geo. 2, Sel. N. P. 761, note (8); may bind another by releasing a debt to the testator or intestate. But a fraudulent receipt given by one executor is not binding on the rest. Vide *infra*, tit. Receipt.—Release.

(*x*) *Alban* v. *Pritchett*, 6 T. R. 680; and see *Winsmore* v. *Greenbanke*, Willes, 597, and tit. Husband and Wife.

(*y*) See Crim. Pleadings, tit. False Pretences. And the st. 7 & 8 Geo. 4, c. 29, s. 53.

(*z*) It is essential that such pretence should consist in some false and fraudulent representation as to the existence or non-existence of some specific fact, by the credit given to which, either wholly or in part, the property is obtained. 4th Report of Crim. L. Commissioners, p. 72. The obtaining a cheque for 1,000*l.* for money to take up a bill of representation by the defendant, that he had money enough in his pocket to meet the bill all but 200*l.*, when in fact he had not more than 300*l.* in his pocket, was held to be within the statute. *Crossley's Case*, 2 Lewin's C. C. 164. A pretence that the party would do an act which he never intended to do, as that he *would* pay for goods, is not within the statute. *R.* v. *Goodhall*, Russ. & Ry. C. C. L. 461. So a false excuse made by a pauper, that he had not clothes made, with intent to excuse himself from working, is not within the Act, though the fact induce an overseer to furnish him with clothes. *R.* v. *Wakeling*, Russ. & Ry. C. C. L. 504; and see *R.* v. *Codrington*,[2] 1 C. & P. 661.

[1]Eng. Com. Law Reps. xxxii. 219. [2]*Id.* xi. 518.

Proof of the false pretence.

It is not essential to prove that the prisoner used the very words which constitute the false pretence, as alleged in the indictment; it is sufficient to prove acts and conduct which virtually amount to the false pretence laid. (A). Thus, where the pretence alleged was that the prisoner pretended that a paper produced to the prosecutor was a true paper, and that it had been signed by *W. S.* It appeared that in fact the prisoner, when he offered the paper (which was in the form of a promissory note for ten shillings and sixpence, and resembling those which were generally circulated in the neighbourhood on the credit of *W. S.*), made no representation whatsoever; but the learned Judge (*a*) was of opinion that the offering the note as genuine *was equivalent to a representation that it was so, and the twelve Judges all held afterwards that the conviction was right (*b*). *456

The proof of the pretence must correspond with the allegations in the indictment. An allegation that the defendant pretended that he had paid a sum of money into the Bank of England is not supported by proof that he said that the money had been paid into the Bank (*c*). Where several act in concert, the pretence conveyed by the words of one, in the presence of the rest, will support an allegation of a false pretence by all (*d*).

2dly. The proof of the falsity of the pretence must of course correspond with the allegations.

It is not necessary to prove that the whole pretence as set out on the indictment is false; for part may be true, and part false, even although the whole be alleged to be false (*e*).

Proof of obtaining, &c.

3dly. The obtaining the money or goods.—This offence borders frequently very closely upon felony; for if the property be obtained with intent to defraud the owner, the only criterion for judging of the nature of the offence is this, whether the owner divested himself wholly of the property by the delivery, or merely parted with it for a temporary purpose. If *A. animo furandi* pretend to *B.*, the owner of a horse, that he has been sent for it by *C.*, who requested to borrow it, and *A.* by this pretence obtain the horse, and sell it, he is guilty of larceny; but if *A.* in such case, and with the like intention, were to obtain from *B.* a sum of money on pretence that *C* wanted to borrow it, and would repay it another time, the offence would not amount to felony (*f*): the distinction is, that in the one case the owner meant to part entirely with the whole property; in the other, with the temporary possession only (B).

(*a*) Graham, B.

(*b*) *Freeth's Case*, Stafford Lent Ass. 1807. Russ. & Ry. C. C. L. 127. See also *Story's Case*, Russ. & Ry. C. C. L. 81. Where the pretence alleged was a representation that a cheque was a good and genuine order for the payment of money, it was held to be proved by evidence of a false representation by the prisoner, that he had an account with the bankers on whom it was drawn, and that it would be paid. *R.* v. *Parker*, 2 Mood. C. C. 1.

(*c*) *Rex* v. *Plestow*, 1 Camp. 494, *cor.* Lord Ellenborough.

(*d*) *Rex* v. *Young*, 3 T. R. 98.

(*e*) See the observations of the Judges in *R.* v. *Perrott*, 2 M. & S. 379, where the false pretence was alleged to be, *that the clerks expected fees*, that a pound note must be sent as a fee to the head clerk, *and that nothing could be done without it.* It was held to be unnecessary to prove the parts in *italics;* and per Abbot, L. C. J. Mich. 1826, the constant practice on the circuit is to rule that it is sufficient to prove part of the pretences. Where, however, the pretence as laid consists of two parts, which are jointly laid as the means of defrauding, one of which turns out on the evidence to be insufficient, the prisoner cannot be convicted. *R.* v. *Wickham*, 2 P. & D. 333; 10 Ad. & Ell. 34.

(*f*) *Coleman's Case*, 1 Leach, 303, n. (a). *Atkinson's Case*, East's P. C. 673.

(A) (To authorize conviction on an indictment for false pretences, it is not necessary to prove all the pretences laid in the indictment to be false, unless all are material to constitute the offence charged. *People* v. *Haynes*, 11 Wend. 557. See also *People* v. *Gates*, 13 Wend. 311.)

(B) (But where a person got possession of a promissory note, by pretending that he wished to look at it, and then carried it away, and refused to deliver it to the holder, it was held that this was merely a private fraud and not punishable criminally. *The People* v. *Miller*, 14 John. R. 371. See also note to *The People* v. *Babcock*, 7 John. R. 201.)

Ownership. An allegation that the prisoner obtained from *A.*, the servant of *B.*, three shillings of the monies of *B.*, by falsely pretending that nine shillings were due for the carriage of a parcel, whereas six shillings only were due, is not supported by proof that *A.* paid the three shillings out of his own money, having no money of *B.*'s in his hands at the time (*g*), for it would be merely optional in *B.* to reimburse *A.*; but it seems that if in such case *A.* had had three shillings of the money of *B.* in his possession, the evidence would support the allegation (*h*).

Where the prisoner was charged with obtaining money by false tokens, and it appeared that in fact he had obtained a bank-note, it was held that it
*457 might *(upon the evidence) be presumed that he had received the money at the Bank (*i*). The late statute specifies chattel money or valuable security, as the subject of the offence, and the allegations ought to correspond with the fact (*k*).

By means of the false pretence. 4thly. By means of the false pretence.—It is sufficient to show that the money was obtained immediately by the means and instrumentality of the false pretence, although a previous confidence subsisted which rendered that pretence effectual; as where an agent, employed by the prosecutor to pay wages to his servants every week, delivered in a false account of payments, by means of which he obtained a larger sum than was due (*l*) (A).

5thly. The intention to defraud. *See* tit. FORGERY.

It is no ground of acquittal that it appears on the trial that the obtaining amounted to larceny (*m*).

FALSE RETURN, *see* SHERIFF.

FEOFFMENT.

Effect of. IF the issue be *feoffavit vel non* (*n*), and a deed of feoffment and livery (*o*) be proved, the defendant cannot adduce evidence to prove that it was made by covin to defraud creditors, for it is a feoffment, and the covin ought to have been specially pleaded; but if the issue had been seised or not seised, the covin would have been evidence, for he remains seised as to creditors, notwithstanding the feoffment (*p*). Though a deed be proved, and possession for forty years can be proved, it is but evidence of a feoffment, and

(*g*) *Rex* v. *Douglas*, 1 Camp. 212, *cor.* Lord Ellenborough.
(*h*) *Ibid.*
(*i*) *Hale's Case*, 9 St. Tr. 94.
(*k*) 7 & 8 G. 4, c. 29, s. 53.
(*l*) *Witchell's Case*, East's P. C. 830.
(*m*) 7 & 8 G. 4, c. 29, s. 53.
(*n*) A feoffment might be by livery without deed. Gil. L. E. 85, and may be so pleaded. But if a man plead a feoffment, *per fait*, *quære* whether he can give a parol feoffment in evidence. *Ib.* and 2 Roll. Abr. 672. *Semble*, if a demise be pleaded by deed, evidence of a parol demise is not admissible. Gilb. L. Ev. 86. *Vide supra*, tit. CORPORATION.
(*o*) In making livery of seisin no particular form of words is necessary, nor is even the word seisin necessary, but it is a question for the jury, under the circumstances, whether the feoffor intended to give possession of the premises to the feoffee in order to confirm his title under the deed of feoffment. *Doe* v. *Stock*, 1 Gow, C. 178. And see Shep. Touch. 209. Where there was no other evidence of livery of seisin than the memorandum indorsed on the feoffment, it was held that the possession for less than twenty years was insufficient to found a presumption of it, and that the feoffment being produced out of the possession of the adverse party, did not dispense with the necessity of proving it, where the party producing it took no interest under it, and had never acknowledged it as a valid instrument, but the contrary. *Doe* v. *Marquis Cleveland*,[1] 9 B. & C. 864.
(*p*) B. N. P. 257; Hob. 72.

(A) (An indictment will not lie for obtaining money by false pretences, where the money is parted with as a charitable donation, although the pretences moving to the gift are false and fraudulent. *The People* v. *Clough*, 17 Wend. 351.)

[1]Eng. Com. Law Reps. xvii. 512.

cannot be pleaded as such (*q*). If the land be in lease, the assent or *ouster* of the tenant must be proved (*r*), unless the lessee, his wife, family and servants, be absent (*s*), and then it is sufficient although his cattle be on the land.

FINE (*t*).

Proof of. THE chirograph of a fine is evidence of it, because the chirographer is appointed by the law to give out copies of the agreements between the *parties that are lodged of record. But where the fine is to be proved with proclamations (*u*), as it must be, to bar a stranger, they must be proved by an examined copy of the roll, for the chirographer is not authorized to make out copies of the proclamations, and therefore his indorsement on the back of the fine is not evidence of them (*x*). *458

A fine does not operate until it has been executed (*y*).

Both parties and privies to a fine are absolutely barred by it (*z*); and so are *strangers*, who have at the time of levying the fine a present interest, unless they interpose their claim within five years after proclamations made (*a*), provided they do not labour under some legal impediment (*b*); such persons have five years allowed in which to prosecute their claims after such impediments are removed (*c*). Those whose rights accrue after the levying the fine and proclamations made, originating in some cause anterior to the fine, must prosecute their rights within five years after the time when such rights accrue (*d*). But as against one who has no seisin of the estate, even although he has a chattel interest in it, as a term for years (*e*), the levying a fine operates nothing, but may be defeated under the plea that *partes finis nihil habuerunt* (*f*). The payment of rent by

(*q*) 1 H. 8, 28 H. 8; Dyer, fol. 22, pl. 135, in *Core's Case*, and per Coke, C. J. in *Isaac* v. *Clarke*, 2 Bulstr. 306.

(*r*) Com. Dig. Feoffment, B. 7.

(*s*) *Ibid.*; and *supra*, Vol. I. Ind. tit. FINE.

(*t*) As to the operation of fine levied on a contingent estate by way of estoppel during the contingency, see *Doe* v. *Oliver*,[1] 10 B. & C. 186. By the stat. 3 & 4 W. 4, c. 74, s. 2, after the 31st of December 1833, no fine shall be levied or common recovery suffered.

(*u*) A fine without proclamations makes a discontinuance, but does not bar the estate-tail. Com. Dig. tit. Fine, G. 1; and see 27 Edw. 1; the stat. 4 Hen. 7, c. 24; 31 Eliz. 2; 2 And. 109.

(*x*) *Chettle* v. *Pound*, B. N. P. 229; *Allen's Case*, 13 Car. 1, Clayt. 51. *Hatch* v. *Bluck*,[2] 6 Taunt. 486.

(*y*) Pl. Comm. 357, b. It may be executed either by entry or by writ (West. Symb. 85. Com. Dig. Execution, A. 6); by writ of *habere facias seisinam* within the year, or *scire facias* afterwards. *Ibid.* and Com. Dig. Fine, E. 15.

(*z*) 2 Inst. 516; Com. Dig. Fine, I.

(*a*) See the stat. 4 Hen. 7, c. 24. A fine operates as a conveyance of an interest by way of estoppel, Watk. Prin. Conv. 252; and if the party levying the fine have no interest, none can pass. Parties and privies in blood *and* estate are estopped. Hob. 33; Watk. Prin. Conv. 255; *Grant's Case*, 10 Co. 50; *Johnson* v. *Bellamy*, 2 Leon. 36; 3 Co. 87. But they are not bound unless they be privies in estate as well as in blood. *Ib.* But although a fine works nothing, twenty years' wrongful possession after fine will bar an ejectment. *Doe* v. *Gregory*,[3] 2 Ad. & Ell. 14. As to the effect of a fine by tenant in tail to give a tortious fee, see *Doe* v. *Finch*,[4] 4 B. & Ad. 283.

(*b*) Coverture, infancy, imprisonment, insanity, and absence beyond sea.

(*c*) Stat. 4 Hen. 7, c. 24.

(*d*) 4 Hen. 7, c. 24. When once the five years have begun to run, they go on, notwithstanding any subsequent disability. *Doe* v. *Jones*, 4 T. R. 300. But if a person labour under several impediments, he shall have five years after the last impediment removed. 1 Lev. 215; Bl. Comm. 375, a. [Ballentine, Chap. III.]

(*e*) 5 Rep. 123; Hardr. 401.

(*f*) Hob. 334. Except as against parties or privies. See *Doe* d. *Cooper* v. *Runcorn*,[5] 5 B. & C. 696. But a freehold may be aequired by *disseisin*. Watk. Prin. Conv. 254. But if the feoffment be fraudulent, the fine may be reversed. *Fermor's Case*, 3 Co. 78; Cowp. 694; 1 Burr. 117.—Fine. A fine levied by a mortgagor in fee, who remains in possession after the day of payment, is a nullity, for he has no freehold. In order to constitute a title by disseisin there must be a wrongful entry. *Hall* v. *Doe* d. *Surteis*,[6] 5 B. & A. 687; and see *Doe* v. *Perkins*, 3 M. & S. 271; *Smartle* v. *Williams*, 1 Salk. 245; *Rowe* v. *Power*, 2 N. R. 1; 1 East, 575.

[1]Eng. Com. Law Reps. xxi. 50. [2]*Id.* i. 460. [3]*Id.* xxix. 14. [4]*Id.* xxiv. 56. [5]*Id.* xii. 359. [6]*Id.* vii. 232.

the tenant in possession to the conusor of the fine is *primâ facie* evidence of the seisin of the latter (*g*); but the mere receipt of rent by a stranger to the legal title is not sufficient (*h*). Proof that a writ of possession, after a recovery in ejectment, was executed on the evening of the 6th of November, the first day of term, by the entry of the officer on the land, and his claiming it for the cognizor, although the possession of the tenant who afterwards paid rent to the cognizor was not actually changed, was held to be evidence of a seisin to support a fine levied on the 8th of November, but relating to
*459 *the 6th (*i*); and it seems that the receipt of rent after a fine has been levied for a period antecedent to the fine, is *primâ facie* evidence of the cognizor's possession of the premises during the time for which rent was received (*k*).

FORCIBLE ENTRY.

One who has a right of possession cannot legally take it by force, and is liable to a criminal prosecution if he use violence and commit a breach of the public peace (*l*). But he may assert his right, and take possession if he can do it peaceably, without incurring any penalty; and being in possession, may retain it, and plead that it is his soil and freehold, or otherwise, according to his interest. And though the violent and forcible assertion of a right may subject the party to criminal animadversion, yet it does not render him liable to a civil suit for merely taking that which was his own. The taking possession with such a number of persons as is calculated to deter the rightful owner from sending them away and resuming possession, constitutes a forcible entry (*m*). A judge of assize may refuse to award restitution after a true bill found by the grand jury for a forcible entry and detainer, and the Court has not jurisdiction to interfere (*n*).

FOREIGN LAW.

Proof of. The existence of a foreign law or custom is to be proved as a matter of fact, by evidence to show what the law or custom is: and the Court will not presume that the law, even of Scotland, agrees with that of England upon any particular point (*o*); and it is clear, that the written law of a foreign country must be proved by documents properly authenticated, and not by *parol* (*p*) (a). And in one instance it has been held (*q*) that the unwritten

(*g*) *Doe* d. *Foster* v. *Williams*, Cowp. 621; 11 East, 495. (*h*) B. N. P. 104; *supra*, tit. Ejectment.
(*i*) *Doe* d. *Osborne* v. *Spencer*, 11 East, 495. (*k*) *Ibid.* per Ld. Ellenborough.
(*l*) See Lord Kenyon's observations in *Taylor* v. *Cole*, 3 T. R. 295.
(*m*) *Milner* v. *Maclean*,[1] 2 C. & P. 17. (*n*) *R.* v. *Harland*, 1 P. & D. 93.
(*o*) And therefore, where the plaintiff's cause of action in *assumpsit* arose in Scotland, Ld. Eldon held that the defendant was bound to prove that the defence of infancy was available by the law of Scotland. *Male* v. *Roberts*, 3 Esp. C. 163. And in general, if an action be brought on a contract, made in a country where the liability of the defendant differs from his liability in this country, it lies on the defendant to show it. *Brown* v. *Gracey*,[2] 1 D. & R. 41. If a defendant justify an arrest in a foreign country, *qu.* whether it be not incumbent on him to prove that it was justifiable according to the law of that country. *Mure* v. *Kay*, 4 Taunt. 43. See *Mostyn* v. *Fabrigas*, Cowp. 174
(*p*) *Clegg* v. *Levy*, 3 Camp. 166. As to impeach the validity of an agreement. *Ibid.* and *Millar* v. *Heinrick*, 4 Camp. 155. In order to prove the written law of a foreign country, it seems that an examined copy of the original law ought to be produced. In *Picton's Case*, 24 Howell's St. Tr. 494, Lord Ellenborough said, "in order to prove the written law of any nation, a copy of that law should be produced. If I were sitting at Guildhall, and proof of foreign regulations were necessary, I should require an authenticated copy of those regulations." On a question as to the law of Jewish marriages, Lord Stowell directed questions to be addressed to the tribunal of the Bethdin, and the answers were received and acted upon, in analogy to the practice of the Court of Chancery, where the law of a foreign country is received, not on oath, but on a reliance on the honour and integrity of the professors of that law; and further information was received on the depositions of persons conversant in that case. *Lindo* v. *Belisario*, 1 Haggard, 216. [*Talbot* v. *Seeman*, 1 Cranch, 38; *Church* v. *Hubbar*, 2 Cranch, 187.]
(*q*) In the case of *Bohtlinch* v. *Inglis*, 3 East, 380, evidence was admitted of one of the mercantile navi-

[a] *Packard* v. *Hill*, 2 Wendell, 411.

[1] Eng. Com. Law Reps. xii. 5. [2] *Id.* xvi. 426.

law of a foreign country must also be proved (*r*) (1). Before an instrument *made in a foreign country, which derives a legal effect and operation from the law of that country, can be admitted in evidence, the existence of the law itself must be proved by witnesses (*s*) (2). An instrument purporting to be a divorce under the seal of the Synagogue at Leghorn is not admissible to prove such divorce, unless the law of the country be previously established (*t*). *460

Although by the municipal laws of a foreign country, certain formal proceedings are required to enable parties to sue as partners, this will not prevent their suing as such in this country (*u*).

gation laws of Russia, and also of a documentary opinion of the Judges of the Custom-house court of St. Petersburgh, on the effect and operation of that law, signed by the presiding Judges of that Court; and a question on a special case was reserved for the opinion of the Court of K. B. upon the admissibility of the latter document; but the Court gave no opinion.

(*r*) *Boehtlinck* v. *Schneider*, 3 Esp. C. 58, per Ld. Kenyon, C. J.

(*s*) *Ganer* v. *Lady Lanesborough*, Peake's C. 17, *cor.* Ld. Kenyon. [See *Le Ray* v. *Crowninshield*, 2 Mason's R. 151.]

(*t*) *Ibid.*; and see *Mure* v. *Kay*, 4 Taunt. 43; *Burrows* v. *Jemino*, 2 Str. 733; *Fremoult* v. *Dedire*, 1 P. Wms. 429; *Feaubert* v. *Turst*, 1 Brown's P. C. 38. As to proof of an Irish stat. *vide* Vol. I. and Index, tit. STATUTE.

(*u*) *Shaw* v. *Harvey*,[1] 1 M. & M. 528. A plea of discharge in Scotland upon a *cessio bonorum* does not preclude an English creditor from afterwards suing his debtor in England upon the contract (made in England), although he had opposed such discharge in Scotland, as he might have appeared to object to the jurisdiction. If the plea had alleged that the plaintiff had or ought to have availed himself of the benefit of the Scotch law, by receiving a distributive share of the defendant's estate, it might have made a difference. *Phillips* v. *Allan*,[2] 8 B. & C. 477. See *Smith* v. *Buchanan*, 1 East, 6. Where a female domestic slave by birth accompanied her mistress to England and returned back voluntarily with her to A., the place of birth and servitude, held, that although not subject to control or coercion whilst in England, yet that on her return to such place of birth and servitude without manumission, the dominion and property of her master revived. *Slave Grace*, 2 Hagg. 94; and see *Sommersett's Case*, 22 How. St. Tr. 1. A foreign contract must be construed according to the law of the country where made, but the remedy must be according to law of England. *De la Lega* v. *Vianna*,[3] 1 B. & Ad. 284. As to the effect of a foreign bankruptcy in passing bankrupt's property in this country, see *Sill* v. *Worswick*, 1 H. B. 655. A plea of judgment recovered for the same cause of action in the Vice-Admiralty Court of Sierra Leone, not being a court of record, and the judgment being only evidence of the cause of action, and not shown to be binding and conclusive on the defendant, is not a bar to a count on the original ground of action, *Smith* v. *Nicholls*,[4] 5 Bing. N. C. 208; and 7 Dowl. P. C. 283.

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(1) [If foreign laws respecting trade be not positively shown to have been in writing as public edicts or statutes, they may be proved by parol testimony. *Livingston* v. *Maryland Insurance Co.* 6 Cranch, 274. {The statutes of another state, or their repeal, cannot be proved by parol evidence. *Raynham* v. *Canton*, 3 Pick. Rep. 293.}]

(2) [The public laws of a foreign nation, on a subject of common concern to all nations, promulgated in the United States, by the national executive, may be read in evidence in the courts of the U. States, without further authentication or proof. *Talbot* v. *Seeman*, 1 Cranch, 38.

It is said by Washington, J. that the written or statute laws of foreign countries must be proved by the laws themselves, *if they can be procured;* if not, inferior evidence of them may be received: Unwritten laws or usages may be proved by parol evidence, and when proved, it is for the court to construe them, and decide upon their effect. *Consequa* v. *Willings & al.* 1 Peters' Rep. 229. See also *Seton* v. *Delaware Ins. Co.* Circuit Court, April 1808, and *Robinson* v. *Clifford*, Circuit Court, April 1807. Wharton's Digest, 229. {Reported, 2 Wash. C. C. Rep. page 175, and page 1. In *Connecticut* it has been decided with respect to this subject, that the several States of the Union are to be considered in relation to each other as foreign nations. *Brackett* v. *Norton*, 4 Conn. Rep. 517.[a]}

In *Kenny* v. *Clarkson*, 1 Johns. 385, it was held that foreign statutes cannot be proved by parol; but that the common law of a foreign country may be shown by the testimony of intelligent witnesses of that country. See also *Woodbridge* v. *Austin*, 2 Tyler's Rep. 367. *Frith* v. *Sprague*, 14 Mass. Rep. 455. In *Smith* v. *Elder*, 3 Johns. 105, the confession of the defendant that he had carried goods contraband by the laws of Great Britain, was held to be sufficient evidence of the law of that country, in an action for putting prohibited goods on board a vessel bound thither, in consequence of which the vessel was seized, and the owner (the plaintiff) put to expense in procuring her release.[b]]

[a] Acc. *Hempstead* v. *Reed*, 6 Conn. Rep. 480.

[b] *Denison* v. *Hyde*, 6 Conn. Rep. 508. *Middlebury College* v. *Cheney*, 1 Vermont Rep. 336.

[1] Eng. Com. Law Reps. xxii. 374. [2] *Id.* xv. 269. [3] *Id.* xx. 387. [4] *Id.* xxxv. 88.

FORGERY (*x*).

Proof of forgery.

It is necessary to prove :—1st, A making within the county;—2ndly, That it was a false making in law and in fact;—3dly, Of the particular instrument set forth;—4thly, With intent to defraud, &c.

A making within the county.

It is essential in the first place to *connect* the prisoner with the instrument alleged to be forged, as by evidence of his having uttered or published it, or of its being found in his possession.

It is seldom that direct evidence can be given of the fact of forgery. In the case of negotiable securities the evidence is usually applied to the uttering rather than to the forging, although both are usually charged. Where the instrument is not of a negotiable nature, as in the case of a bond or will, after proof that the instrument has been forged by some one, a strong presumption necessarily arises against the party in whose favour the forgery
*461 is *made, or who has the possession of it, and seeks to derive benefit from it. Evidence that the instrument so proved to have been forged is in the hand-writing of the prisoner, must, if unexplained, necessarily be strong evidence of guilt (*y*).

The prosecutor cannot give secondary evidence of the forged deed, unless he has given the prisoner notice to produce it, and notice at the assizes is insufficient; but if the prisoner has declared it to be destroyed, no notice is necessary (*z*).

Comparison of hands is not evidence to prove the forgery, but, as will be seen, persons of skill may be admitted to give their opinion, whether the particular hand-writing on the forged instrument is natural and genuine, or feigned and imitated; because, as it is said, a judgment may be formed upon such points by habit and experience (*a*). So where the question is, whether a seal has been forged, engravers of seals may testify as to the difference between a genuine impression and the one alleged to be false (*b*).

A making within the county.*

Proof must also be given that the offence was committed within the county. The bare fact of finding the forged instrument in the county where the party who forged it was at the time, is not *primâ facie* evidence that he forged it in that county (A). Brown being an accomplice of Parkes, who had forged a note, uttered it in Middlesex, in the absence of Parkes,

(*x*) The characteristic of the crime of forgery is the false making of some written or other instrument for the purpose of gaining credit by deception, 5th Rep. of Crim. L. Commiss. 65. With respect to the false making, the offence extends to every instance where the instrument is, under the circumstances, so constructed that it may induce a party to give credit to it as genuine and authentic in a point where it is false and deceptive; and in this respect a forged instrument differs from one which is merely false, in stating facts which are false, *Ib.*

The offence may be defined to consist in the false and fraudulent making of an instrument with intent to prejudice any public or private right, *ib.* And see 4 Comm. 247. *R.* v. *Coogan*, Leach's C. C. L. 448. *R.* v. *Taylor*, 2 East, P. C. c. 19, s. 47. *Parkes & Brown's Case*, 2 Leach's C. C. L. 275. *Jones & Palmer's Case*, 1 Leach's C. C. L. 366. 3 Jus. 169.

(*y*) See *R.* v. *Parkes & Brown*, East's P. C. 964. (*z*) *R.* v. *Haworth*,[1] 4 C. & P. 255.

(*a*) See tit. HAND-WRITING. *Cary* v. *Pitt*, Peake's Ev. Appen. lxxxv; *R.* v. *Cator*, 4 Esp. C. 117.

(*b*) By Lord Mansfield, C. J. in *Foulkes* v. *Chad*, cited Russel, 1509; and Phill. on Ev. 227.

* By the stat. 1 W. 4, c. 66, the *venue* may be laid in county where the prisoner is apprehended, or where he is in custody.

(A) (Upon trial of an indictment for forging bank notes, the fact, if proved of the forged notes mentioned in the indictment, and other forged notes of like kind, and the plates, implements, and materials for forging such notes being found in the prisoner's possession, is *prima facie* circumstantial evidence that the prisoner was the forger, and such forged notes being found in the possession of the prisoner in the county of B. is likewise *prima facie* evidence proper to be given to the jury of the fact that he committed the forgery there. *Spencer* v. *Commonwealth*, 2 Leigh, 751.)

[1] Eng. Com. Law Reps. xix. 370.

who was apprehended in the same county, with forty similar notes in his possession, dated Ringhton, Salop, and a majority of the Judges held, that there was no evidence of the commission of the forgery in Middlesex (*c*). In *Crocker's* case, the prisoner being indicted in the county of Wilts, it appeared that whilst he was in London his lodgings in Wiltshire were searched in the presence of his wife, and in a pocket-book (in which his name had been written by himself) the note in question was found, bearing date more than two months before, at which time he was in another county; the prisoner was convicted, but afterwards received a pardon, on the ground (as has been stated) that a majority of the Judges were of opinion that there was not sufficient evidence of the commission of the offence within the county (*d*) (1.)

2dly. Such a false making as in point of law amounts to a forgery, consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right. It is falsely made if it be falsely made in any material part (*e*). Any fraudulent alteration of a written instrument in any material part (*f*), whether it be by addition, diminution, erasure, transposition, or any combination of these acts, or by any other device or means whatsoever (*g*), seem to be sufficient in law to constitute a false making of the instrument so altered (*h*) (A). The false making may consist in *the alteration of a genuine instrument, by expunging an indorsement (*i*); *462 inserting a legacy in a will, afterwards executed by another, who is ignorant of the alteration (*k*); applying a genuine signature and seal to a false writing, such as a release (*l*); inserting the name of a person in an indictment against whom the bill was not found (*m*): or fabricating a document, which is not a copy of a genuine instrument, in order to offer it in evidence as a true copy (*n*); the altering a deed in a material part (*o*): altering the name of a banker at whose house a provincial bank-note is made payable (*p*); or altering the date of a bill of exchange, in order to accelerate the time of payment (*q*); for in each case a new and false instrument is created, and as much mischief, indeed frequently more, is likely to arise than would have arisen if the whole instrument had been fabricated; in such cases it is a general rule, that the alteration of part is a forgery of the whole (*r*). So the offence may consist in the making a false instrument in a man's own name, as if, after executing a genuine deed of feoffment, he make a subsequent one, for purposes of fraud, of a date prior to the former

False making in law.

(*c*) *R.* v. *Parkes & Brown*, 2 East, P. C. 992. (*d*) Russel, 1500.
(*e*) 2 East, P. C. 855; 3 Ins. 171.
(*f*) See 5th Rep. of the Crim. L. Com. 70; and Teague's C. 2 East, P. C. 979; *R.* v. *Elsworth*, *ib.* 986; *R.* v. *Treble*, 2 Taunt. 328; 2 East's P. C. 583; *R.* v. *Beckett*, Russ. & Ry. C. C. 251. Per Lord Ellenborough, 5 Esp. C. 100; *R.* v. *Marsh*, 3 Mod. 56.
(*g*) *R.* v. *Bigg*, 3 P. Wms. 419.
(*h*) Supra note (*x*), and Criminal Pleadings, tit. FORGERY.
(*i*) *R.* v. *Bigg*, 3 P. Wms. 419. (*k*) 1 Haw. c. 70, s. 2, 6; Moor, 760; Noy, 101.
(*l*) 2 Ins. 171; 1 Haw. c. 70, s. 2. (*m*) *R.* v. *Marsh*, 3 Mod. 66; 1 Haw. c. 70, s. 2.
(*n*) *Upfold* v. *Leit*, 5 Esp. C. 100, by Lord Ellenborough.
(*o*) Moor, 619; 2 East's P. C. 986. (*p*) *R.* v. *Treble*, 2 Taunt. 328; 2 Leach, 1040.
(*q*) East's P. C. 853. *Master* v. *Miller*, 4 T. R. 320.
(*r*) East's P. C. 855; Crim. Pl. 478; 1 Haw. c. 70, s. 2, 4, 5; 3 Inst. 169, 170. *R.* v. *Dawson*, East's P. C. 885, 978.

(1) [In the case of the *United States* v. *Britton*, 2 Mason's Rep. 464, where a check was drawn in Philadelphia on Boston in favour of the prisoner, who was then in Philadelphia, and who produced the check altered in Boston—there being no evidence that it was altered elsewhere—it was held that it was *prima facie* evidence that it was altered in Massachusetts, that being the first state where it was known to be altered.[a]]

(A) (*Commonwealth* v. *Ladd*, 15 Mass. R. 524.)

[a] But see *Commonwealth* v. *Barmenter*, 5 Pick. Rep. 279.

(*s*); or if a person indorse a name as the indorsement of another person of the same name (*t*) with that of the payee of the note.

If any person, being deceived as to the contents of any written instrument, be, by means of such deception, fraudulently induced to sign or otherwise execute such instrument, it is in law a false making by the party so fraudulently inducing him to sign or execute such instrument (*u*). If several persons make distinct parts of or otherwise jointly contribute to the making of a false instrument, it is a false making by each (*x*).

But a false *making* is essential. The mere false representation by the prisoner that he is the person whose name is on the note, is no forgery, for there is no false making (*y*); but it has been held, it seems, that the making a note by the prisoner in his *own name*, and dating it as of a place with which he has no connection, with intent afterwards to pass it off as the note of another, is a forgery (*z*).

*463 *It seems to be perfectly settled, that the making a false instrument in the name of another, whether the prisoner does or does not assume to be that other, being a real person, is a forgery (*a*). And also, that the making an instrument in the name of a non-existing person is forgery (*b*), although the name be assumed by the party at the time for the purpose of fraud, and to avoid detection, and the credit be given to the person and not to the instrument (*c*), and although no additional credit be obtained by the false name (*d*).

(*s*) 1 Haw. c. 70, s. 2; 3 Inst. 169; Fost. 117; 1 Hale, 683; Pult. 47, b.; 27 Hen. III.; Moor, 655.

(*t*) *Mead* v. *Young*, 4 T. R. 28; *R.* v. *Brown*, East's P. C. 963.

(*u*) 1 Haw. P. C. c. 70, s. 2; 2 East's P. C. 856; Moor, 760; Noy, 101.

(*x*) *R.* v. *Kirkwood and others*, 1 Moody's C. C. 304; *R.* v. *Dade*, ib. 307.

(*y*) *Hevey's Case*, East's P. C. 856; Leach, 268. The indictment in such case should be for obtaining money under false pretences, if money has been obtained.

(*z*) See the case of *Parkes & Brown*, East's P. C. 963. According to the finding of the jury, the case stood thus:—Parkes signed a promissory note in the name of *Thomas Brown*, with the consent of the other prisoner, whose name was Thomas Brown, dated *Ringhton*, Salop, and Brown afterwards uttered it, with a false representation that the note was his brother's; there was no evidence that the prisoner Brown had any residence in or connection with Ringhton. The Judges were of opinion that the prisoners were properly convicted, on the ground that it had not been signed by *the Thomas Brown*, whose name it purported to be; for the note imported that he resided at Ringhton, and was a correspondent of Down & Co. (the bankers where the money was payable according to the terms of the note). In this case, the date "Ringhton, Salop," on the note, and the place of payment, were particularly specified by Grose J., who delivered the opinion of the Judges, as constituting a false making. The false representation by Brown, that it was the note of his brother, was also mentioned as a circumstance of importance; but as this was no part of the instrument itself, being a mere false statement made subsequent to the fabrication of the note, it could be no ingredient in the false making, although it was evidence of the fraudulent intention on uttering the note, and also of the intention of the parties when the note was made. In the abstract, it amounts to this, that a man who signs his own name to a note, dated at a place where he does not reside, and payable at a banker's where he has no money, is a forgery. It is remarkable, that in the above case the jury did not expressly find an intention on the part of the prisoners, at the time of the making, to utter it as the note of a third person. If the note contained a mere promise to pay, (without place of date or payment,) signed by the prisoner, and was afterwards uttered by him in the name of another, the case would be more doubtful. See also *R.* v. *Webb*,[1] 3 B. & B. 228.

(*a*) *Dunn's Case*, East's P. C. 966; where the prisoner assumed the character of Mary Wallace, a real person, and signed a note in the name of the latter, in the presence of the prosecutor. *Hadfield's Case*, Russel, 1425. Ev. Col. St. vol. 6, p. 580; where the prisoner pretended to be the Hon. Augustus Hope, and drew the bill in question in his name. And see *R.* v. *Lewis*, Fost. 116; *R.* v. *Wilks*, 2 East, P. C. 958; *R.* v. *Ballard*, 1 Leach, 83; *R.* v. *Lockett*, ib. 94; *R.* v. *Abraham*, 2 East's P. C. 940.

(*b*) *Lewis's Case*, Fost. 166; where the prisoner forged a power of attorney in the name of Elizabeth Tingle (a non-existing person), administratrix of her father, R. Tingle, a seaman. *Bolland's Case*, East's P. C. 958; Leach, 83, where the prisoner indorsed the name of Banks (a non-existing person) on a genuine bill. *Lockett's Case*, East's P. C. 490; where the prisoner made an order on a banker in the name of a fictitious person, purporting to be made by one who kept cash there.

(*c*) *Sheppard's Case*, East's P. C. 967; 1 Leach, 226; where the prisoner obtained goods at a silversmith's in the name of Turner, and gave a draft in that name; and where the prosecutor swore that he gave credit to the prisoner and not to the draft.

(*d*) *Toft's Case*, East's P. C. 959. The bill, with a general indorsement upon it, had been stolen, and on

[1] Eng. Com. Law Reps. vi. 423.

In *Aicles's Case*, where the prisoner drew a bill in the name of John Mason, No. 4, Argyle-street, Oxford-road, and it appeared that the prisoner had assumed the name (the residence being correct) a month before, considerable doubt seems to have been entertained by the Judges on the question, whether this amounted to forgery, although the Jury found that the name had been assumed for the purpose of that very fraud (*e*). This finding seems, however, to decide the point; if the lodging had been taken, and the name assumed but one hour before the making of the instrument, there would have been no room for doubt, and the lapse of a month can make no difference, for it is still one act of contrivance for the purpose of fraud. The continued residence and use of the name might indeed be *evidence* to a jury that the prisoner was, for legal purposes, the person he assumed to be in making the instrument, but its *effect* is defeated by their finding that this was for the purpose of committing the fraud; in other words, it is a finding that he was not the person in whose name the note was drawn.

Where the prisoner has signed a bill of exchange, or other instrument, in *a name which he has assumed, and which he alleges to be his own name, it *464
is a question of fact for the consideration of the Jury whether (although the name be not strictly his own) he has habitually used it, and become known by it, or whether he has assumed it for the purpose of committing the particular fraud. If he has acquired the name which he has used, by habit and reputation, so that he is known and recognized by it, he is not guilty of a false making in the use of it; but if he has adopted and assumed it for the very purpose of committing the fraud, it is but part of the contrivance itself, and therefore can afford no defence to the charge of forgery; it can make no difference in such case, whether the name was assumed immediately before and preparatory to the perpetration of the crime, or some length of time before (*f*).

It is essential to prove the falsity of the instrument, either by showing that the writing is not that of the person by whom it purports to have been made (A), or by showing that no such person exists; in the former instance, it is necessary, in the first place, to identify the person whose hand-writing

False making in fact.

offering it to be discounted at a banker's, being required to indorse it, the prisoner, Edward Taft, wrote upon it the name of John Williams. *Taylor's Case*, East's P. C. 960; where the prisoner having unduly obtained a bill of exchange, obtained payment from the drawee, and indorsed a receipt on the bill in the name of William Wilson (a fictitious person), held to be forgery; Buller, J. *dubitante*.

(*e*) East's P. C. 969, 970; 6 Ev. St. 580; Russel, 1436.

(*f*) Where the prisoner, Samuel Whiley, drew a bill in the name of Samuel *Milward*, to pay for goods ordered by him of the prosecutor at Bath, seven or eight days before, in the same name, and it appeared that on the day before he ordered the goods he put a brass plate with the name of Milward on his door at Bath (where he had lived for about a month previous to the transaction), the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know. The learned Judge left it to the jury to say whether the prisoner had not assumed the name of *Milward* in the purchase of the goods and delivery of the draft, in order to defraud the prosecutor, and they found in the affirmative; and the Judges afterwards held, that fraud having been found by the jury, the conviction was right. (*Whiley's Case*, Cor. Thompson, B. Somersetshire Spr. Ass. 1805; and afterwards by the Judges, Russel, 1439). So where the prisoner Francis made an order on a banker for the payment of money in the name of *Cooke*, it was proved that the prisoner's real name was Francis, although he had occasionally assumed other names; it was left to the jury whether, in the particular instance, the prisoner had assumed the name for the purpose of fraud, and the jury finding the fact, the Judges held that the conviction was right. (*R.* v. *Francis*, Russel, 1440); four of the Judges were absent.

(A) (So where certain coal consigned to P. of New York, was claimed by another of the same name who resided there, but was not the true consignee, and he knowing this obtained an advance of money on endorsing the permit for the delivery of the coal, it was held to be forgery, and not the merely obtaining money under false pretences. *People* v. *Peacock*, 6 Cow. 72. But if a merchant write his name on blank pieces of paper, and intrust them with his clerk for the purpose of having notes written upon them, and one by false pretences obtain them of the clerk, and make upon them notes other than those for which they were intended, the fraudulent use of them is not forgery. *Putnam* v. *Sullivan*, 4 Mass. R. 45.)

is afterwards to be negatived, with the person whose instrument the prisoner meant to imitate.

In *Sponsonby's Case*, (*g*), the prosecution for forging an indorsement by William Pearce, the payee of a genuine bill, failed, because Davis the drawer was not called to prove that the William Pearce, whose signature was negatived, was the real payee of the bill.

If the description on the face of the bill apply to several persons, the signatures of all must be negatived.

It may be proved by circumstances, that the prisoner meant to simulate the writing of a particular person.

Where the prisoner, being himself the payee of the note uttered, stated that *W. H.* of *B.* was the maker, it was held that it was sufficient for the prosecutor to show that it was not the note of that person, and that it lay on the prisoner to prove it to be the genuine note of another *W. H.*, if it were so (*h*).

*465 *Where the bill purported to have been drawn by Andrew Holme, payable to John Sowerby, and the prisoner, on negotiating the bill, stated that John Sowerby, the indorsee, was the son of John Sowerby, of Liverpool, a cheese-monger, the father was examined as a witness, and proved that there was no other person but his son in Liverpool to whom the description given by the prisoner applied, and also proved that the indorsement had not been written by his son. It was objected, that Andrew Holme, the drawer, ought to have been called in order to prove who the payee really was, but it was held to be a sufficient answer, that the prisoner had acknowledged that the signature of Andrew Holme (his uncle) was a forgery (*i*).

On an indictment for personating the proprietor of stock, and forging his signature, the latter was admitted to prove facts tending to show that he was the party personated (*k*).

Proof of descriptive averments.

3. Proof must be given of those averments which are necessarily introduced upon the record, to show that the forged instrument was of the description of those the forgery of which is prohibited by the statute; as that it was a bond, will, or receipt. Thus where the indictment is for forging a receipt for money on a navy-bill, evidence is requisite to show, as averred, that the signature of the party upon the bill operates as a receipt (*l*).

(*g*) Leach, 374, *cor.* Adair, Serj. Some evidence of identity was certainly requisite, but it seems to be very doubtful whether it would, as laid down in the above case, be essential to call the drawer as the best witness of the fact. It was there held that the fact, that the William Pearce produced as a witness, was intimate with the drawer, and had received a letter from him, signifying that such a bill had been remitted to him, and directing the application, was not sufficient evidence of identity.

(*h*) *Hampton's Case*, 1 Ry. & M. C. C. 255. The giving a forged note to an agent or accomplice, that he may pass it, is a disposing thereof to him within the stat. *Giles's Case*, 1 Ry. & M. C. C. 166. Upon a charge of uttering forged notes, in order to show the guilty knowledge, evidence of uttering (subsequently to the act under inquiry) of bills precisely similar as to the names of drawers and acceptors, which were also forgeries, is admissible. *R.* v. *Smith*,[1] 4 C. & P. 411.

(*i*) *Downes's Case*, East's P. C. 977. On an indictment for uttering a forged acceptance, purporting to be the acceptance of W. & Co. No. 3, Birchin-lane, it is not sufficient to prove that it is not the acceptance of W. & Co. No. 20, Birchin-lane. *R.* v. *Watts*,[2] 3 B. & B. 197.

(*k*) *Parr's Case*, East's P. C. 997.

(*l*) *R.* v. *Hunter*, Leach, 711. It is sufficient, if from its terms, the instrument operate as a receipt as averred, although the word receipt be not used, *Boardman's Case*, 2 Lewin's C. 181. Where a paper was in reality a certificate of work done, but which, if genuine, it was proved by parol evidence would have been an authority for payment of the sum mentioned in it; it was held to be sufficient to sustain an allegation in the indictment for forging a warrant for payment of money; and that it is not necessary to show by averments that the instrument is within the meaning of the statute. *Reg* v. *Rogers*, 9 C. & P. 41. An indictment for uttering a forged order for goods, the letter purporting only to be a request, and the person whose name

[1]Eng. Com. Law Reps. xix. 448. [2]*Id.* vii. 408.

In *Wall's Case* (*m*), on an indictment for forging a will of lands, where the will set forth purported to have been attested by two witnesses only, the Judges held that the prisoner had been improperly convicted for want of *evidence at the trial to show what estate the supposed testator had in *466
the lands so devised, since in the absence of such proof it was to be presumed that the estate was freehold.

Where the indictment alleged that a bill of exchange had been signed by H. Hutchinson, and it appeared that the signature was a forgery, it was held that the variance was fatal (*n*).

It seems to be a general rule, that if the forged instrument appear on the face of it to be valid as the instrument which it is alleged to be, an indictment lies for forging it, although from some collateral fact the instrument, if genuine, would not have been available; but that it is otherwise where the defect appears on the face of the instrument itself (*o*). Thus an indictment is maintainable for forging a conveyance, although the estate may be described by a wrong name (*p*); for forging a will, although the supposed testator be still living (*q*), or be described in the forged will by a wrong christian name (*r*); or for forging a bill of exchange, or other instrument, on paper not stamped (*s*), although no stamp could legally be impressed upon the instrument after it was made; consequently such an instrument is admissible in evidence on an indictment for forgery, although unstamped (*t*). And in general no evidence of collateral facts is available in defence for the purpose of showing that the instrument could not, if genuine, have been legally enforced.

Purport variance.

The purport of a writing is that which appears on the face of it, and if the writing when produced does not appear to be that which according to the allegation it purports to be, the variance will be fatal (*u*); as, where the indictment stated that the bill purported to be a bank-note, and the instrument produced in evidence was in the form of a promissory note, "I promise to pay, &c. for Self and Company of my bank in England" (*x*) (A).

was forged having no authority to order, was held to be wrong, as he might have been indicted for uttering a forged request. *Reg* v. *Newton*, 2 Moody, 59. The prisoner was charged with uttering a forged bill; it appeared that the bill was not addressed to a drawee by name, but at a house of business; and having an acceptance forged on it, it was held to be properly described as a bill of exchange. *Reg* v. *Hawkes*, 2 Moody, 60. Where a forged letter containing the request to let the prisoner have goods, added also a promise to answer for the amount; it was held to be not less a forged request within the Act. *Reg* v. *White*, 9 C. & P. 282. A paper simply stating the goods, and signed in the name of a customer, the prosecutor being in the habit of delivering goods on such papers, was held to amount to a request for the delivery of goods within the statute. *Reg* v. *Pulbrook*, 9 C. & P. 37.

(*m*) East's P. C. 953. *Tamen qu.*; for how could it make any difference, whether the supposed testator had or had not lands upon which the will, if genuine, could operate? *Qu.* what were the averments in the indictment? Where the prisoner, having obtained an order for payment, signed in the names of the chairman and one guardian, added the name of another; held, that by uttering the instrument, he put forth as true whatever was stated on it, and that its appearing from the minutes that another person was chairman on the day of the date was immaterial. *Reg* v. *Pike*, 2 Moody, 70. The forgery of a power of attorney for any pension due or supposed to be so, is within the 7 Geo. 4, c. 16, s. 38, although it may be that no such pension exists to which such document professes to relate. *Reg* v. *Pringle*, 2 Moody, 127.

(*n*) *Carter's Case*, East's P. C. 985.

(*o*) Forging an acceptance of an incomplete instrument, as where at the time no drawer's name was inserted, is not a forgery of an acceptance of a *bill of exchange* within 1 Will. 4, c. 66, s. 64. *R.* v. *Butterwick*, 2 Mood. & R. 196.

(*p*) *Japhet Crook's Case*, Str. 901. For other instances, see Crim. Pleadings, 110, 2d edit.

(*q*) *R.* v. *Murphy*, 10 St. Tr. 183. *R.* v. *Sterling*, Leach, 117. *Coogan's Case*, 2 Leach, 503.

(*r*) *Coogan's Case*, East's P. C. 948.

(*s*) *R.* v. *Hawkeswood*, Leach, 295; East's P. C. 955. *R.* v. *Morton*, Ibid. *R.* v. *Reculist*, Ibid. 956. *R.* v. *Davis*, Ibid.

(*t*) *Ibid.*

(*u*) See East's P. C. 883; Doug. 302. *R.* v. *Reading*, Leach, 672.

(*x*) *R.* v. *Jones*, *cor.* Lord Mansfield, Doug. 302; 2 East's P. C. 882.

(A) (In an indictment for forgery, though there be a variance of a letter in any word between the paper alleged to be forged and the indictment, the paper will be received in evidence if the variance does not make

If the instrument given in evidence correspond with the description in the indictment, but is defectively executed in any respect, it is a question for the jury whether it is a counterfeit of the kind of instrument the forgery of which is charged; and if the resemblance be sufficient to impose upon persons of ordinary observation, although persons of experience could not have been deceived, it will be sufficient to support the allegation of forging the particular description of instrument, or a paper writing purporting to be that instrument; as where, on an indictment for forging a bank-note, it appeared that the word pounds was omitted in the body of the bill (*y*), and there was no water mark on the paper; so where the notes were so ill executed that the difference between the false and genuine notes was very
*467 *apparent in several particulars, some persons having in fact been deceived by them (*z*).

An allegation that the whole of an instrument was forged, is proved by evidence of an alteration of a genuine instrument for the purposes of fraud (*a*).

Intent. 4thly. The *intention* to defraud must be proved as averred (*b*) (A). Such an intention is usually evidenced principally by the act itself, which, from its nature, in general leaves no room for doubt upon the point. The inference is frequently confirmed by the conduct and behaviour of a guilty party, in the artifices and falsehoods which he employs for the purpose of effecting his object, or of avoiding detection. The subsequent uttering or publication of the forged instrument is admissible and strong evidence to prove the original design in forging the instrument; and whether the making or uttering of a forged instrument be done with intent to injure a particular person as alleged, is matter of evidence to the jury (*c*).

A party is guilty of uttering a forged bill within the statute, where he utters it in payment of a debt and knowing that the names of the parties on the bill are fictitious, although he intend at the time to take up the bill, the party to whom he utters it not knowing that the names on the bill are of merely fictitious persons (*d*).

Where the intent as laid was to defraud *A.*, *B.*, &c. the stewards of the feast of the Sons of the Clergy, and it appeared that the individuals specified were trustees of a charitable fund, and that the money which had been obtained by means of the forgery was trust money, it was held to be sufficient, since the money was theirs as against all the world but subscribers (*e*).

(*y*) *R.* v. *Elliott*, 2 East's P. C. 951; 2 N. R. 93. By the stat. 2 & 3 Will. 4, c. 123, s. 3, it is sufficient to describe the instrument as in an indictment for stealing the same. *See* 11 Geo. 4, & 1 Will 4, c. 66, s. 10.

(*z*) *Hoost's Case*, *cor.* Le Blanc, J., 2 East's P. C. 950.

(*a*) *Supra*; and *Dawson's Case*, East's P. C. 978. 1 Stra. 19; Crim. Pl. 91, 92. *Teague's Case*, East's P. C. 172. See further as to variance, tit. VARIANCE.—PERJURY; and Crim. Pleadings, 2d edit. 101, 253. [The *State* v. *Waters*, 2 Const. R. 669.]

(*b*) East's P. C. 854, 988; 1 Leach, 215.

(*c*) *Barrow's Case*, East's P. C. 989. 1 Leach, 77. *Elsworth's Case*, East's P. C. 989.

(*d*) *R.* v. *Hill*, 2 Moody's C. C. 30. (*e*) *R.* v. *Jones & Palmer*, East's P. C. 991. 1 Leach, 366.

another word or one differing in sense and grammar. If it is doubtful the meaning will be left to the jury. *United States* v. *Hinman*, 1 Baldwin's C. C. R. 292.)

[An indictment for forging a note of a bank incorporated by the name of "The President and Directors of the Bank of South Carolina," is not supported by the production of a note of a bank incorporated by the name of "The Bank of South Carolina." *The State* v. *Waters*, 2 Const. Rep. 669. See *Commonwealth* v. *Boynton*, 3 Mass. Rep. 77. See also *United States* v. *Cantril*, 4 Cranch, 167.]

(A) (Passing a counterfeit note in the name of a fictitious person, an assumed name, or on a bank which never existed, is within the law. It is not necessary that the note if genuine would be valid, if on its face it purports to be good; the want of validity must appear on its face. *United States* v. *Mitchell*, 1 Baldwin, C. C. R. 367. The scienter may be proved by the fact of similar forged orders found in the possession of the defendant; or of an accomplice in passing them. *U. S.* v. *Hinman*, 1 Baldwin, C. C. R. 292.)

If a banker having authority to pay money to *A.*, *B.* and *C.*, and to them only, pay it to *A.* and to two strangers who personate *B.* and *C.*, the instrument is properly alleged to have been made with intent to defraud those bankers, for they remain liable for the amount (*f*).

It is sufficient to show that concealment was the object of the forgery (*g*); and the assumption of a name which the party writes as his own, is evidence of an intention to evade responsibility under a feigned name, and so to defraud (*h*).

If the intent to defraud a corporation be alleged, an intent must be proved to defraud them in their corporate capacity; and if an intent to defraud several in their individual capacities be alleged, and it should appear that the real intention was to defraud them in their corporate character, it seems that the variance would be fatal (*i*).

Principals and accessories, &c.

Where a wife, in pursuance of directions given by her husband, utters a forged instrument in his absence, they may be tried together, and the wife may be convicted as a principal in the felony, and the husband as an accessory *before the fact (*k*). Where the witness, in consequence of a communication with the husband, went to his house, and there saw the wife, where the communication between the husband and the witness was mentioned, and the wife sold to the witness several forged notes and delivered them to him, and after delivery, but before change had been received by the witness out of the money given to the wife, the husband put his head into the room and said "Get on," but did not otherwise interfere, it was held that the wife might properly be convicted; for although the law, out of tenderness to the wife, when a felony (*l*) is committed in the presence of the husband, raises a *primâ facie* presumption in her favour of coercion by the husband, yet it is necessary that the husband should be actually present and taking part in the transaction (*m*).

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Proof of uttering with a guilty knowledge. (A).

Proof that the prisoner exhibited a forged instrument as a true and genuine instrument, is evidence that he pronounced or published it (*n*). With respect to the proofs on this subject, see tit. Coin (*o*).

(*f*) *Dixon's Case*, 2 Lewin's C. 178.

(*g*) *R.* v. *Aickles*, East's P. C. 968. *Shepherd's Case*, East's P. C. 967. But where the immediate effect of the act is to defraud, the jury ought to find the intention. *Shepherd's Case*, Russ. & Ry. C. C. L. 169.

(*h*) Ibid.

(*i*) See *R.* v. *Jones & Palmer*.

(*k*) *R.* v. *Morris*, Leach, 1096.

(*l*) But the rule does not extend to cases of murder.

(*m*) 1 Hale, 46. Kel. 37. 2 East's P. C. 559. *Hughes's Case*, cor. Thompson, B. Lancaster Lent Ass. 1813, MS.

(*n*) East's P. C. 972. 3 Ins. 172. The uttering a forged order, under a false representation, is evidence of the *scienter*. *R.* v. *Shepherd*, Leach, C. C. L. 265. Evidence of a delivery of a forged bank-note by *A.* to *B.* in order that *B.* may put it off, is a disposing and putting away by *A.* within the statute 15 G. 2, c. 13. *R.* v. *Palmer*, 1 N. R. 96. Where the prisoner, on quitting the office of assistiant overseer, delivered over to his successor, amongst other vouchers, a paper in the usual form, "£. for the high constable," signed *J. H.*, which had been altered to a larger sum, it was held to amount to an uttering a forged receipt with intent to defraud the high constable. *Reg.* v. *Boardman*, 2 Mo. & R. 147.

(*o*) *Supra*, tit. Coin. See also *R.* v. *Ball*, 1 Camp. 324. Russ. & Ry. C. C. L. 132. The prisoner uttered a forged bank note on the 17th of June, and evidence was admitted that on the 20th of March preceding he had uttered a 10*l.* note of the *same* manufacture, and that there had been paid into the bank of England various forged notes, dated between the preceding months of December and March, all of them of the same manufacture, and having different endorsements upon them of the hand-writing of the prisoner. It was also proved, that when apprehended, he had in his possession paper and implements fit for making notes of

(A) Passing a paper is putting it off in payment or exchange; uttering it is a declaration that it is good, with an intention to pass or an offer to pass it. *United States* v. *Mitchell*, 1 Baldwin, C. C. R. 317. Uttering a fictitious bank bill, not purporting to be countersigned by a cashier of the bank by which the note was supposed to be issued, is not a crime within the statute of 1800, c. 64. *Commonwealth* v. *Boynton*, 2 Mass. R. 77. Nor is the possession of fictitious bills, purporting to be bills of a bank not in existence, with intent to pass them as genuine bills, an offence within that statute. *Commonwealth* v. *Morse*, 2 *Id.* 138. But uttering such fictitious bank bills with intent to injure and deceive, is a fraud at common law, punishable by indictment. *Commonwealth* v. *Boynton*. *Supra*.)

Defence. On an indictment for forging a will, it is no defence to show that probate of the will has been granted by the Ecclesiastical Court (*p*).

Competency. Formerly, upon a conviction for forgery, the forged instrument was condemned, and ordered to be destroyed. Hence a party who would, if the instrument had been genuine, have had an interest in its destruction, either because he would have been liable upon it, or because it would have barred his claim against another, was regarded as an incompetent witness, since, at all events, the proof against him was rendered much more difficult by a *469 *conviction. The objection to competency survived the practice on which it was founded, and hence the rejection of witnesses on this ground has been considered to be an anomaly (*q*), for it was certainly irreconcilable with the general principles now established on the subject of interest (*r*). It was said, that where the prisoner, if the instrument were genuine, might sue the witness upon it, the latter had a direct interest in the conviction, because it was not to be presumed that the Crown would, after conviction, attempt to establish a claim upon that instrument against the witness (*s*); and that although the instrument were made for the benefit, not of the prisoner but of a third person, and although the conviction would not be evidence against that person being in *inter alios*, yet that an impediment would be thrown in the way of his recovery, since the Court would impound the forged instrument; and the party convicted could no longer be a witness (*t*).

The general rule therefore was, that a party who had an interest in setting aside the instrument, supposing it to be genuine, was an incompetent witness for the Crown, on a prosecution for forgery (*u*).

Thus it was held in *Treble's Case*, that the supposed maker of a note, purporting to be made payable on demand, at his own house, or at his banker's in London, was competent to prove that he had not made it payable at the banker's where it purported to be payable (*x*); yet here the evidence seems to have tended to the very fact of forgery itself (A).

the same kind with those produced. All the judges were of opinion that the evidence was admissible to prove the prisoner's intention. Where the prisoner was charged with having feloniously uttered a 5*l*. bank of England note, on the 27th of November, and evidence was given of his having uttered a forged 2*l*. note of the bank of England on the 4th of July preceding, and that he had also uttered a provincial note of the Leicester bank about six weeks before the uttering in question, and that he had uttered a 5*l*. bank of England note about the end of November, which was returned to him as bad; it was held that the conviction was improper, no evidence having been given, as to two of the notes, that they had been actually forged. And some of the Judges were of opinion, that even in case evidence had been given that the second and third notes were forged, yet that, being notes of a different description and denomination, the evidence as to uttering them ought not to have been received. *R.* v. *Millard*, 1 Russ. & Ry. C. C. L. 245. On an indictment for uttering a forged bill of exchange, other forged bills on the same house, found on the prisoner at the time of his apprehension, are evidence against him. *R.* v. *Houghton*, Russ. & Ry. 130. *R.* v. *Wylie*, 1 N. R. 92. *R.* v. *Roberts*, 1 Camp. 339.

(*p*) *R.* v. *Buttery & Macnamara*, cor. Garrow, B., O. B. 1817; and afterwards by the Judges.

(*q*) See Ld. Ellenborough's observations, *R.* v. *Boston*, 4 East, 572. And see 2 East, 993.

(*r*) See tit. INTEREST. (*s*) Co. Lit. 352. 2 Ins. 39.

(*t*) *R.* v. *Whiting*, 1 Salk. 283. 1 Lord Raym. 396. 2 Haw. c. 46, 424. East's P. C. 994; but see *R.* v. *Bray*, R. T. Hardw. 358. *Smith* v. *Prager*, 7 T. R. 63.

(*u*) *Russell's Case*, Leach, 8. *Reeve's Case*, Ibid. 812. *Caffey's Case*, East's P. C. 995. [See 2 Evans' Pothier, 315.] *R.* v. *Rhodes*, 2 Str. 728. *Thornton's Case*, 2 Leach, 634. See also *Crocker's Case*, 2 N. R. 87; 2 Leach, 987. *R.* v. *Bunting*, East's P. C. 996. *R.* v. *Rhodes*, Leach, 31. But see B. N. P. 284. An executor is a bare trustee claiming no interest under the will.

(*x*) *Treble's Case*, 2 Taunt. 328; 2 Leach, 1040.

(A) (On an indictment for forging a check on a bank, in the name of *B.* which had been passed to *C.* and having been paid by the bank, which afterwards got possession of the money and retained it, *B.* having been released by the bank, was held a competent witness to prove the forgery. *The People* v. *Howell*, 4 John. R. 296. Per Kent, Ch. J. "the rule in almost all criminal cases, except in the case of a forged instrument is, that the witness is to be received, if he be not interested in the event of the suit, so that the verdict could be given in evidence in the action in which he was a party." *Ib. Respublica* v. *Keating*, 1 Dall. 110. *United States* v. *Johns*, 4 Dall. 412. *Commonwealth* v. *Snell*, 3 Mass. R. 82. *Com-*

So upon an indictment for personating the proprietor of stock, and forging his signature, the latter was admitted to prove the amount of the stock which he had at the Bank (although not to prove the false signature), for the purpose of showing the intention to defraud him, as alleged in the indictment (*y*). On an indictment for forging a promissory note which bore an indorsement by the prisoner, of the receipt of a year's interest, it was held that the supposed maker was not competent to negative the fact of payment, because it tended to prove the forgery; but all the Judges agreed that such a witness was competent to prove all the facts perfectly collateral (*z*). The objection to competency in such cases no longer rests upon any principle, although the practice has become too inveterate to be wholly rejected; yet it is obvious that it ought to be strictly restrained within its ancient limits; and upon this ground, perhaps, the distinction between evidence of the very fact of forging, and collateral facts, may have proceeded.

The objection to competency ceased where the witness had no interest in the destruction of the instrument. Thus, where *A.* drew a bill on *B.* payable at the banking house of *C.*, *B.*'s acceptance having been forged, but *C.* having given him credit to the amount, although he had paid the bill; *B.* *was held to be competent to prove the forgery (*a*). So where the party whose receipt has been forged, had recovered the amount from the prisoner (*b*). So the supposed testator might prove the forgery of his will (*c*). So a witness might be rendered competent by a release (*d*) (a), as from the holder to the drawer, there being no other name on the note. *470

So one who signed an instrument as the mere agent of another, as a cashier at the Bank, who gives security for the faithful discharge of his duty, was held to be competent to prove the forgery of his name, for he is not responsible on the instrument, and it is not to be presumed that he acted criminally and fraudulently in breach of his duty (*e*). Of an agent.

And now by the stat. 9 Geo. 4, c. 32, s. 3, on prosecutions for forging or uttering any deed, &c., or for being accessary before or after the fact to any such offence, if the same be a felony, or for aiding, abetting, or counselling the commission of such offence, if the same be a misdemeanor, no person shall be deemed to be an incompetent witness by reason of any interest which such person may have or be supposed to have in respect of such deed, &c.

Another question arises, whether, when the person whose writing is forged *may* be called, he *must* be called; it seems now to be settled that he need not, although the point has been much discussed, and even decided differently (*f*). But upon indictments for the forging of bank-notes, it has been held that the supposed signature of the bank clerk may be disproved by any person acquainted with his hand-writing, without calling him (*g*). Agent need not be called.

(*y*) *R.* v. *Parr*, East's P. C. 997.

(*z*) *Crocker's Case*, 2 N. R. 87; 2 Leach, 987. It is said that Lord Ellenborough, C. J., Macdonald, C. B., and Lawrence and Le Blanc, Js., were of opinion that the witness was competent on all points, except the fact of forgery.

(*a*) *Usher's Case*, East's P. C. 999. *Testick's Case*, Ibid. 1000; 12 Mod. 338.

(*b*) *R.* v. *Wells*, B. N. P. 289. *Dean's Case*, 12 Vin. Ab. 23.

(*c*) *Coogan's Case*, 2 Leach, 503. *R.* v. *Sterling*, East's P. C. 1003. *R.* v. *Murphy*.

(*d*) *R.* v. *Akehurst*, Leach, 178. *Dr. Dodd's Case*.

(*e*) *R.* v. *Abraham Newland*, East's P. C. 1001. (*f*) *Captain Smith's Case*, East's P. C. 1000.

(*g*) *Hughes's Case*, *cor.* Le Blanc, East's P. C. 1000. *M'Guire's Case*, Ibid.

monwealth v. *Waite*, 5 Mass. R. 261. *Territory* v. *Barran*, 1 Martin, 208. *Furber* v. *Hilliard*, 2 N. Hamp. R. 481. *Noble* v. *The People*, 1 Breese, 29. *State* v. *Coulter*, 1 Hay, 3. *Contra*, *State* v. *Brunson*, 1 Root, 307. *State* v. *A. W.* 1 Tyler, 260. If an instrument supposed to be forged, is destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence. *United States* v. *Britton*, 2 Mason's C.C. R. 464.)

a *Rex* v. *Pigeon*, Eng. Com. Law Reps. xi. 328. *Rex* v. *Bayley*, *Id.* 442.

The objection that secondary evidence is substituted for the best does not apply in this case, since there is not such a distinction between one man's knowledge of his own hand-writing, and the knowledge of another on the same subject, as constitutes (*h*) the former evidence of a superior degree to the latter.

This rule, as to the incompetency of a witness, did not extend to civil proceedings, for there the result did not occasion the destruction of the instrument, as in prosecutions for forgery (*i*). In a late case, upon the trial of an action against an agent for negligence in transacting the purchase of an annuity, the supposed surety was admitted to prove that the deed which purported to have been executed by him was a forgery (*k*).

FORMER CONVICTION.

By the stat. 6 & 7 W. 4, c. 111, which recites that doubts had been entertained whether the practice under the stat. 7 & 8 Geo. 4, c. 28, s. 11, as to charging the jury at the same time to inquire of the principal offence and previous conviction, was consistent with a fair and impartial inquiry, it is enacted that on the trial of a prisoner for any subsequent felony, it shall
*471 *not be lawful to charge the jury to inquire concerning such previous conviction, until they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and that the sending of such statement to the jury, as part of the indictment, shall be deferred until after such finding. Provided nevertheless, that if, upon the trial of any person for any such subsequent felony, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the former indictment and conviction of such person for the previous felony before such (any) verdict shall have been returned; and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning such subsequent felony (*l*).

FRAUD (A).

Effect of fraud. Fraud is an extrinsic collateral act which vitiates all transactions, even the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal (*m*).

As to civil suits. In civil suits all strangers may falsify for covin, either fines, or real or feigned recoveries, and even a recovery by a just title, if collusion was prac-

(*h*) Vide Vol. I. tit. Best Evidence.

(*i*) But yet the Court, it seems, have the power of impounding forged deeds proved to be forged in civil cases.

(*k*) *Hunter* v. *King*, *cor.* Holroyd, J. Guildhall Sitt. after Mich. Term, 1 Geo. 4, and afterwards by the Court of K. B.;[1] 4 B. & A. 209.

(*l*) It appears that this amendment in the criminal law, evidently so essential a one to the fair administration of justice, was occasioned by the remarks of Parke, B. in summing up to the jury in *Jefferson's Case*, 2 Lewin's C. 187. In some of the earlier cases under the stat. 7 & 8 G. 4, c. 18, s. 11, the reading and proof of the charge of the previous felony were deferred till after the verdict on the principal charge.

(*m*) A fraudulent representation will avoid a bond founded on that representation; *secus*, of a representation merely erroneous. *Nash* v. *Palmer*, 5 M. & S. 374. But strong evidence is necessary in order to avoid an instrument, (*e. g.*) a lease, after long lapse of time. *Chandos* v. *Brownlow*, 2 Ridg. P. C. 317.

(A) (Fraud may be committed by the artful and purposed concealments of facts exclusively within the knowledge of one party and known by him to be material, and where the other party had not equal means of information. *Prentiss* v. *Russ*, 4 Shepley, 30. In general where a party is charged with a specific fraud in a civil action, his character is not in issue. The evidence of fraud cannot be repelled, therefore, by proving his general good character for integrity. *Fowler* v. *The Ætna Fire Insurance Company*, 6 Cow. 673.)

[1] Eng. Com. Law Reps. vi. 403.

tised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release. collateral warranty, or other advantageous pleas (*n*).

In criminal proceedings, if an offender be convicted of felony on confession, or be outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser whose conveyance would be affected as it stands; and even after a conviction by verdict he may traverse the time (*o*).

In the proceedings of the Ecclesiastical Court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution against the first; and the fact being admitted by demurrer, the Court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked, and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the Court gave judgment against it.

In the more modern cases, the question seems to have been, whether the parties should be admitted to prove collusion, not seeming to doubt but that strangers might (*p*).

*So that collusion, being a matter extrinsic of the case, may be imputed by a stranger, and tried by a jury, and determined in the courts of temporal jurisdiction. *472

And as fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the Ecclesiastical Courts, which, from the nature of their proceedings, are at least as much exposed, and which have been in fact as much exposed, to be practised upon for sinister purposes, as the Courts of Westminster-hall (*q*).

Where fraud depends upon the intention of a party, the existence of that intention is usually a matter of fact, which must be found by a jury (*r*), who are to decide on questions of *mala fides*. In some instances it results by inference of law, from the particular circumstances of the case, as found by the jury (*s*) (A).

(*n*) See tit. FINE; and *supra*, Vol. I.

(*o*) Vol. I. tit. JUDGMENTS.

(*p*) Vide *supra*, Vol. I. tit. JUDGMENTS. A party cannot rescind his own act on the ground of fraud. *Jones* v. *Yates*,[1] 9 B. & C. 512. Nor avail himself of his own wrong. *Williams* v. *Gardiner*, 11 Moore, 142. Where a party had been elected into a corporate office, and a rule *nisi* for a *mandamus* had been obtained, calling upon him to take upon himself the office; held, that he could not allege, as a ground of excuse, his own disability in not having received the sacrament within a year before his election. *R.* v. *Walker*, 6 M. & S. 277. Where the defendant had proposed a person to be accepted as tenant in his stead, who proved to be insolvent, and whom the defendant knew had compounded with his creditors; held to be such a fraud that he still remained liable for the rent. *Bruce* v. *Ruler*, 2 M. & Ry. 3. A party to the suit in the Ecclesiastical Court cannot be admitted to show that the sentence has been fraudulently obtained. See *Prudham* v. *Phillips*, Ambl. 763. So one who has conveyed an estate in order to confer a colourable qualification to kill game cannot be admitted to allege his own fraud to defeat the conveyance. *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367.[a] See *Hawe* v. *Leader*, Cro. J. 270; *Doe* v. *Banks*,[2] 4 B. & A. 401, *supra*.

(*q*) The above is part of the judgment of L. C. J. De Grey, in the *Duchess of Kingston's Case*, St. Tr., in which the Judges came to the following resolutions:—First, that a sentence in a spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy; but, secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

(*r*) See tit. BANKRUPT.—COIN.—DECEIT.—FRAUDULENT CONVEYANCE.—FORGERY.—INTENTION. As to fraud on the insolvent law, see[3] 4 B. & Ad. 555.

(*s*) See tit. BANKRUPTCY, 154; and see the observations of Buller, J., *Estwick* v. *Caillaud*, 5 T. R. 420.

(A) (A secret conveyance of her property, by a woman immediately before her marriage, is a fraud upon

(a) A party to a fraud is competent to prove it. *Lawyer* v. *Seltons*, 1 Rawle, 141.

[1]Eng. Com. Law Reps. xvii. 436. [2]*Id.* vi. 462. [3]*Id.* xxiv. 115.

A secret trust to evade the statute of mortmain may be proved by extrinsic evidence (*t*).

Fraud is never to be presumed where not expressly found (*u*) (A).

Proof that a deed was prepared in the office of a respectable solicitor is not evidence to show the fairness of the transaction, where fraud is alleged.

FRAUDS, STATUTE OF; 29 Car. II. c. 3.

The provisions of this celebrated statute seem to operate principally as rules of evidence, calculated for the exclusion of perjury, by requiring, in particular cases, some more satisfactory and convincing evidence than mere oral testimony affords; they dispense with no evidence of consideration which was requisite previous to the statute (*x*); they give no efficacy to written contracts which they did not possess before.

It would be inconsistent with the object of the present treatise to enter *473 *into a discussion of the different clauses of this statute; little more is proposed than to refer briefly to the decisions upon the subject.

Sec. 1. Creation of estates, &c.

By sec. 1. "It is enacted, that all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out, of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of *leases or estates at will only*."

Sec. 2. Exception as to leases.

Sec. 2. "Except all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised."

It has been held, that the purchase of a standing crop of mowing grass is not within the first section (*y*), and that it does not apply to a parol agreement for an easement for seven years in the lands of another, such as a right of way or privilege of stacking coals (*z*).

But in the late case of *Hewlins* v. *Shippam* (*a*), it was held that a free-

(*t*) See the authorities, 2 Powell on Devises, by Jarman, 29.

(*u*) Hawkins, P. C. b. 2, c. 49, s. 11.

(*x*) *Rann* v. *Hughes*, 7 T. R. 350; 4 Bro. P. C. 27. *Barrel* v. *Trussel*, 4 Taunt. 121. Neither do they make it necessary to allege in a declaration that the promise is evidenced as the statute requires; but in a plea it is otherwise, if the agreement pleaded can have no effect unless it be in writing. Com. Dig. *Action on the Case*, F. 3. *Case* v. *Barber*, Ray. 450. [S. C. T. John. 158.] The defence, no contract in writing, need not, it seems, be specially pleaded. *Buttermere* v. *Hayes*, 5 M. & W. 456; 7 Dowl. 489. *Jones* v. *Flint*, 2 P. & D. 594. See *Eastwood* v. *Kenyon*, 3 P. & D. 376.

(*y*) *Crosby* v. *Wadsworth*, 6 East, 610. But it is within the 4th section.

(*z*) *Wood* v. *Lake*, Say. 3. *Webb* v. *Paternoster*, Palm. 71. [See[1] 7 Taunt. 384, S. C.; 2 Marsh, 560.] Note, in the former case the party, in addition to the liberty of stacking hay, was also to have the use of the close, which distinguishes it from the latter case; and see note (*a*).

(*a*)[2] 5 B. & C. 221. And although a freehold right was claimed in that case, the reasons given by the Court, and the authorities cited, seem to extend equally to licenses for a mere definite term. See *Monk* v. *Baxter*, Cro. J. 574; *Rumsey* v. *Rawsun*, 1 Vent. 18; *Hoskins* v. *Robins*, 2 Vent. 123; *Harrison* v. *Parker*, 6 East, 754; *Fentiman* v. *Smith*, 4 East, 107. And the Court observed, that the objection that the right lay in grant, and therefore could not pass without deed, was not taken in the cases of *Webb* v. *Paternoster*, Palm. 71; *Wood* v. *Lake*, Sayer, 3, or *Taylor* v. *Waters*,[1] 7 Taunt. 374. It is indeed to be observed that the first of these cases was decided before the Statute of Frauds was passed, and that the interest in the

the marital rights of the husband, and will be set aside. *Linker* v. *Smith*, 4 Wash. C. C. R. 224. *Waller* v. *Armistead's Ex'rs*, 2 Leigh. 11.)

(A) (Fraud it is said will never be presumed, though it may be proved by circumstances. Therefore where an act does not necessarily import fraud, where it has more likely been done through a good than bad motive, fraud should never be presumed. *Gregg* v. *The Lessee of Sayre and Wife*, 8 Peters, 244.)

[1]Eng. Com. Law Reps. ii. 140. [2]*Id.* xi. 207.

hold easement in the land of another cannot be created without deed; and that although a parol demise might be an excuse for a trespass, until it was countermanded, yet that a right and title to such an easement, as to have passage for water, could not be created without deed.

"*Shall have the force and effect of leases or estates at will only.*"—Notwithstanding these words, where a tenant has held for two or three years under a parol demise for twenty-one years, he is to be considered a tenant from year to year (*b*), the year's tenancy commencing on the same day of the *year with the parol lease. (1). Where there was a parol agreement for a *474
lease for seven years, the tenant to enter at Lady-day, and quit at Candlemas, it was held that the landlord could not put an end to the tenancy except at Candlemas, for the tenants in such cases are considered to be tenants from year to year; and although by the Statute of Frauds, the agreement be void as to the duration of the lease, it governs the terms on which the tenancy subsists in other respects (*c*). A parol lease for three years, to commence *in futuro*, is not good (*d*) (A).

Where a party enters under a mere agreement for a future lease, he is a tenant at will only; if he pay a yearly rent he becomes a tenant from year to year, such tenancy being determinable on the execution of the lease according to the agreement. And though no rent be paid, the relation of landlord and tenant subsists, the party having entered with a view to a lease, and not with a view to a purchase.

Sec. 3. enacts, "That no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be *assigned, granted* or *surrendered*, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law."

Sec. 3. Assignments, surrenders of existing estates, and interests.

case of *Wood* v. *Lake* amounted to a lease, inasmuch as the party was to have the *sole* use of that part of the land on which he was to stack his coals. In the case of *Winter* v. *Brockwell*, 8 East, 308, the defendant put up the sky-light on his own land, and all that the court decided was, that as the plaintiff had consented to the obstruction, he could not afterwards revoke it without reimbursing the defendant's expenses. In *Fentiman* v. *Smith*, 4 East, 107, where the plaintiff claimed to have passage for water by a tunnel over the plaintiff's land, Lord Ellenborough held distinctly that "the title to have the water flowing in the tunnel could not pass by parol license without deed." A parol license to use an easement must at all events be express. *Bridges* v. *Blanchard*,[1] 1 Ad. & Ell. 536. *Qu.* whether an easement to admit light without interruption from the owner of land adjoining the house of another may be without deed. *Ib.* And if so, whether it is countermandable. *Ib.* The taking tolls of a market without deed does not confer a settlement. *R.* v. *Chipping Norton*, 5 East, 239. Per Ld. Ellenborough, no interest passes by the parol demise.

(*b*) *Clayton* v. *Blakey*, 8 T. R. 3. But note, that he had held for several years, and been treated as a yearly tenant. See Watkins's Principles of Conveyancing, 4th ed. 6, and his observations on the marginal note in the case of *Clayton* v. *Blakey*, 8 T. R. 3. See *Richardson* v. *Gifford*,[2] 1 Ad. & Ell. 52; *infra*, tit. WASTE. *Semble*, that under an agreement for a tenancy exceeding three years, void for want of signature, the tenant is for the first year tenant at will, and afterwards from year to year subject to stipulations.

(*c*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471. See Watkins's Elements of Conveyancing, 4; Hargrave's Notes to Co. Litt. 55; 4 Taunt. 128; where it was held that a letter without restriction as to time, creates a tenancy at will. See also Evans's Stat. vol. 1, p. 234.

(*d*) *Rawlins* v. *Turner*, 1 Ld. Raym. 736.

(1) [In Massachusetts, tenants under parol lease for a year are mere tenants at will, by force of st. 1783, c. 37. *Rising & al.* v. *Stannard*, 17 Mass. Rep. 285. *Ellis* v. *Paige & al.* 1 Pick. 45.]

(A) (In Pennsylvania various things take a parol contract for the conveyance of lands out of the Statute of Frauds. Thus a parol conveyance of land will be taken out of the Statute of Frauds by a particular equity arising from the payment of purchase money, or what is much the same, expenditure in improvements made with the money of the donee, of which it would be a fraud in the donor to deprive him: but such an equity cannot be pretended by a volunteer. A parol gift to a son which has induced no such expenditure, is as much within the statute as if it were to a stranger. Per Rogers, J. in *Eckert* v. *Mace*, 3 Penn. R. 364, in note. *S. P. Stewart* v. *Stewart*, 3 Watts, 253.)

[1]Eng. Com. Law Reps. xxviii. 143. [2]*Id.* xxviii. 35.

Assignments.

The statute has been held to extend to a parol *assignment* of a lease from year to year (*e*), (1) and to surrenders of tenancies from year to year (*f*); and therefore a mere parol agreement between a landlord and tenant to determine the tenancy in the middle of a quarter is not binding (*g*).

The mere cancelling of a lease is not a sufficient surrender within this clause (*h*), but a surrender of a lease by deed may be effected in writing without deed, as where a mortgagee wrote upon the mortgage deed a receipt for principal and interest, adding, "I do release and discharge the within premises from the term of 500 years." (*i*).

Surrender by operation of law.

Or by act and operation of law.—The taking a new lease by parol is by operation of law a surrender of the old one (*k*), although it be by deed (*l*), provided it be a good one, and pass an interest according to the contract and intention of the parties, for otherwise the acceptance of it is no implied surrender of the old one (*m*). Where *A.* by parol, let a house to *B.* who

*475 underlet it to *C.*, and then *A.*, with *B.*'s assent, accepted *C.* as his tenant and received rent from him, it was held that the substitution involved a surrender; for it was made with the assent of *B.*, which could not be without a surrender of the former lease (*n*). So where it was agreed between the landlord and tenant, that another tenant should be substituted for him, which was done, it was held that the first tenancy was thereby determined (*o*). Where the landlord having had a dispute with his tenant, told him that he might quit when he pleased, and the tenant accordingly quitted in the middle of the quarter, it was held that the landlord was entitled to recover in an action for use and occupation for the whole quarter (*p*). But

(*e*) *Botting* v. *Martin*, 1 Camp. 317, *cor.* Sir A. M'Donald, C. B.

(*f*) 2 Camp. 103; 1 Starkie's C. 379.[1] And see *Magennis* v. *M'Cullough*, Gilb. Eq. C. 236.

(*g*) *Thomson* v. *Wilson*,[1] 2 Starkie's C. 379. *Mollett* v. *Brayne*, 2 Camp. C. 103; *Johnstone* v. *Huddlestone*,[2] 4 B. & C. 922; where an occupation took place under a new lease, under the mistaken idea that it was a good and valid lease.

(*h*) *Roe* v. *The Archbishop of York*, 6 East, 86. (*i*) *Farmer* v. *Rogers*, 2 Wilson, 26.

(*k*) See 1 Will. Saund. 236, b. The principle on which the taking a new lease amounts to a surrender of the old one, is this, that without it the intention of the parties cannot be effectuated. See Shepherd's Touchstone, tit. Surrender. If a sole tenant assent to occupy and does occupy jointly with another, that puts an end to the former tenancy. *Hamerton* v. *Stead*,[3] 3 B. & C. 478; and see *Mellow* v. *May*, Moore, 636.

(*l*) Ibid.; and see *Thomas* v. *Cooke*,[4] 2 Starkie's C. 410.

(*m*) *Wilson* v. *Sewell*, 4 Burr. 1980; *Davison* v. *Stanley*, Ibid. 2210; 1 Will. Saund. 236, b. and the cases there cited.

(*n*) *Thomas* v. *Cooke*,[4] 2 Starkie's C. 408, *cor.* Abbott. J. and afterwards by the Court of K. B. 2 B. & A. 119. So where the tenant took lodgings for a year, paid for one quarter, and for the interval between that time and the time of re-letting by the lessor; for the letting to another dispenses with the necessity for a surrender. *Walls* v. *Atcheson*,[5] 3 Bing. 462. In the case of *Lloyd* v. *Crispie*, cited ib. by Parke, J., it was held, that where the lessor had consented to the introduction of another occupier he had no claim on the lessee, who was under covenant not to assign without license.

(*o*) *Stone* v. *Whiting*,[6] 2 Starkie's C. 235, *cor.* Holroyd, J. And see *Whitehead* v. *Clifton*,[7] 5 Taunt. 518; *Hurding* v. *Crathorn*, 1 Esp. C. 57; *infra*, Use and Occupation.

(*p*) *Mollett* v. *Brayne*, 2 Camp. 103, *cor.* Ld. Ellenborough, and afterwards by the court of K. B. A lessee grants a lease for eleven years, covenanting to pay for tillages, &c. at the end of the term; a quarrel taking place during the term, the tenant says that he will go; the landlord says, "You may;" the tenant replies, "I shall expect to be paid for what I have laid out;" the landlord says nothing; the tenant quits: held that the landlord was entitled to a verdict, on a plea of set-off of the rent, to an action for work and labour; the tenancy not having, under the circumstances, been determined. *Whitaker* v. *Barker*, York Sum. Ass. 1832, *cor.* Parke, J. Held also, that the tenant, deserting the premises, was not entitled to the compensation for

(1) [If a person affix his signature and seal to the back of a lease, it is not an assignment of the lease. *Jackson* v. *Titus*, 2 Johns. 430. And if it be agreed between him and the person to whom it is intended to be assigned, that a third person should write an assignment over the signature and seal, which he does, and delivers the deed to the assignee, the assignment is a nullity. Ibid. But an assignment of a deed by writing not under a seal is good. *Holliday* v. *Marshall*, 7 Johns. 211. A parol agreement by a joint lessee of a salt-well for seven years, to transfer his interest to the other lessee, is void by the statute. *M'Dowell* v. *Delap*, 2 Marsh. 33.]

[1]Eng. Com. Law Reps. iii. 391. [2]*Id.* x. 471. [3]*Id.* x. 159. [4]*Id.* iii. 405. [5]*Id.* xiii. 52. [6]*Id.* iii. 331. [7]*Id.* i. 173.

where the landlord accepted from his tenant the key of the demised house in the middle of the quarter, it was held that the former could not recover in respect of any subsequent rent (*q*). The mere fact of a lease being found in a cancelled state, in the possession of the lessor, does not show a surrender in law, or conclusively show a determination of the lease (*r*).

Sec. 4. Executory promises and agreements.

Sec. 4.—No *action* shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate (*s*), or whereby to charge the defendant upon any special promise to answer for the *debt*, *default*, or *miscarriage* of another person, or to charge any person upon any agreement made upon consideration of *marriage*, or *upon any contract or *sale of lands*, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of *one year* from the making thereof, unless the *agreement* upon which such action shall be brought, or some *memorandum* or *note thereof*, shall be in *writing*, and *signed* by the party to be *charged* therewith, or some other person thereunto by him lawfully authorized."

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Money paid on an executed consideration.

No action shall be brought.—The statute does not apply where an action is brought to recover money paid on an executed consideration for the use of the plaintiff, although by the operation of the statute the money could not have been recovered from the party who paid it. *A.* being the tenant of *B.* and restrained from assigning without the consent of *B.*, agreed to pay to *B.* 40*l.* out of 100*l.* to be paid to him by another tenant for the goodwill, if *B.*'s consent to the substitution could be obtained. The new tenant was cognizant of the agreement, took possession, and paid the money to *A.* who promised to pay the 40*l.* to *B.*; it was held that *B.* might recover the 40*l.* from *A.* as money had and received to the use of *B.* (*t*), for the consideration was *past*, and the statute out of the question, but it would have been otherwise if the new tenant had not paid the money, and the action had been brought against him (*u*)

Admission.

If the party admit that he has made an agreement which is binding under the statute, the admission renders the proofs prescribed by the statute unnecessary; as where he has paid money into court upon a count charging him with an agreement which could not have been proved, except through the medium of written evidence (*x*).

But if the party merely admit the fact that an agreement was made, but do not admit that an agreement was made in a manner which would be

tillages, &c. stipulated for in the lease. Held also, that if the tenant had been entitled to a compensation on quitting, he might deduct it from the claim for rent set off, though not mentioned in his particulars. But note that Parke, J. intimated doubts whether such reduction was in strictness allowable.

(*q*) *Whitehead* v. *Clifford*,[1] 5 Taunt. 518.

(*r*) A lease had been duly executed, and once in the lessee's possession, and the lease began to operate, but was afterwards found in the lessor's possession in a cancelled state; held, that as there was no surrender by operation of law, nor any ground for presuming that there had been any note in writing within the statute of frauds, the lease was to be considered as still in operation. *Doe* v. *Thomas*,[2] 9 B. & C. 299. The plaintiff in trespass for seizing goods was the assignee of an under-lease granted by *G.*, one of the defendants, and no rent had been paid; the original lease to *G.* had also come by assignment to the other defendant, who had obtained a new lease from the lessors, and cancelled the old one; held that upon the general issue pleaded under the 11 G. 2, c. 19, s. 19, the defendant might justify as for a distress for the rent due in *G.*'s right, without showing any express recognition of the act by him, and that the notice having been given in the name of the other defendant, did not preclude the defendants from availing themselves of the title under *G.* in their defence to the action. Upon the construction of the stat. of frauds, the cancellation of the original lease was not of itself a surrender of such lease. *Wootley* v. *Gregory*, 2 Y. & J. 536.

(*s*) See *Rann* v. *Hughes*, 7 T. R. 350. A mere promise in writing without consideration will not bind the executor.

(*t*) *Griffith* v. *Young*, 12 East, 513.

(*u*) Per Le Blanc, J., 12 East, 513.

(*x*) *Middleton* v. *Brewer*, Peake's C. 15.

[1]Eng. Com. Law Reps. i. 173. [2]*Id.* xvii. 380.

binding under the statute, the admission will not dispense with the statutory proof. If a party, in his answer in Chancery, admit the agreement generally, without insisting upon the statute, the Court will hold it to be good (*y*); but if the defendant merely admit an agreement in fact, and insist that it is void under the statute, the Court will not enforce it (*z*). So if a parol agreement be stated in a court of law, a demurrer would admit the agreement, and yet still advantage might be taken of the statute (*a*).

Debt of another.

Or to charge the defendant upon any special promise to answer for the *debt*, *default* (*b*), or *miscarriage* of any other person.

Where, therefore, there is no debt or default of another, the case is not within the statute. Where one brings an action against another for an assault, and the defendant, in consideration that the plaintiff will withdraw the record, undertakes to pay a sum of money and costs, he is liable (*c*), for

*477 *this is an *original promise*, and it does not appear that there has been any default or miscarriage of any other person. So where the plaintiff, at the request of the defendant, advanced a sum of money to pay workmen in the garden of the defendant's infant grandson, the case was held to be without the statute, the money having been advanced on the defendant's credit, for the infant was not liable (*d*); so where the defendant buys goods at an auction without naming his principal (*e*); so where the plaintiff, at the request of the defendant, discharged his debtor out of custody, charged in execution on a *ca. sa.* (*f*).

Question to whom the credit was given.

It is a question for the jury, whether the credit, before the debt was incurred, was given to the defendant, or to another as the principal, taking into their consideration the amount of this debt, the situation of the parties, and all the other circumstances of the case (*g*); if upon notice given by the defendant to the plaintiff to produce his books, it appear that the credit was not originally given to the defendant, but to another, it is strong but not conclusive (*h*) evidence against the plaintiff (*i*), that the defendant was but a surety. Where the vendor refuses to deliver goods on the credit of *A. B.* and the defendant undertakes absolutely to pay the amount, the promise need not be in writing, for this is in effect a sale to the defendant as principal, not to *A. B.*, to whom no credit was given.

(*y*) Prec. in Chanc. 208, 374, 353; 2 H. Bl. 66. (*z*) *Rondeau* v. *Wyatt*, 2 H. Bl. 66.

(*a*) 2 H. B. 68. By Ld. Loughborough, in delivering the judgment of the Court. This is to be understood of a demurrer to a plea which ought to show that the agreement was valid under the statute. An agreement void as to part, by the Statute of Frauds, from being verbal, is void in toto. *Chater* v. *Beckett*, 7 T. R. 201. Hence, an agreement for the sale of lands and chattels, if void as to the land by the Statute of Frauds, is void in toto. *Cork* v. *Tombs*, 2 Anst. 420. *Lea* v. *Barber*, Id. 425, n. And per Abbott, C. J., in *Mayfield* v. *Wadsley*,[1] 3 B. & C. 361.

(*b*) Where the plaintiff, on a verbal promise of indemnity, consented to become bail, it was held to be a promise to answer for the debt or default of another within the Statute of Frauds. *Green* v. *Creswell*, 2 P. & D. 430.

(*c*) *Reed* v. *Nash*, 1 Wils. 305. This was on demurrer to the declaration, which did not allege that any assault had been committed. And see Burr. 1890, where Wilmot, J. observed, that it was not a promise to pay the debt of another person; the defendant was himself originally liable. See also *Stephens* v. *Squire*, 5 Mod. 205. [*Allaire* v. *Ouland*, 2 Johns. Cas. 52. *Slingerland* v. *Morse*, 7 John. R. 463. *Leonard* v. *Vredenburgh*, 8 John. R. 29.]

(*d*) *Harris* v. *Huntbach*, 1 Burr. 373. (*e*) *Simon* v. *Motivos*, 3 Burr. 1921.

(*f*) *Goodman* v. *Chase*, 1 B. & A. 297; for as between the plaintiff and his former debtor, the debt was satisfied.

(*g*) 1 B. & P. 158. Where a boy was placed in a school by his mother, and application was made to his uncle, who said it was quite right that the application should be made to him, for that he was answerable, that he could not conveniently pay then, but that when the next schooling became due he would pay altogether: it was held that it was properly left to the jury whether the original credit was not given to him. *Darnall* v. *Trott*,[2] 2 C. & P. 82.

(*h*) *Keate* v. *Temple*, 1 B. & P. 158.

(*i*) *Croft* v. *Smallwood*, 1 Esp. C. 121, [and *Mr. Day's* note]. See *Legge* v. *Gibson*, Selw. 828, n.

[1] Eng. Com. Law Reps. x. 110. [2] *Id.* xii. 36.

So where the defendant is under a legal obligation to pay for a benefit received by another, the promise need not be in writing, as where an overseer promises to pay an apothecary for the cure of a pauper (*k*); but where it appears that another than the defendant is liable as the principal, the case is within the statute, unless the defendant bind himself upon an express promise, founded upon a new consideration to pay the debt.

Where the person to whom the goods are furnished is liable, credit having been originally given to him (*l*), another is not liable without a note in writing. As where the promise is to see another paid for goods, or for labour supplied to a third person; as, to see a surgeon paid if he would cure *J. S.* of a wound (*m*). A promise to see the plaintiff paid amounts to a promise to pay (*n*); as where the defendant said, "You must supply my mother-in-law with bread, and I will see you paid" (*o*) (A). In such cases the very form of the promise seems to imply the intention of the defendant to render himself liable as surety only, and points out the principal. So an undertaking by the defendant, that if the plaintiff would lend his gelding to *J. S.* the latter would re-deliver it, is within the statute (*p*). And so it was held where the defendant said, "I will pay you if *J. S.* will not;" and the *goods were *afterwards* delivered (*q*). Where *A.*, falsely pretending that he *478
was authorized by *B.* to order goods on his credit to be delivered to *C.*, promised to see the vendor paid, it was held that he was not liable, either on his promise, or for goods sold, but that he would be liable in an action on the case for the deceit (*r*). An undertaking to guarantee the payment of a note is within the statute (*s*).

A promise to pay the debt of another, is not within the statute unless the promise be made to the party to whom the other is answerable (*t*). New consideration.

But next, any person may bind himself by an express parol promise, founded upon a new consideration, to pay the amount of another person's debt. (1). As where *A.* having a lien upon policies of insurance in his hands,

(*k*) B. N. P. 281. And see 3 B. & P. 250; 4 M. & S. 275; 1 B. & A. 404.
(*l*) *Matson* v. *Wharam*, 2 T. R. 80. *Anderson* v. *Hayman*, 1 H. B. 120. *Lexington* v. *Clarke*, 2 Vent. 223.
(*m*) *Watkins* v. *Perkins*, Ld. Raym. 224. *Robinson* v. *Pulsford*, 1 Vent. 23; 2 Keb. 563.
(*n*) *Robinson* v. *Pulsford*, 1 Vent. 23; 2 Keb. 563.
(*o*) 2 T. R. 80; Cowp. 227. [*Erwin* v. *Wagoman*, Cooke's R. 402.]
(*p*) *Buckmyre* v. *Darnall*, Ld. Raym. 1085; Salk. 27; 6 Mod. 248.
(*q*) *Jones* v. *Cooper*, Cowp. 227. But see *Mawbray* v. *Cunningham*, Cowp. 228.
(*r*) *Thomas* v. *Bond*, 1 Camp. 4. (*s*) *Ex parte Adney*, Cowp. 460.
(*t*) *Eastwood* v. *Kenyon*, 3 P. & D. 276. Such a defence need not be specially pleaded, *Ibid.*

(A) (A promise to pay the debt of a third person, in consideration of the promisee surrendering property levied upon by execution, is an original undertaking, and need not be in writing to render it valid. *Mercein* v. *Andrews*, 10 Wend. 461. And where the defendant inquired of the plaintiff the terms on which he would furnish newspapers to the defendant's nephew to sell and distribute, and said, "If my nephew should call for papers, I will be responsible for the papers that he should take," it was held that this was an original undertaking, and not within the statute. *Chase* v. *Davy*, 17 John. R. 114. But a promise in writing to pay the debt of another, acknowledging a past consideration, viz. land conveyed to that other, but not at the promisor's request, is *nudum pactum* and void. *Chaffe* v. *Thomas*, 7 Cow. 358. The mischief produced in Pennsylvania, by the want of a provision in their Act of Assembly, similar to that in the Statute of Frauds, by which a parol promise to pay the debt of another is void, has induced the Courts to lean against a recovery wherever the precise terms of the promise are not explicitly shown by clear and satisfactory proof. Per Gibson, C. J., in *Sidwell* v. *Evans*, 1 Penn. R. 385.)

(1) [If a promise to pay the debt of another be found on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not within the statute, but is an original promise. Per Kent, C. J. *Leonard* v. *Vredenburgh*, 8 Johns. 29. *Jones* v. *Ballard*, 2 Rep. Con. Ct. 113. *Aliter*, if the whole credit is not given to the person who comes in to answer for another. Per Kent, C. J. *ubi sup.* See also, *Leland* v. *Creyon*, 1 M'Cord, 100. S. P. If *A.* in consideration that *B.* will deliver him goods, and that *C.* will discharge *A.* from execution, promise to pay *C.* the amount of the execution; this is an original undertaking, and not within the statute. *Skelton* v. *Brewster*, 8 Johns. 376. So if *A.* being bound to indemnify *B.* in a suit in which he is arrested, request C. to become special bail for B. and promise to indemnify him. *Harrison* v. *Sawtel*, 10 Johns. 242. S. P. *Perley* v. *Spring*, 12 Mass. Rep. 297. See also 11 Johns. 221, *Bailey* v. *Freeman*. So if *A.* in consideration of a sale of land to him by *B.* promise *C.* to be

delivers them up to an agent of the owner, on an agreement that the defendant, the agent, will pay the amount of a bill drawn by his principal, and accepted by *A.* for the accommodation of the principal (*u*). The principal of this and similar cases seems to be very clear. *A.* had a right to retain the policies, and if the defendant had personally undertaken to pay him a sum of money in consideration of his giving up the policies, the doing so being a relinquishment of an advantage by the plaintiff, would have been a good consideration to enforce the payment of the money; but if the relinquishment would have been a good consideration to support a promise to pay money, why should it not be equally sufficient to support any other promise? If a promise by the defendant to pay 20*l.* (the amount of the bill) would have been binding, why should not the promise to pay the amount of the bill specifically, be also binding? So where the plaintiff had a lien on goods for a debt due from *A. B.*, and the defendant, in consideration that the plaintiff would relinquish his lien, promised to pay the debt, it was held that the case was not within the statute (*x*). So where the plaintiff distrained for rent, and the defendant, an auctioneer, being in possession of the goods, and about to sell them for the benefit of the creditors, by virtue of a bill of sale made by the tenant, promised to pay the debt (*y*). So a promise to execute a bail-bond is not within the statute (*z*). So if *A.* be

(*u*) *Castling* v. *Aubert*, 2 East, 325. And see *Houlditch* v. *Milne*, 3 Esp. C. 87. *Barrell* v. *Trussell*, 4 Taunt. 117. [*Sian* v. *Pigott*, 1 Nott & M'Cord, 124.]

The plaintiff, an occupier of lands, at the request of the defendant, resisted a suit by the vicar for tithes, upon a promise to pay him all costs which might be paid by him, held not to be within the statute; and to be available for the costs antecedently incurred. A payment of the costs by the plaintiff's attorney to the vicar is a payment by his agent, and it is immaterial in what way the latter settled this account with his principal; it is no objection, therefore, that the plaintiff had only paid him by giving a promissory note for the amount. *Adams* v. *Dansey*,[1] 6 Bing. 506. See ASSUMPSIT. *Money paid.*

So where the plaintiff, at the request of the defendant, became a co-surety with him in an indemnity-bond to a third person, the defendant undertaking to save the plaintiff harmless. *Thomas* v. *Cook*,[2] 8 B. and C. 728. An auctioneer employed to sell goods on premises in respect of which rent is in arrear, the landlord applies for rent, saying, "It is better so to apply than to distrain," the auctioneer says, "You shall be paid, my clerk shall bring you the money," an action lies. *Bampton* v. *Paulin*,[3] 4 Bing. 264. See *Thomas* v. *Williams*,[4] 10 B. & C. 664.

(*x*) *Houlditch* v. *Milne*, 3 Esp. C. 86. *Williams* v. *Leiper*, 2 Wils. 308. See *Keate* v. *Temple*, 1 B. & P. 158.

(*y*) *Williams* v. *Lepee*, 3 Burr. 1886; 2 Wils. 308. *Castling* v. *Aubert*, 2 East, 325, 330. *Bampton* v. *Paulin*,[3] 4 Bing. 264. [S. P. *Atkinson* v. *Barfield*, 1 M'Cord, 575.]

(*z*) *Jarmain* v. *Algar*, 1 R. & M. 348.

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accountable to him for debts due to him from *B. Gold* v. *Phillips*, 10 Johns. 412. So where *A.* promised *B.* not to require payment from him of a certain note, in consideration of which *B.* promised to indemnify *A.* from one-third of all loss in consequence of his indorsing certain notes for *C. Myers* v. *Morse*, 15 Johns. 425. So where *A.* subscribed to pay the trustees of a religious society a certain sum annually towards the support of a clergyman, and *B.*, in consideration of a certain sum, agreed to indemnify *A.* against all claims arising from his subscription. *Conkey* v. *Hopkins*, 17 Johns. 113. So where *A.* deposited a certain sum of money and goods in *B.*'s hands, on an agreement that *B.* should pay a certain note indorsed by *C.* for *A.*'s accommodation, and should indemnify *C.* against the note. *Olmstead* v. *Greenly*, 18 Johns. 12. See also *Underhill & al.* v. *Gibson & al.* 2 N. Hamp. Rep. 352.

Where a husband and wife were about separating, and a friend of the wife promised the husband to pay for the board of the children, if he would sign the articles of separation—the promise was held not to be within the statute. *Hughes* v. *Creyon*, 2 Rep. Con. Ct. 257.

If a person promise to pay the amount of a debt which he owes to a creditor of him to whom it is due, and to save him harmless from the demand of his creditor—such promise is not within the statute. *Colt* v. *Root*, 17 Mass. Rep. 229. {Nor is a promise to pay a debt of a testator by an executor, who has given bond to the Judge of Probate to pay the testator's debts and legacies, within the statute, for the bond is an admission of assets. *Stebbins* v. *Smith*, 4 Pick. Rep. 97.} *Sed vide Waggoner* v. *Grey's adm'rs*, 2 Hen. & Mun. 603. A defendant having funds in his hands, and making an express parol promise to pay the debt of another, is liable notwithstanding the statute. *Raymer* v. *Sim*, 3 Har. & M'Hen. 541. The undertaking of assignees, to whom property has been delivered for the purpose of paying creditors, is not within the statute. *Drakeley* v. *Deforest*, 3 Conn. Rep. 272.

The statute does not apply to promises raised by implication of law. *Allen* v. *Pryor*, 3 Marsh. 306. *Goodwin et al* v. *Gilbert*, 9 Mass. Rep. 510.

[1] Eng. Com. Law Reps. xix. 149. [2] *Id.* xv. 333. [3] *Id.* xiii. 425. [4] *Id.* xxi. 143.

*indebted to *B.*, assigns a debt due from *C.*, which the latter promises to pay to *B.* (*a*).

Where an accommodation acceptor defends an action at the request of the drawer, the case is not within the statute, and he may recover the costs as money paid to the use of the defendant (*b*). So if *J. S.* agree, in consideration of the assignment of a debt due to the plaintiff, to pay him 10*s.* in the pound, the case is not within the statute (*c*).

But a promise to pay the debt of another, in consideration of *forbearance* to sue that other, has been held to be within the statute (*d*) (1).

Where *A.* had wrongfully occasioned the death of *B.*'s horse, and *C.* promised to pay the damages, in consideration that *B.* would not sue *A.*, it was held, that the case was within both the intention of the statute, which was to prevent the commission of fraudulent practices by the means of perjury, and also within the words of the statute, inasmuch as the terms *miscarriage* and *default* applied to tortious acts, from which duties resulted independent of any contract (*e*), and the case was distinguished from that of *Read* v. *Nash* (*f*), because it did not appear that the defendant in the former action had ever been guilty of an assault, or been liable in damages (2).

A parol promise to pay the debt of another, and also to do some other thing, is void altogether, since the plaintiff cannot separate the two parts of the contract (*g*).

On any agreement made in consideration of marriage.—It seems to be fully settled that mutual promises to marry are not within the statute (*h*). Where a father promised his daughter 3,000*l.* and died before her marriage, leaving her 2,000*l.* only, and afterwards the husband hearing of the letter filed his bill to obtain the other 1,000*l.*, it was dismissed, because the marriage was not contracted in *expectation* of 3,000*l.* (*i*). Promise to marry.

(*a*) Where a debtor of the plaintiffs, being arrested by them, executed an assignment of monies due to him from the defendants, who were partners in three several firms in London, Buenos Ayres, and Chili, a written notice of which assignment was sent to the partners carrying on the business in London, who promised that they would pay when they received the money, after a prior claim had been paid, and said that a notice to Chili would have made no difference: held, that such promise was not within the Statute of Frauds, as an undertaking to pay the debt of another; and that the admission by one partner was competent evidence to charge the others, and his promise binding upon them. *Lacy* v. *M'Neile*,[1] 4 D. & R. 7.

(*b*) *Howes* v. *Martin*, 1 Esp. 162. But it has been held that a promise by the indorser of a dishonoured note to indemnify the holder, if he will sue the drawer, is within the statute. *Winckworth* v. *Mills*, 2 Esp. 484, *tam. qu.*; and see *Reade* v. *Nash*, 1 Wils. 305.

(*c*) *Anstey* v. *Marden*, 1 N. R. 124.

(*d*) *Rothery* v. *Curry*, B. N. P. 281. *Fish* v. *Hutchinson*, 2 Wils. 94; Ld. Raym. 1087; but see above, 477.

(*e*) *Kirkham* v. *Marter*, 2 B. & A. 613. (*f*) 1 Wils. 305.

(*g*) *Chater* v. *Beckett*, 7 T. R. 201. [See also *Crawford et al.* v. *Morrell*, 8 Johns. 253.] *Thomas* v. *Williams*,[2] 10 B. & C. 664. A promise by an auctioneer, about to sell the tenant's goods, made to a landlord to pay rent not then due, is void by the statute, Ibid.

(*h*) B. N. P. 280. *Harrison* v. *Cage*, Ld. Raym. 386; 1 Salk. 24. *Cocke* v. *Baker*, Str. 34, *contra*. *Philpot* v. *Wallett*, Skinn. 24; 3 Lev. 65.

(*i*) *Ayliff* v. *Tracy*, 2 P. Wms. 45.

(1) [A parol promise by a garnishee to the plaintiff in an attachment, that if he would discontinue the attachment and wait for some months, he (the garnishee) would pay the debt for the defendant in the attachment, was held to be void under the statute. *Boyce* v. *Owens*, 2 M'Cord, 208.]

(2) [A parol promise by a stockholder in a bank, who, on a division of the stock, has received his share thereof, to pay the holder of an outstanding note of the bank, is void by the statute. Per Parker, C. J. *Spear* v. *Grant*, 16 Mass. Rep. 13. Where goods were delivered to *A.* to be transported on freight, and *A.* converted them to his own use, and *B.* requested the owner, who was about to institute a writ against *A.* to forbear, and to sue *C.* for the damages, and promised by parol to pay the amount of damages if the plaintiff should fail to recover them from *C.*, the promise was held to be within the statute, and void. *Turner* v. *Hubbell*, 2 Day, 457. So where *A.* gave a promissory note to *B.*, and *C.* told *B.* that he had taken an assignment of *A.*'s property, and would pay the debt due to him from *A.* *Jackson* v. *Rayner*, 12 Johns. 291. So where one partner promised to pay a note given in the partnership name by another partner for his private debt. *Wagnor* v. *Clay*, 1 Marsh. 257.]

[1] Eng. Com. Law Reps. xvi. 185. [2] *Id.* xxi. 143.

For the sale of lands.

Contract for sale of lands, &c.—The main distinction between this branch of the 4th section and the 1st section, is, that the 1st section relates to the actual creation of interests in lands, the *fourth* to executory contracts for the creation of such interests. A sale by auction is within this clause (*k*) (A).

Interest in lands.

Lands, tenements or hereditaments, or any interest in or concerning them.—It has been held that a contract for the purchase of a growing crop

*480 of grass, *to be mown and made into hay by the vendor (*l*), and conferring a right to make a profit of the surface of the land, or for the sale of growing turnips, their maturity not being stated (*m*), or of growing trees for hop-poles, (*n*), or for the abatement of the tenant's rent (*o*), for the grant of a rent-charge, or of a right of common, or to take lodgings (*p*), is within the statute.

But that a sale of mature potatoes, to be got immediately (*q*) (the contract merely conferring an easement, or right to come upon the land to carry away the potatoes); a contract for all the potatoes growing on certain land, to be dug and carried away by the purchaser, the potatoes alone being the subject-matter of the sale (*r*): a sale of timber growing (*s*); an agreement by *A.*, the owner of land, that *B.* should cultivate it, yielding to *A.* a moiety of

(*k*) *Walker* v. *Constable*, 2 Esp. C. 659; 1 B. & P. 306. *Stansfield* v. *Johnson*, 1 Esp. C. 102.

(*l*) *Crosby* v. *Wadsworth*, 6 East, 602. Where a corporation were empowered to sell the aftermath of premises by writing; held, that their agent writing down the name of the highest bidder as purchaser, and his giving a promissory note for the price, could not be considered a sale in writing. *Symonds* v. *Ball*, 8 T. R. 151.

(*m*) *Emmerson* v. *Heelis*, 2 Taunt. 38. But *qu.* and see *Warwick* v. *Bruce*, 2 M. & S. 205. And see also *Waddington* v. *Bristow*, and 2 B. & P. 99.

(*n*) *Teal* v. *Auty*,[1] 2 B. & B. 99.

(*o*) *O'Connor* v. *Spaight*, 1 Scho. & Lef. 306.

(*p*) Where upon an agreement by parol to take lodgings "for two or three years," to enter on a future day, before which the defendant upon inspecting declined taking them, and never entered; it was held, first, that it was an agreement for an interest in land within the statute, and, secondly, that use and occupation could not be maintained. The declaration contained two special counts, besides the counts for use and occupation; the first, upon an executory consideration, stating the demise to have been for two years, which could not therefore be supported, as being an untrue averment; the second stated, that in consideration that the plaintiff had demised, the defendant promised to enter and become tenant upon terms stated, but there was no promise to pay the rent; and held, that as the plaintiff could only recover damages for the refusal to enter and become tenant, the relation of landlord and tenant never having been created, the plaintiff was precluded by the statute from recovering damages for breach of the agreement, there being no memorandum in writing. The effect of the statute upon parol leases is, that where valid as leases, the party may have a remedy upon them *quoad* leases, but not to sue for damages for not taking possession. *Edge* v. *Strafford*, 1 C. & J. 391.

(*q*) *Parker* v. *Staniland*, 11 East, 362.

(*r*) *Warwick* v. *Bruce*, 2 M. & S. 205. So where the contract was for a field of potatoes growing, the seller being to raise them from the ground at the request of the purchaser; for they are within the description of emblements, and are to be deemed chattels. *Evans* v. *Roberts*,[2] 5 B. & C. 829; 8 D. & R. 611. A bargain between an occupier of a farm and one who succeeds him, for growing crops of wheat for a specific sum, the former telling the latter that if he does not take the wheat he shall not have the farm, is not a contract for land within the statute; per Bayley and Holroyd, Js. But per Littledale, J. if the giving up of the land was part of the consideration, it is a contract within the statute. *Mayfield* v. *Wadsley*,[3] 3 B. & C. 357. Where there is a contract for land, and distinct contracts at specific sums for the dead stock, and the purchaser takes possession, an action lies for goods sold and delivered. Ibid. And crops agreed to be taken by an incoming of an outgoing tenant may be recovered under a count for goods bargained and sold; per Bayley and Holroyd, Js. Ibid. A contract by parol to purchase, at 2*s.* per sack, potatoes, growing (June), to have them at digging-time (October), and to find diggers, is not a contract for an interest in land within the statute. *Sainsbury* v. *Matthews*, 4 M. & W. 343. Where the defendant agreed by parol in August for a crop of growing corn, and the profit of the stubble afterwards, some potatoes growing, and whatever lay grass was in the fields, but the plaintiff was to have liberty for his cattle to run with the defendant's; the latter was to harvest the corn, and dig the potatoes, but the plaintiff to pay the tithes; held, that the introduction of the lay grass into the contract, as a matter of purchase and sale, although *per se* it might be taken to be an interest in land, yet it being consistent with an agisting by the owner of the vendor's cattle, and of the possession of the land still remaining with the former, the objection founded on the statute ought not to prevail. *Jones* v. *Flint*, 2 P. & D. 594.

(*s*) Per Treby, J., 1 Ld. Raym. 182.

(A) (An agreement for the exchange of lands is within the statute of frauds. *Rice* v. *Peet*, 15 John. R. 503.)

[1]Eng. Com. Law Reps. vi. 32. [2]*Id.* xii. 377. [3]*Id.* x. 110.

the crops (*t*); a parol contract for an easement, such as a liberty to nail *the framework of a sky-light against a wall (*u*), or to stack coals in a yard, or use a way over the land of another (*x*) (A), is not within the statute. (1).

(*t*) *Poulter* v. *Killingbeck*, 1 B. & P. 397. And an appraisement of the value having been made for both parties, it was held that *A.* might recover for *goods sold and delivered.*

(*u*) *Winter* v. *Brockwell*, 8 East, 310, n.; 11 East, 366.

(*x*) *Wood* v. *Lake*, Say, 3. *Webb* v. *Paternoster.* But as to these cases, see *Hewlins* v. *Shippam*, *supra*, 473.

(A) (In Pennsylvania a right of way can be passed by deed only, and not by parol. *Collam* v. *Hocker*, 1 Rawle, 108. But where there is evidence of an uninterrupted use of an alley for a passage and water-course, for a period less than twenty years, evidence of contribution by the persons so using it, to the expenses of laying and repairing the pavement, and of laying water-pipes under the surface, is proper to be submitted to the jury, as bearing upon the fact of the presumption of a grant. *Lewis* v. *Carstairs*, 6 Whart. 193. A party who might otherwise be entitled to the exclusive enjoyment of an easement, may be equitably estopped from contesting the right of others to use it, if by allowing a common enjoyment of it for a period less than twenty years, and by positive acts of acquiescence on his part, he encourages an innocent purchaser to pay his money for the purchase of property to which such easement appears to be appurtenant. *Ibid.* So a parol promise to pay the owner of land a specific sum on his consenting to have a public road or highway laid through his lands, is not within the statute of frauds, and may be enforced by action, if such road be laid out and occupied as such. *Noyes* v. *Chapin*, 6 Wend. 46.)

(1) [A contract for the sale of things annexed to the freehold, but which are capable of separation without violence, and by the terms of the contract are to be separated, is held, in Connecticut, not to be within the statute. *Bostwick* v. *Leach*, 3 Day, 476. Nor is an agreement not to exercise a right regarding the freehold,—as not to use a mill, or not to carry on a trade within a particular shop. *Ibid.* In New York, the sale of a growing crop of wheat, by parol, is held not to be within the statute. *Newcomb & al.* v. *Ramer*, 4 Johns. 421, *note.*

A parol promise by the owner of lands, to a person who had entered into possession without title and made improvements, to sell them to him, is void. *Freer* v. *Hardenburg*, 5 Johns. 272. But a promise to pay for the improvements made on one's land is not within the statute. *Ibid.* *Benedict* v. *Beebe*, 11 Johns. 145. {*Lower* v. *Winters*, 7 Cow. Rep. 263.} Possession is an interest in land, within the meaning of the statute. *Howard* v. *Easton*, 7 Johns. 205. See also *Fox* v. *Longley*, 1 Marsh. 388. So is a right in equity of redeeming mortgaged lands. *Scott & al.* v. *M'Furland*, 13 Mass. Rep. 309: And a contract to release a covenant of warranty annexed to land. *Bliss & al.* v. *Thompson*, 4 Mass. Rep. 488: And a promise by the grantee to execute a deed of defeasance, so that the conveyance shall operate as a mortgage. *Boyd* v. *Stone*, 11 Mass. Rep. 342: And a promise by the grantee to return the deed unrecorded, if the contract is rescinded, or if certain conditions are performed by the grantor. *Sherburne* v. *Fuller*, 5 Mass. Rep. 133. Any permanent right to hold another's lands for a particular purpose, and to enter on them at all times without his consent, is an interest within the statute. *Cook* v. *Stearns*, 11 Mass. Rep. 533. Thus an easement in the lands of another, or a right to enter on them for the purpose of erecting and keeping in repair a dam, embankment or canal, in order to raise water to work a mill cannot be acquired by parol. *Ibid.* See also *Phillips* v. *Thompson*, 1 Johns. Chan. Rep. 131. S. P. But where there is a parol agreement for a right of way, or other interest to land, and any acts are done in pursuance thereof, which are prejudicial to the party performing them, and are in part execution of the contract, the agreement is valid notwithstanding the statute. *Ricker & al.* v. *Kelley & al.* 1 Greenleaf, 117. An agreement after the execution of a lease, that the lessee shall not use the pasture land without paying for it, is within the statute. *Tryon* v. *Mooney*, 9 Johns. 583. So is an agreement between *A.* and *B.*, that *B.* shall purchase *C.*'s lands for the benefit of both; though *B.* makes the purchase, and thereupon it is further agreed that *A.* shall advance half the purchase money and be equally interested in the purchase. *Parker* v. *Bodley*, 4 Bibb, 102, S. P. *Henderson* v. *Hudson*, 1 Munf. 510. {But where *A.* and *B.* entered into a parol agreement, by virtue of which they were to be jointly interested in the profits arising from the purchase and sale of certain tracts of land, and *A.* was to make the bargain for the purchase, and render all necessary services for that purpose, and *B.* was to furnish the purchase money, and take and execute deeds in his own name, it was held in an action brought by *A.* against *B.* for a moiety of the profits so made, that the case was not within the statute of frauds. *Bunnel* v. *Tainter's Adm.* 4 Conn. 568.}

A parol agreement between owners of adjoining lands, that a surveyor should run a dividing line between them, and that it should thus be ascertained and settled—which was executed, and the line run accordingly, and marked on a plat by a surveyor in their presence, as the boundary—was held to be conclusive, and not within the statute. *Boyd's Lessee* v. *Graves & al.*, 4 Wheat. 513. {*Ebert* v. *Wood*, 1 Binney, 216.} See *Jackson* v. *Dysling*, 2 Caines' Rep. 198. *Stuyvesant* v. *Dunham & al.*, 9 Johns. 61. *Whitney* v. *Holmes*, 15 Mass. Rep. 151.

An agreement to remove a fence and open a road, is not an agreement concerning an interest in lands. *Storms* v. *Snyder*, 10 Johns. 109. Assumpsit may be maintained by grantor against grantee for the consideration of a conveyance, if not in fact paid, although payment is acknowledged in the deed—it not being a contract within the statute. *Bower* v. *Bell*, 20 Johns. 338. *Wilkinson* v. *Scott*, 17 Mass. Rep. 249. An agreement to abate in the price what the land is deficient in the quantity expressed in the deed, is not within the statute. *Mott* v. *Hurd*, 1 Root, 73. Sed vide *Bradley* v. *Blodget*, Kirby, 23. The terms "lands, tenements and hereditaments," in the statute of frauds, in Tennessee, do not comprehend an equitable estate: Sales of occupant claims are therefore not within the statute. *Danforth* v. *Lowry*, 1 Hayw. Tenn. Rep. 61.

Under an act of Pennsylvania "for the prevention of frauds, &c." an action for damages may be maintained on a parol agreement for the sale of land. *Ewing* v. *Tees*, 1 Binney, 450. The act, though it does

A parol agreement that an arbitrator shall determine between the parties whether a lease shall be granted, is within the statute (*y*). It seems to be now settled that an equitable mortgage, by the deposit of title deeds, is not within the statute (*z*). Neither is a collateral agreement by a lessee to pay a per centage on money laid out by the landlord on the premises (*a*) (A).

It has frequently been held in equity, that a part performance takes the case out of the statute (*b*). Where the tenant agreed to pay the landlord 40*l.* out of 100*l.* for the good-will of the farm if he would receive another tenant, it was held that the defendant having received the 100*l.* was liable at law (*c*); so where the plaintiff let land in consideration of receiving half the crop, and the crop was appraised by mutual consent, it was held (*d*) that the statute was out of the question; so in equity, where the party has been put into possession (*e*), especially if he has incurred expense (*f*) (B); or a man, upon promise of a lease, has laid out money in improvements (*g*),

(*y*) *Walters* v. *Morgan*, 2 Cox's Chan. Ca. 369.

(*z*) *Russel* v. *Russel*, 1 Bro. Ch. 269. This is a matter of daily occurrence. 11 Ves. 403, 404, n.; 12 Ves. 197; 1 Evans's St. 235.

(*a*) *Hoby* v. *Roebuck*,[1] 7 Taunt. 157. *A.* in 1792, grants a lease of a theatre to *B.*—*B.* covenanting not to grant rights of admission, except two hundred and fifty free admissions, without the consent of *A.*; and in case of any of the covenants being broken, the lease to be void. *B.* then assigns his interest to trustees, to receive the profits and pay the debts, &c. who leave *B.* in the management and direction of the concern; in the course of which, in 1799, *B.* grants a ticket of admission to *C.* for twenty-one years. In 1800, the trustees take possession of the theatre, but suffer *C.* to exercise his privilege of admission till 1814, when the ticket is stopped, on the ground that *B.* had no right to make such a grant: held that this was not an interest in land, but a license to *C.* to enjoy the privilege of admission; and therefore that it was not necessary that it should pass by deed, or that *B.* should have been authorized by the trustees, in writing to make such a grant. *Taylor* v. *Waters*,[2] 2 Marshall, 551; 7 Taunt. 374.

(*b*) *Griffith* v. *Young*, 12 East, 513. *Crosby* v. *Wadsworth*, 6 East, 602. *Ld. Aylesford's Case*, Str. 783. And this, it has been said, is on the ground of fraud. 1 Bro. C. C. 413, 417; 1 Ves. 221; Buller, J. (in *Brodie* v. *Paul*, 1 Ves. jun. 133), intimated an opinion that the same rule prevailed at law as in equity on this subject; but a contrary opinion was expressed by Ld. Eldon, in *Cooth* v. *Jackson*, 6 Ves. 29. See *Teal* v. *Auty*,[3] 2 B. & B. 99, where the contract was for growing trees, which the defendant (the vendee) cut down and took away; and held that he might recover, the agreement being executed. See also above, 99.

(*c*) *Griffith* v. *Young*, 12 East, 513. (*d*) *Poulter* v. *Killingbeck*, 1 B. & P. 397. And see 6 East, 612.

(*e*) *Pyke* v. *Williams*, 2 Vern. 445.

(*f*) 9 Mod. 37; Freem. 281. *Foxcroft* v. *Lister*, 2 Vern. 456. *Hoyd* v. *Buckland*, 2 Freem. 269.

(*g*) 1 Vern. 151; Prec. Ch. 561.

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not make such parol agreement void, restricts its operations as to the acquisition of an interest in the land, and no title in fee simple can be derived under it. *Bell* v. *Andrews*, 4 Dallas, 152. Where such parol agreement has been executed by payment of a valuable consideration, and delivery of possession, it is binding between the parties. *Billington* v. *Welsh*, 5 Binney, 131. But to bind a subsequent *bona fide* purchaser, notice either in fact or law must be clearly sworn. *Ibid.* There is nothing in the act to prevent a declaration of trust by parol. *German* v. *Gabbald*, 3 Binney, 302. In Kentucky, the statute of frauds is held to be imperative against all parol contracts for lands where the trust is direct, but not to extend to resulting trusts, which will be decreed, though proved by parol alone. *Fischli* v. *Dumaresly*, 3 Marsh. 23. The statute withholds the remedy for enforcing a parol contract for lands, but does not destroy its obligation—and it is a good defence to a bill for specific performance of a written contract, that it has been rescinded, or its terms abated by a subsequent parol agreement. *Lucas* v. *Mitchell*, 3 Marsh. 245. In New York and Pennsylvania, if a person purchase land with another's money and take a deed of it in his own name, there is a resulting trust in favour of him to whom the money belonged—and such trust may be proved by parol. *Jackson* v. *Sternbergh*, 1 Johns. Cas. 153, S. C.; 1 John. 45, *n.* *Foote* v. *Colvin*, 3 Johns. 215. *Jackson* v. *Matsdorf*, 11 Johns. 91. Wharton's Digest, 580, cites manuscript cases in the Circuit Court of the U. States. *Secus*, in Massachusetts. *Goodwin* v. *Hubbard & al.* 15 Mass. Rep. 218. *Runey & al.* v. *Edmands*, ibid. 294. *Storer* v. *Batson*, 8 Mass. Rep. 431. *Jenny* v. *Alden*, 12 Mass. Rep. 375.]

(A) (A parol agreement of an individual with a number of his neighbours, that he would contribute a lot of ground in consideration that they would erect a school-house upon it for their common benefit, when accompanied by proof of the execution of the agreement is not affected by the statute of frauds, but passes a good title to the persons subscribing and building the house as trustees for the neighbourhood. *Martin* v. *M'Cord*, 5 Watts, 493.)

(B) (To take a parol gift of land out of the statute of frauds, it is necessary to show that the donee has made improvements which add to its permanent value, and that by reason of his expenditure, he would be prejudiced by a rescision of the contract. Where the benefit to the donee by the possession of the land has exceeded his expenditure upon it, the statute will be enforced. *Wack* v. *Sorber*, 2 Whart. 387.

Assumpsit will lie to recover the money agreed to be paid for owelty on a parol partition of lands;

[1] Eng. Com. Law Reps. ii. 57. [2] *Id.* ii. 140. [3] *Id.* vi. 32.

or a lessee enters and builds (*h*), but the permitting one already in possession to continue in possession is no part-performance of an agreement for a further lease (*i*). Where the bill stated it to be a part of the agreement that the contract should be reduced into writing, and in consequence of the agreement the party was put to expense, it was held that the bill would lie for the sum laid out, and an action at law was directed, and also that the agreement should be admitted (*k*). Where the act would not prejudice the party in case the agreement were not to be enforced, it is not to be considered as a part-performance (*l*) (1). So where the act has been done with another view, and not with an intention to carry the agreement into effect (*m*); or where it is merely ancillary to the contract (*n*). An estate was sold at twenty-five years, *purchase, the tithes and timber to be taken *482
at a valuation: it was held that the making the valuation and sending the abstract, did not amount to a part-performance (*o*). The receipt of earnest will not take the case out of the statute (*p*). Where *A.* articled for an estate in his own name, and *B.* alleged that the estate had been bought for him, but there was no written agreement or part-payment between them, it was held, that *B.* could not prove the fact by parol evidence (*q*) (A).

Upon any agreement that is not to be performed within the space of one year, &c.—It has been held, that cases depending upon contingencies, Within one year.

(*h*) 9 Mod. 37.
(*i*) *Smith* v. *Turner*, Prec. in Ch. 561.
(*k*) 1 Vern. 159.
(*l*) *Gunter* v. *Holme*, Amb. 586.
(*m*) Ibid.
(*n*) *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559.
(*o*) *Whitbread* v. *Brookhurst*, 1 Bro. C. C. 404.
(*p*) Prec. in Chan. 560.
(*q*) *Bartlett* v. *Pickersgill*, 32 & 33 Geo. 2, in Chan. cited *R.* v. *Boston*, 4 East, 577.

though there must be an averment of circumstances to take the contract out of the statute of frauds. *Walter* v. *Walter*, 1 Whart. 292. *Gratz* v. *Gratz*, 4 Rawle, 411. But in Pennsylvania damages may be recovered for the non-performance of mere parol contracts for the sale of lands. *Ewing* v. *Tees*, 1 Binn. 450. *Bell* v. *Andrews*, 4 Dall. 152.)

(1) [*Davenport* v. *Mason*, 15 Mass. Rep. 85, S. P.—Where possession of land has been taken, and improvements made under an agreement, the terms of which do not distinctly appear, though the court will not grant relief on the ground of part performance, yet the bill will be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements. *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. Rep. 273. Consideration-money paid, possession taken, and valuable improvements made, under a parol contract for the conveyance of lands, will, *in equity*, take the case out of the statute, and entitle the complainant to a decree, for a specific performance. *Downey* v. *Hotchkiss*, 2 Day, 225. *Smith* v. *Lessee of Puton*, 1 Serg. & Rawle, 80. *Whetmore* v. *White*, 2 Caines' Cas. in Er. 87. But, *at law*, part performance will not take a parol agreement out of the statute. Per Kent, C. J. *Jackson* v. *Pierce*, 2 Johns. 221. *Kidder* v. *Hunt*, 1 Pick. 328. Expenses incurred in faith of a parol agreement, which is violated, may, however, be recovered in an action of indebitatus assumpsit. 1 Pick. *ubi sup.* And in equity, a part performance, which will take a case out of the statute, must be made under such circumstances as amount to fraud. *Meach* v. *Stone & al.* 1 Chipman's Rep. 182. Payment of the purchase money, it seems, is not sufficient part performance to take a case out of the statute. *Jackson's Assignees* v. *Cartright et al.* 5 Munf. 308.

The part performance, which will, in equity, take a case out of the statute, must be of the identical agreement set up by the bill. *Phillips* v. *Thompson*, 1 Johns. Ch. Rep. 131. And it must be such as usually or necessarily follow such an agreement. *Townsend* v. *Sharp*, 2 Overton's Rep. 192.

A parol promise to convey lands to a son, in consideration of natural affection merely, will not be specifically enforced in equity against the father, even in favour of a purchaser from the son. *Hickman* v. *Grimes*, 1 Marsh. 86. Nor will a parol promise, alleged to have been made by an ancestor, be enforced against an infant heir, although his guardian does not insist on the statute. *Grant* v. *Craigmiles*, 1 Bibb, 203.

A court of equity will not compel specific performance of a parol agreement to convey lands, in a case where the party who asks its assistance is chargeable with unfair conduct in relation to the contract which he seeks to enforce—but will leave him to his legal remedy. Per Washington, J. *Thompson* v. *Tod*, 1 Peters' Rep. 385. If part of the purchase money be paid, and possession be delivered in pursuance of and with a view to the performance of a parol agreement, it is held in Pennsylvania, that the case is taken out of the statute. *Bassler* v. *Niesly*, 2 Serg. & Rawle, 355. S. P. *Jones* v. *Peterman*, 3 ib. 546. But where the lessee, in a parol lease for seven years, had possession before the agreement, and continued in possession afterwards, and had made no improvements, nor incurred expenses on the faith of the agreement, it was held that possession could not be regarded as a part performance. *Jones* v. *Peterman*, ubi sub. The cases in England, on the subject of the specific performance of agreements for the sale of lands, are not strictly applicable in this country, on account of the rapid change of the value of lands here. *Todd* v. *Pfoutz*, 3 Yeates, 177.]

(A) (See *Parker* v. *Wells*, 6 Whart. 153.)

which may or may not happen within the year, as upon the return of a ship, marriage, or death, the case is not within the statute (*r*), although the event does not in fact happen within the year (*s*). But where it appears to be the intention of the parties, that the agreement shall not be performed within the year, the case is within the statute (*t*), although part be performed within the year (*u*).

Agreement (A). *Unless the agreement, &c.*—The term *agreement* comprehends *contracting parties*, a *consideration*, and a *promise*. Hence it is necessary that the names of the contracting parties should be stated (*x*) (1).

Consideration. The *consideration.*—A *promise* in writing to pay the debt of another, without specifying the consideration for the promise, has been held to be insufficient (*y*) (2).

(*r*) Salk. 289. Per Wilmot, J. 3 Burr. 1281. *Peter* v. *Compton*, Skinn. 353. Lord Raym. 317. [*Moore* v. *Fox*, 10 Johns. 244.] *Fenton* v. *Emblers*, 3 Burr. 1278; where, in consideration that the plaintiff would become housekeeper to the defendant's testator, and take upon himself the care and management of his family, the testator undertook to pay her certain wages, and leave her an annuity. So where, in consideration that the plaintiff would not sue his debtor in his lifetime, the latter promised that his executor should pay him a stipulated sum. *Wells* v. *Horton*,[1] 4 Bing. 40.

(*s*) Ibid. Lord Holt was of opinion that the contract could not be refused after the expiration of the year. Lord Raym. 317.

(*t*) According to the resolution of the Judges, in *Peter* v. *Compton*, Skinn. 353. A contract for the hire of a carriage for five years at so much per annum, is a contract not to be performed within a year, though by the custom the hirer was entitled to annul at any time upon the terms of paying a year's hire. *Birch* v. *E. of Liverpool*,[2] 9 B. & C. 392; and see *R.* v. *Hurstmonceaux*,[3] 7 B. & C. 551.

(*u*) *Boydell* v. *Drummond*, 11 East, 142. *Bracegirdle* v. *Heald*, 1 B. & A. 722. Where the contract was for a year's service, to commence on a future day; part-performance in such case does not take it out of the statute. *Ib.*

(*x*) See the cases below, under the 17th section, and *Champion* v. *Plummer*, 1 N. R. 252; and the cases *infra*, note (*y*), and 483, note (*e*).

(*y*) *Wain* v. *Warlters*, 5 East, 10. The promise in that case was thus: "I will engage to pay you (the plaintiff), by half-past four this day, fifty-six pounds and expenses, or bill to that amount on Hall. J. W." The consideration was the forbearance to sue Hall. See *Egerton* v. *Mathews*, 6 East, 307. *Stadt* v. *Lill*, 9 East, 348. As to the case of *Wain* v. *Warlters*, which has excited so much legal discussion, see Lord Eldon's observations, *Ex parte Minet*, 14 Ves. 159. *Ex parte Gordon*, 15 Ves. 286. "To the amount of 100*l.* consider me as security on *J. C.*'s account" (signed and dated.) Held not a sufficient memorandum of an agreement to pay for the default of *J. C. Jenkins* v. *Reynolds*,[4] 3 B. & B. 14. An engagement, in consideration of staying proceedings on a bill of exchange against *W. B.*, in these terms, "Mr. *W.* will engage to pay the bill drawn by *W. P.* in favour of *S. S.* is insufficient. *Saunders* v. *Wakefield*,[5] 4 B. & A. 595; see also *Goodman* v. *Chase*, 1 B. & A. 297; *Jenkins* v. *Reynolds*,[4] 3 B. & B. 14. An engagement "to pay you

(A) (In cases not absolutely closed by authority, the Supreme Court has always expressed a strong inclination not to extend the operation of the statute of frauds so as to embrace original and distinct promises, made by different persons at the same time upon the same general consideration. *Townley* v. *Sumratt*, 2 Peters, 182. If the thing promised *may* be performed within a year, the contract is not within the provision of the statute in relation to the time of performance. *Sinscott* v. *M'Intire*, 3 Shepley, 201. See also *Plimpton* v. *Curtis*, 15 Wend. 336. *Russell* v. *Slade*, 12 Day, 455.)

(1) [An agreement to marry at the end of five years is within the statute. *Derby* v. *Phelps*, 2 N. Hamp. Rep. 515.

A paper purporting to state the "articles of sale of the estate of J. W. deceased," containing terms of payment, and a schedule of the property as divided, with no other description of it than "mansion-house in D. street—lot No. 1—No. 2," &c. and the names of the purchasers, and the sums stipulated to be given, carried out against each lot, &c. and the signature of the auctioner affixed, and a memorandum beneath it, signed by the bidder, in which he engaged to take the property bidden off by him at the prices and credits mentioned—was held not to be a sufficient memorandum within the statute, as it did not show who were the *two parties* to the contract. *Sherburne et ul.* v. *Shaw*, 1 N. Hamp. Rep. 157.]

(2) [Under the statute of Virginia which provides that "*the promise* or *agreement* shall be in writing," the consideration need not be in writing. *Violet* v. *Patton*, 5 Cranch, 142. In New York and South Carolina, the English doctrine is adopted. *Sears* v. *Brink et al.* 3 Johns. 210. *Leonard* v. *Vredenburgh*, 8 ib. 20. *Stephens* v. *Winn*, 2 Nott & M'Cord, 372, *n.* It is expressly recognized, though not directly adjudicated, in New Hampshire. *Neelson* v. *Sanborne*, 2 N. Hamp. Rep. 414. But in Massachusetts, {and New Jersey,} it is rejected. *Packard* v. *Richardson et al.* 17 Mass. Rep. 122. {*Buckley* v. *Beardsley*, 2 South. Rep. 570.} Where the agreement is by covenant or writing under seal, no consideration need be expressed, for the seal itself imports a consideration; and the statute has not altered the common law in this respect. *Livingston* v. *Tremper*, 4 Johns. 416. See also *Aiken* v. *Duren*, 2 Nott & M'Cord, 370. In *Adams* v. *Bean*, 12 Mass. Rep. 137, it was held that a written engagement, on the back of a lease, that the lessee should pay the rent, sufficiently imports a consideration, though it is not expressed.]

[1] Eng. Com. Law Reps. xiii. 332. [2] *Id.* xvii. 404. [3] *Id.* xiv. 99. [4] *Id.* vii. 328. [5] *Id.* vi. 531.

*Where the defendant wrote a letter to the mortgagee of premises, stating that he had agreed to dispose of them, it was held to be insufficient, since it did not specify the terms of sale, or the sums, or number of houses (*z*). So an agreement for a lease at a certain rent, which did not specify the term (*a*), was held to be insufficient. But it is sufficient if the consideration appear by necessary inference and implication (*b*), or by reference to an agreement between the principal and the plaintiff indorsed on the other side of the paper (*c*). A letter written by the defendant to the plaintiff's attorney, requesting the plaintiff to give indulgence to a third person till a future day, when he (the defendant) would see the plaintiff paid, was held to be sufficient, although it did not specify the sum, which was allowed to be proved by parol evidence (*d*).

A guarantee in writing, to pay for goods to be delivered by the vendor to a third person, sufficiently expresses the consideration (*e*) (1).

on *T. L.*'s account, 50*l.* at the expiration of the usual credit, on the event of any deficiency on his part so to do," is insufficient. *Atkinson* v. *Carter*, 2 Ch. 403. *Pace* v. *Marsh*,[1] 1 Bing. 216. *Boehm* v. *Campbell*,[2] 3 Moore, 15. *Stead* v. *Liddiard*,[3] 1 Bing. 196; *infra*, 483. A promise by a third person to pay, if the creditor would not (as he was about to do) sell goods transferred by the debtor for the demand, and which was not shown to have been merely a mortgage, is not within the statute. *Barrell* v. *Trussell*, 4 Taunt. 117. {And by the King's bench of Ireland, in *Joint* v. *Mostyn*, 2 Fox & Smith's Rep. 4.} "I hereby guarantee the present account of Miss *H. M.*, due to *S. & Co.*, of 112*l.*, and what she may contract from this date," is sufficient under the statute of frauds. *Russell* v. *Moseley*,[4] 3 B. & B. 211. So where the terms were, "I agree to be security to you for *J. C.*, late in the employ of *J. P.*, for whatever you may entrust him with while in your employ, to the amount of 50*l.*" *Newbury* v. *Armstrong*,[5] 6 Bing. 201. See further *Cole* v. *Deyer*, 9 Law Journal; *Ryder* v. *Curtis*,[6] 8 D. & R. 62. *Shortrede* v. *Cheek*,[7] 1 Ad. & Ell. 57.

(*z*) *Seagood* v. *Meale*, Pr. Ch. 560; 9 Ves. 250, 252; 11 Ves. 555.

(*a*) *Clinan* v. *Cooke*, 1 Scho. & Lef. 22. (*b*) Per Lawrence, J. 6 East, 308.

(*c*) *Stead* v. *Liddiard*,[3] 1 Bing. 196.

(*d*) *Bateman* v. *Phillips*, 15 East, 270. The letter was addressed to the plaintiff's attorney, and ran thus: "The bearer *D. W.* has a sum of money to receive from a client of mine, some day this next week; I trust that you will give him indulgence till that day, when I undertake to see you paid."

(*e*) *Stadt* v. *Lill*, 9 East, 348; 6 Esp. 89. In the following case the guarantee was held to be sufficient:—A letter stating that *J. S.* having accepted a bill drawn on him by the plaintiff for 1,026*l.* he gave his guarantee for the due payment of the same in case it should be dishonoured by the acceptor. *Bochm* v. *Campbell*,[2] 3 Moore, 15. "I hand you drafts drawn by *W.* and accepted by *B.* and indorsed by *C.*; should the bills not be honoured when due, I promise to see that they do so." *Morris* v. *Stacy*,[8] Holt's C. 153. "*L.* having given his acceptance for freight (stating the particulars), I engage to be accountable to you should it not be paid when due." *Pace* v. *Marsh*, 1 Bing. 216. A consideration is sufficiently expressed in a guarantee in this form:—"I guarantee the payment of any goods which *A.* delivers to *B.*" *Stadt* v. *Lill*, 9 East, 348. "I hereby guarantee the present account of Miss *H. Moseley*, due to *Shortridge & Co.* South Shields, and what she may contract from this date." *Russell* v. *Moseley*,[4] 3 B. & B. 211.

(1) [A memorandum of the sale of lands must, besides being signed by the party, contain the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof. *Parkhurst* v. *Van Courtlandt*, 1 Johns. Ch. Rep. 273. A receipt for money, stating that it was the cash part of the purchase of a lot bought of the person subscribing the receipt, is not sufficient to take a case out of the statute. *Ellis* v. *Deadman*, 4 Bibb, 466. A receipt in these words—"Received of *A.* $20, on account of a plantation on the *Cypress*, sold to him this day for $2,200, payable in different instalments, as per agreement. Charleston, Aug. 1, 1816," and signed by the vendor, was held sufficient to take the case out of the statute. *Cosack* v. *Descoudres*, 1 M'Cord, 425. Where a contract for the purchase of land is executory, the price must be stated in the written memorandum. *Secus*, where the contract is executed by the payment of the purchase money, and the payment is admitted in the memorandum. *Fugate* v. *Honsford*, 3 Littell's Rep. 262.

Where the bill charged that the defendant agreed by parol to bid in land for the complainant, at a sheriff's sale, though he took the title in his own name, and the defendant pleaded the statute in bar; it was held that an account signed and delivered by the defendant, in which he charged the complainant with the consideration money for the purchase of the land, was a sufficient memorandum or note in writing to take the case out of the statute. *Denton* v. *M'Kensie*, 1 Desauss. 289.

A written agreement in these words, "I promise to pay the amount aforesaid, if *C. S.* should not pay it in six months," is a sufficient promise within the statute. *Buckley* v. *Beardsley*, 2 Southard's Rep. 570. So is the following, written by *C.* on a note given by *A.* to *B*—"I guarantee the payment of the within note to *B.*, one half in six months, the other half within twelve months." *Neelson* v. *Sanborne*, 2 N. Hamp. Rep. 413.]

[1]Eng. Com. Law Reps. viii. 302. [2]*Id.* iv. 245. [3]*Id.* viii. 294. [4]*Id.* vii. 414. [5]*Id.* xix. 55. [6]*Id.* xvi. 335. [7]*Id.* xxviii. 37. [8]*Id.* iii. 58.

So a memorandum, signed by the defendant, by which he agrees to give so much for goods, is sufficient; for the consideration is to be inferred from the agreement, viz. the sale and delivery of goods (*f*).

Note or memorandum.

Or some memorandum or note thereof.—Under this section, as well as the 17th, the terms of the contract may be collected from several distinct papers, provided they be connected by reference from one to another; but it is not sufficient to connect them by mere extrinsic oral testimony (*g*). Thus, an agreement for a lease which does not specify any definite term, and which has no reference to an advertisement which does express the term, cannot be connected with it by oral evidence (*h*); and a letter, referring to some agreement generally, but without specifying the terms of it, is not sufficient (*i*). *Thus a reference in an agreement to such parts of another paper as have been read to the party, is insufficient (*k*) (1).

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And it is not essential that a note or memorandum of the agreement should have been delivered to the other party. A letter written by a man to his own agent, setting forth the terms of the agreement, has been held to be sufficient (*l*). So where the father wrote a letter to a friend of the plaintiff's, agreeing to give 500*l.* to his daughter on her marriage, to be charged upon his land (*m*); but where the father wrote a letter to the daughter, after an agreement with the intended husband, in which he stated his agreement to leave her 3,000*l.*, and that the matter was to be fully concluded the next day, was held to be a mere communication, and not binding, the husband having married the daughter in ignorance of the letter (*n*) (2).

A proposal, by letter when acceded to by parol, is sufficient (*o*), although it be afterwards retracted and again agreed to by parol (*p*).

(*f*) *Egerton* v. *Mathews*, 6 East, 307. Note, this was on the construction of the 17th sec.

(*g*) *Tawney* v. *Crowther*, 1 Bro. Ch. C. 161, 318. [*Lent et al.* v. *Padeford*, 10 Mass. R. 249.]

(*h*) *Clinan* v. *Cooke*, Sch. & Lef. 22. Evans on the Stat. vol. 1, p. 237. *Seagood* v. *Meale*, Prec. in Chan. 560. *Clerk* v. *Wright*, 1 Atk. 12. *Whaley* v. *Bagenal*, 1 Bro. P. C. 345.

(*i*) Ibid. 1 Ves. Jun. 326.

(*k*) *Brodie* v. *St. Paul*, 1 Ves. Jun.; and Evans on the Stat. vol. 1, p. 237, where the cases on this subject are collected. And see *Kain* v. *Old*,[1] 2 B. & C. 627.

(*l*) Per Lord Hardwicke, 3 Atk. 503; 2 Ch. Rep. 147; 1 Vern. 110.

(*m*) *Moore* v. *Hart*, 2 Ch. R. 284; 1 Vern. 210.

(*n*) *Aylyffe* v. *Tracey*, 2 P. Wms. 65.

(*o*) *Coleman* v. *Upcot*, 5 Vin. 527.

(*p*) *Bird* v. *Blosse*, 2 Vent. 361. It has been said, that a proposal by letter at first refused, but afterwards assented to, is binding. *Hodgson* v. *Hutchinson*, 5 Vin. 522; but see observations, 1 Evans's Stat. p. 236, n. 13. The defendant by letter agreed to take fixtures at an appraisement, and named *S.* as his appraiser; the plaintiff's appraiser and *S.* having met, but disagreeing, appointed an umpire, who completed the valuation, but the defendant, under pretext that he had not authorized such umpirage, refused to take the goods until after they had been removed, when he gave notice that he was ready to pay the amount *as settled* by the appraisers: held, that taking the correspondence and inventory and appraisement together, it amounted to a sufficient agreement within the statute; and that, considering the whole correspondence as taken together to form the contract, the whole was admissible, a stamp being affixed to the original letter. *Hemming* v. *Perry*, 2 M. & P. 374. It is sufficient to satisfy the statute if the agreement be in the form of a letter, signed by the party sought to be charged with it, though not signed by the plaintiffs seeking to enforce it; but where it does not contain the statement of all the terms, so as to require something more than a

(1) [See *Parkhurst* v. *Van Courtlandt*, cited in the preceding note. In order to make a letter evidence of an agreement for the sale of lands, so as to take it out of the statute, it ought distinctly to set forth the terms of the agreement, or at least refer to some written instrument, in which the terms are set forth, and that the party accepted such terms. Therefore a letter from the vendor to the vendee, informing him that the writings for the land were ready, and adding, that "the sooner he came and settled the business, the better"—was held not to be sufficient. *Givins* v. *Calder*, 2 Desauss. 188. It has, however, been decided in Virginia, that a letter promising to make a deed of land, "according to contract," is a sufficient memorandum or note in writing, within the statute, though the terms of such contract are not mentioned. *Johnson* v. *Ronald's Adm'r*, 4 Munf. 77.]

(2) [See *Barrell et al.* v. *Jay*, 16 Mass. R. 221; and *Steere* v. *Steere*, 5 John. Ch. Rep. 11, as to proving a trust by letters not directed to the party, but third persons.]

[1] Eng. Com. Law Reps. ix. 205.

Where the defendant had written letters to different people, in which he stated that he had agreed to sell an estate to the plaintiff at twenty-one years' purchase, upon a bill filed for a specific performance, the plea of the statute was allowed (*q*); and, in general, a mere written statement of the party to be bound, of the terms of an agreement, will not be sufficient, unless it be either regularly signed as an agreement, or unless it appear that the party considered the agreement as complete. Thus, the writing instructions for a deed, unless the party subscribe or insert his name, so as to give authenticity to the document, is not binding (*r*). So where the counsel for a lady took down in writing a minute of the father's and intended husband's proposals for a settlement, and gave them to a clerk to prepare the deeds, and before they were drawn the father died, a bill for specific performance was dismissed, since there was no act of the party to indicate that he considered the agreement to be complete, and the neglect to sign it *formally was evidence to show that it was left open to further consideration (*s*). *485

So general instructions for an agreement to be afterwards executed are not binding (*t*).

Signed by the party.—A signature by the party as a witness to a deed which contains the agreement, or which refers to it, is a sufficient signature within the statute (*u*); but it is essential to prove that the witness knew that the instrument contained the agreement, or referred to it (*x*). An agreement for the sale of a house, beginning, "I, *A. B.*," &c. in the handwriting of the vendor, but signed by the vendee only, is sufficient to bind the vendor (*y*). It is immaterial in what part of the instrument the signature is contained (*z*), whether at the beginning or end. The perusing and altering the draft of an intended lease is not a sufficient signature (*a*) (1). Signature.

simple assent of the other party, it is not an agreement in writing within the statute. Where the proposed time of payment was to depend upon an act to be done by the other, at a time which he was to fix; held, that as it required him to supply a further term of the agreement, viz. that time which had not been supplied in writing, the entire agreement was not in writing, and therefore no agreement within the statute. *Boys* v. *Ayherst*, 6 Mad. 316.

(*q*) *Whaley* v. *Baganal*, 6 Bro. C. C. 45. *Qu.* on what ground?

(*r*) *Stokes* v. *Moore*, 1 Cox's P. Wils. 771, n.

(*s*) *Bawdes* v. *Amherst*, Prac. Ch. 402. But see 3 Atk. 503.

(*t*) 2 Bro. C. C. 569. (*u*) 1 Wils. 118; 1 Ves. 6; 3 Atk. 502.

(*x*) Ibid. Per Lord Hardwicke; and see the observations of Sir D. Evans, Evans on the Stat. Vol. 1, p. 236.

(*y*) *Knight* v. *Crockford*, 1 Esp. C. 190. *Lemayne* v. *Stanley*, 3 Lev. 1. *Allen* v. *Bennett*, 3 Taunt. 169. *Welford* v. *Bezeley*, 1 Wils. 118.

(*z*) *Ogilvie* v. *Foljambe*, 3 Merivale, 62. *Selby* v. *Selby*, Ibid. 6. *Knight* v. *Crockford*, 1 Esp. C. 189. *Right* d. *Cater* v. *Price*, 1 Dougl. 241. *Johnson* v. *Dodgson*, 2 M. & W. 653. But *qu.* whether the mere mention of the name of the defendant in the body of the testament, although it be drawn by himself, be sufficient. See *Stokes* v. *Moore*, 1 P. Wms. 790; 1 Cox's Cases, 222. Sugd. V. & P. 89. The signing by a party as a witness is sufficient, if he be cognizant of the contents. *Welford* v. *Beazley*, 3 Atk. 503. *Harding* v. *Crethron*, 1 Esp. C. 58. But *qu.* and see the doubt expressed in *Gosbell* v. *Archer*,[1] 4 N. & M. 485. Where the auctioneer's clerk signed the contract, "Witness, T. N." it was held not to be a signing by the agent of the party. But where a *principal* or *party to be bound* signs as a witness, which he cannot be, he cannot be understood to sign otherwise than as a principal. Per Lord Eldon in *Coles* v. *Trecothick*, 9 Ves. 234.

(*a*) *Hawkins* v. *Holmes*, 1 P. Wms. 770.

(1) [Where *A.* wrote his name upon the back of a note made by *B.* payable to *C.*, and authorized by *D.* to write over the name a stipulation to guarantee the payment of the note; it was held that the signature, and the stipulation written pursuant to the authority, were a memorandum signed by the party, within the statute, and that this authority might be proved by parol. *Ulen* v. *Kittredge*, 7 Mass. Rep. 233. But a contrary decision was made where *A.* gave a note to *B.*, and afterwards, in order to obtain further time, agreed to procure *C.* to guarantee the payment of it, and *C.* put his name on the note, in blank, and said he was held, and *B.* afterwards wrote a guarantee over *C.*'s name, with an express authority. *Hodgkins* v. *Bond*, 1

[1] Eng. Com. Law Reps. xxx. 390.

It is not essential that the signature should be upon the agreement itself; it is sufficient if it be indorsed on the draft of a lease, as a notification of the assent of the party to the terms of the lease, or if it be written in a letter or a memorandum which refers to the agreement (*b*).

By part to be charged.

Signed by the *party to be charged* (A).—It is sufficient if the agreement be signed by the party charged by it in the particular action, although it has not been signed by the other contracting party (*c*) (1); for the writing is not the contract, but merely the evidence of it (*d*). The decisions on the corresponding clause in the 17th section are applicable to this clause (*e*).

Or other person lawfully authorized.

Or some other person thereunto by him lawfully authorized (B).—Proof of an oral authority is sufficient (*f*). So it is sufficient if the authority of the agent has been subsequently recognized (*g*). An auctioneer is the agent of the vendor under this section, as he is under the 17th; and his receipt for the deposit will be a sufficient memorandum of the contract, provided that it sufficiently express the terms, or virtually include them, by reference to other documents (*h*). It has been held that he is not an agent *486 whose signature *will bind the vendee (*i*), but this opinion seems to have been completely overruled in the subsequent cases of *Emmerson* v. *Heelis* (*k*), and *White* v. *Proctor* (*l*), which are consistent with the decisions upon the corresponding clause in the 17th section (2).

By agent.

Where, upon an agreement to sell a house for an annuity, both parties instructed one attorney, who made minutes of his instructions, as follows, "Mr. *B.* agrees to convey the house in consideration of a rent of 40*l.* per annum; Mr. *W.* to take the stock at a fair appraisement;" a bill filed by *W.* for a specific performance was dismissed (*m*).

The clerk of an agent has not, in general, an authority to sign for the

(*b*) *Shippey* v. *Derrison*, 5 Esp. C. 191. [And Mr. Day's note.] *Blagden* v. *Bradbear*, 12 Ves. 466.

(*c*) 3 Bro. C. C. 161, 318; Str. 236; 1 P. Wms. 618. *Hutton* v. *Gray*, 2 Ch. C. 64. *Seton* v. *Slade*, 7 Ves. 265; *vide etiam*, *Martin* v. *Mitchell*, 2 J. & W. 426; see 12 Ves. 107; *Westam* v. *Russell*, 3 V. & B. 192. *Semble*, *contra*, *Lawrenceson* v. *Butler*, 1 Sch. & Lef. 20. And see *Wheeler* v. *Collier*,[1] M. & M. 125. *Laythorp* v. *Bryant*,[2] 2 Bing. N. C. 735.

(*d*) See Evans on the Stat. vol. 1, p. 236. (*e*) *Infra*, 492.

(*f*) *Coles* v. *Trecothick*, 9 Ves. 234, 250. [*Talbot* v. *Bower*, Marsh. 436.] *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. *Aliter*, under the 1st and 2d sections.

(*g*) *Maclean* v. *Dunn*,[3] 4 Bing. 722. *Gosbell* v. *Archer*, 4 N. & M. 492.

(*h*) 7 East, 569. *Blagden* v. *Bradbear*, 12 Ves. 471.

(*i*) *Stanfield* v. *Johnson*, 1 Esp. C. 102. See Lord Eldon's observations in *Coles* v. *Trecothick*, 9 Ves. 234; those of Sir W. Grant, *Buckmaster* v. *Harrop*, 7 Ves. 341; and *Higginson* v. *Clowes*, 15 Ves. 516; and of Lord Erskine, 13 Ves. 456.

(*k*) 2 Taunt. 38. See the observations of Mansfield, C. J. in this case.

(*l*) 4 Taunt. 209. {*M'Comb* v. *Wright*, 4 John. Ch. Rep. 659.} [*Davis* v. *Robertson*, 1 Rep. Con. Ct. 71.]

(*m*) *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559.

N. Hamp. Rep. 284. This last decision, however, was not made on a distinction between an express and implied authority to write a guaranty over the defendant's name.

See *Joselyn* v. *Ames*, 3 Mass. Rep. 274. *Hunt* v. *Adams*, 5 ib. 358. 6 ib. 519. *White* v. *Howland*, 9 ib. 314. *Moies* v. *Bird*, 11 ib. 436.]

(A) (It cannot be doubted that reducing an agreement to writing is, in most cases, an argument against fraud; but it is very far from a conclusive argument. The doctrine will not be contended for, that a written agreement cannot be relieved against on the ground of false suggestions. *Boyce's Executors* v. *Grundy*, 3 Peters, 219. In a contract for the purchase and sale of lands, the statute of frauds is satisfied if the party to be charged therewith sign the contract: it is not necessary to the validity of the contract that it should be signed by both parties. *M'Crea* v. *Purmort*, 16 Wend. 460. See also *Lowry* v. *Mehaffy*, 10 Watts, 387.)

(B) (*Oliver* v. *Dix*, 1 Dev. & Bat. Eq. 158.)

(1) [*Ballard* v. *Walker*, 3 Johns. Cas. 60, *acc.*]

(2) {At a sale of land under an order of a court of equity, the commissioner is the agent of both parties, and his entry in the sale book is a sufficient memorandum within the statute. *Jenkins* v. *Hogg*, 2 Const. Rep. 821. An entry in the books of trustees of a town, of a sale of lots by auction, does not take the case out of the statute unless signed by the trustees or some person for them. *Thomas* v. *Trustees* &c. 3 Marsh. 299. See *Sherburne & al.* v. *Shaw*, 1 N. Hamp. Rep. 157, cited, *ante*, p. 602, *note*.}

[1]Eng. Com. Law Reps. xxii. 266. [2]*Id.* xxix. 469. [3]*Id.* xv. 129.

principal, although it may be sufficient in particular cases where the principal has assented (*n*). Where trustees were authorized to sell at the request of *A. B.*, it was held that their general consent did not constitute *A. B.* their agent, so as to enable him to make a contract (*o*). One of the parties cannot be agent for the other (*p*).

Sec. 17. Sec. 17 (*q*).—No contract for the sale of any *goods, wares, and merchandizes*, for the price of 10*l.*, or upwards, shall be allowed to be good, except the buyer shall *accept part* of the goods so sold, and *actually receive* the same, or give something in *earnest* to bind the bargain, or in part of payment, or that *some note or memorandum* in writing of the said bargain be made and signed by the *parties to be charged* by such contract, or their *agents* thereunto lawfully authorized (1).

Goods, wares, &c. *For the sale of any goods, wares, and merchandizes* (*r*).—It seems that a *sale of stock is within the statute, although this has been doubted; since there can be no actual delivery or acceptance of the goods; and in one instance all the Judges were divided in opinion upon this point (*s*); but in two subsequent cases in equity the Court expressed an opinion such a sale was within the statute, and said that it had been so determined in other cases (*t*). In the case of *Simon* v. *Motivos*, Lord Mansfield, and Wilmot and Yates, Justices, expressed a doubt whether sales by *auction* were within the statute, on account of the great publicity with which such sales are attended (*u*). The words of the statute, however, are so plain and so general that it may be worthy of great consideration, whether the Courts would be warranted in overruling its application to sales by auction, on the ground, not that there is no danger of perjury, but because there may (and that is contingent) be less in such cases than in most others (A).

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Sales by auction.

(*n*) *Coles* v. *Trecothick*, 9 Ves. 234, 250. Where an agent is authorized to sell at a particular price, a sale by his clerk in his absence without special authority is not binding. *Coles* v. *Trecothick*, 9 Ves. 234. *Henderson* v. *Barnewall*, 1 Y. & J. 389.

(*o*) *Mortlock* v. *Buller*, 10 Ves. 292.

(*p*) *Wright* v. *Dannah*, 2 Camp. 203. *Farebrother* v. *Simmons*,[1] 5 B. & A. 333, which was decided on the 17th section; and therefore where the action is brought by an auctioneer, his signature is not sufficient. *Ibid.*

(*q*) For the decisions under the 5th section as to *wills*, see the title WILL.

(*r*) Upon a parol agreement that the plaintiff should furnish seed to the defendant, which he was to sow and harvest, and sell the crop at so much per bushel, Winchester measure; held, that it was to be deemed a contract for the sale of goods, and as it exceeded 10*l.* was not binding, for want of a memorandum in writing. And it seems that since the 5 Geo. 4, c. 74, a contract for sale by Winchester measure is not valid. *Watts* v. *Friend*,[2] 10 B. & C. 440. The defendant agreed by parol to purchase ash trees, which the plaintiff was felling, at 1*s.* 6*d.* per foot, but did not take them away, objecting that they were faulty and unsound; the plaintiff's attorney required him to pay for the timber he had purchased at that price, to which the defendant replied, by letter, that he bought the timber to be sound and good, that the plaintiff "promised to make it so, and now denies it, and which I have some doubts whether it is so or not; he told me I should not have any without all, so we agreed on these terms, and I expected him to sell to somebody else:" held, first that it was not a contract for the sale of any interest in lands, but for the sale of goods, wares, and merchandize, within the 17th section of the statute; second, that as the defendant's letter did not recognize the absolute contract stated in the plaintiff's attorney's letter, but a conditional one, and which might be denied by the plaintiff, there was not a sufficient note in writing to satisfy the stat.; and, lastly, that there being nothing to show that the defendant had divested himself of his right to object to the quality of the goods, or the seller to have lost his lien for the price, there was not a part acceptance or receipt of the goods into the defendant's possession to satisfy the statute and bind him. *Smith* v. *Surman*,[3] 9 B. & C. 561. The words do not extend to shares in a banking company. *Humble* v. *Mitchell*, 3 P. & D. 141.

(*s*) *Pickering* v. *Appleby*, 2 P. Wms. 307.

(*t*) Prec. Chan. 533; and see Ca. T. King, 41.

(*u*) In *Simon* v. *Motivos*, 1 Bl. 599. But the case was not decided upon that ground.

(1) {See 4 Wheat. 89, *note*, where the decisions on this section are collected.}

(A) (Where a purchase is made at an auction sale, at one time and from the same vendor, although the articles purchased are numerous, and struck off separately at separate and distinct prices, the whole constitutes but one entire contract, and a delivery of part of the goods sold, renders the sale valid for the whole, within the statute of frauds. *Mills* v. *Hunt*, 17 Wend. 333. S. C. 20 Wend. 431. [*Davis* v. *Rowell*, 2 Pick. Rep. 64, is an express decision that the sale of chattel by auction is within st. 1788, c. 16, § 2, (copied from 29 *Car.* 2 c. 3. § 17,) of frauds].)

[1]Eng. Com. Law Reps. vii. 120. [2]*Id.* xxi. 106. [3]*Id.* xvii. 443.

The same reasons would apply with equal force to many other cases, such as sales in markets and fairs. It is also to be observed, that sales by auction of lands have been held to be within the 4th section of the same Act (*x*) (1). Where the thing contracted for did not exist at the time of the contract, but was to be so constituted by the application of subsequent labour, and was consequently incapable of delivery or acceptance at the time of agreement, the contract was held not to be within this section of the statute, although the materials to be employed did exist at the time of contract. Thus a contract for a chariot to be made (*y*), or for the purchase of a quantity of oak pins, to be cut out of slabs and delivered to the buyer (*z*); or for a quantity of corn to be thrashed out (*a*), was not within the statute. But now, by the st. 9 Geo. 4, c. 14, s. 7, the former enactments are to take effect, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The former statute was held to extend to the sale of things which exist *in solido* at the time of the sale, although the contract were but executory (*b*), and although the goods were to be subsequently delivered at a different place (*c*).

Where there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which at the time was not prepared and in a state capable of immediate delivery; held, that this was a contract for the sale of goods within the statute (*d*).

A contract to procure goods and carry them is not within the statute, for it is not a contract of sale (*e*).

A contract for the sale of shares in a canal navigation, or other public
*488 *undertaking, need not be in writing, not being within the statute of frauds (*f*).

In order to constitute an acceptance within this clause, there must be such an actual parting with the possession as devests the vendor of his lien.

Where a party purchased several articles in a shop at separate prices, and some were severed from the bulk and marked by him; it was held, that the whole purchase was an entire contract, and being above 10*l.* was within the statute, and no sufficient transfer and acceptance to bring it within the exception in the 17th clause, and that to satisfy the exception there must be an actual transfer and acceptance of the goods, or part thereof (*g*).

(*x*) See Lord Ellenborough's observations upon this point, in *Hinde* v. *Whitehouse;* and see *Heyman* v. *Neal*, 2 Camp. 337; 12 Ves. jun. 466. This is now so settled; *Kenworthy* v. *Scholefield*,[1] 2 B. & C. 945.

(*y*) *Towers* v. *Osborne*, Str. 506. (*z*) *Groves* v. *Buck*, 3 M. & S. 178.

(*a*) *Clayton* v. *Andrews*, 4 Bur. 2101.

(*b*) *Alexander* v. *Comber*, 1 H. B. 20. *Rondeau* v. *Wyatt*, 2 H. B. 63. [*Bennett* v. *Hull*, 10 Johns. 304.] *Cooper* v. *Elston*, 7 T. R. 14. Although the principle has in previous cases been laid down to that extent. See Str. 406; 2 Bur. 2101.

(*c*) *Cooper* v. *Elson*, 7 T. R. 14. [*Newman* v. *Morris*, 4 Har. & M'Hen. 421.]

(*d*) *Garbutt* v. *Watson*,[2] 5 B. & A. 613. So an agreement to furnish chimney-pieces at certain prices, and "to finish them in a tradesmanlike manner," was held to be a contract for the sale of goods requiring no stamp, and something remaining to be done before delivery made no difference. *Hughes* v. *Breeds*,[3] 2 C. & P. 159.

(*e*) *Cobbold* v. *Caston*,[4] 1 Bing. 399. (*f*) *Latham* v. *Barber*, 6 T. R. 67.

(*g*) *Baldney* v. *Parker*, id. ix. 16; 3 B. & C. 37; 3 D. & R. 220. Where goods were made to defendant's order, and he took away some part; held that it was not a sufficient acceptance of the goods within the statute, and that the plaintiff could not recover on the count for goods sold and delivered. *Thompson* v. *Maceroni*,[5] 3 B. & Cr. 1; 4 D. and R. 619. The traveller of *A.* & Co. in London, having called upon *B.*

(1) [*Simonds* v. *Catlin*, 2 Caines' Rep. 64. *Jackson* v. *Catlin*, 2 Johns. Rep. 248. 8 Johns. Rep. 520.]

[1]Eng. Com. Law Reps. ix. 286. [2]*Id.* vii. 249. [3]*Id.* xii. 71. [4]*Id.* vii. 358. [5]*Id.* x. 3.

Shall accept part of the goods so sold, and actually receive the same.— The sale of a mare for 20*l.* to be returned if in foal, and part of the price to be paid back, is an entire and conditional contract, and the acceptance in the first instance takes the case out of the statute (*h*). Where the goods are ponderous, a constructive delivery is sufficient; as where the vendor delivers to the vendee the key of the place where the goods are deposited (*i*); or the muniments of a ship (*k*); or the vendee comes the next day and sees the goods weighed off (*l*); or sells part of the commodity sold to another, who removes it (*m*). Part for acceptance.

But an actual delivery and acceptance of part of the goods takes the case out of the statute; as where the vendee, having purchased a quantity of balsam of Peru for 200*l.*, sent an agent with baskets for part of it, which was delivered (*n*). And if the purchaser take a sample, which is to be considered as part of the commodity contracted for, and not as a mere specimen, it is a part-acceptance within the statute (*o*).

Where goods were ordered by parol at 11*s.* per pound, and were sent to the vendee, who opened the bale, but sent them back with a letter, alleging that they were not worth 6*s.* per pound, it was held to be no acceptance (*p*) (1). *Whether there has been an acceptance or not by the vendee, is in many instances a question of fact for the jury; the sale by the vendee of part of the commodity sold, is evidence of an acceptance for their consideration (*q*). *489

A delivery to an agent (*r*) appointed by the vendee, as, for instance, a carrier, has been held to be an acceptance within the statute (A); although

in the country for orders, *B.* gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye, at a certain price; the traveller said the price was too low, but that he would write to his principals, and if *B.* did not hear from them in one or two days, he might consider that his offer was accepted. *A.* & Co. never wrote to *B.* but sent all the goods; held, that this was not a joint order for them all, so as to make the acceptance of the cream of tartar the acceptance of the lac dye also, within 29 Car. 2, c. 3, s. 17. *Price* v. *Lea*,[1] 1 B. & C. 156. See *Hodgson* v. *Le Bret*, 1 Camp. 233. *Anderson* v. *Scott*, n. Ibid. In the latter case, the plaintiff having selected several pipes of wine in the defendant's cellar, and agreed for the purchase, cut off the spills or pegs by which the wine is tasted, and the defendant's clerk marked the plaintiff's initials on the casks; held to be a sufficient delivery. Where a joint order is given for several classes of goods, the acceptance of one class is a part-acceptance of the whole. *Elliott* v. *Thomas*, 3 M. & W. 170.

(*h*) *Williams* v. *Burgess*, 2 P. & D. 422.

(*i*) *Searle* v. *Keeves*, 2 Esp. C. 598. *Peckerley* v. *Appleby*, Com. 354. *Colt* v. *Nethersoll*, 2 P. Wms. 308. [*Wilkes* v. *Ferris*, 5 Johns. 335. *Hunn* v. *Browne*, 2 Caines' Rep. 44. *Leedon* v. *Phillips*, 1 Yeates, 529].

(*k*) 1 Atk. 171.

(*l*) *Simon* v. *Motivos*, 3 Burr. 1921; 1 Bl. 598.

(*m*) *Chaplin* v. *Rogers*, 1 East, 192.

(*n*) *Descard* v. *Bond*, *cor.* Lord Hardwicke, 7 Geo. 2. But where goods of the value of 144*l.* are made to order, and remain in the possession of the vendor at the request of the vendee, with the exception of a small part which the latter takes away, this is no acceptance of the residue. *Thompson* v. *Maceroni*,[2] 3 B. & C. 1.

(*o*) *Hinde* v. *Whitehouse*, 7 East, 558. *Klinitz* v. *Surrey*, 5 Esp. C. 267. *Talver* v. *West*,[3] Holt's C. 178. *Cooper* v. *Elston*, 7 T. R. 14.

(*p*) *Kent* v. *Huskisson*, 3 B. & P. 233.

(*q*) *Chaplin* v. *Rogers*, 1 East, 192.

(*r*) Where the purchaser of two horses desired the vendor to keep them in his possession at livery, and the vendee in consequence removed them from one stable into another; it was held that the vendor himself might be considered as the agent of the vendee. *Elmore* v. *Stone*, 1 Taunt. 458. Where, upon the sale of a hogshead of wine in the London dock warehouses, a delivery order only was given, but no contract in writing; held, that although the London Dock Company might be bound, when required, to hold the goods on account of the vendee, yet having originally held it as the agents of the vendors, there could be no acceptance by the vendee until the company accepted the order for delivery, and thereby assented to hold the wine as agents of the vendee. *Bentall* v. *Burn*,[4] 3 B. & Cr. 423; 5 D. & R. 284; [and remarks of Bayley, J., 3 B. & A. 324.[5]]

A. agreed to purchase a horse from *B.* for ready money, and to take him within a time agreed upon. About the expiration of that time *A.* rode the horse, and gave directions as to its treatment, &c.; but

(1) (*Outwater* v. *Dodge and Green*, 7 Cow. 85.)
(A) (See *Outwater* v. *Dodge*, 6 Wend. 397.)

[1]Eng. Com. Law Reps. viii. 48. [2]*Id.* x. 3. [3]*Id.* iii. 66. [4]*Id.* x. 138. [5]*Id.* v. 305.

by requiring an *acceptance* of the goods, as well as an *actual receipt* of them, the Legislature seems to have intended some actual assent by the principal beyond that constructive assent which may be inferred from mere delivery to an agent (*s*). But in later cases this doctrine has been overruled; and the rule is, that so long as the buyer continues to have a right to object either to the quantity or quality of the goods, there can be no acceptance of the goods (*t*); and that so long as the seller retains a lien on the goods, there can be no receiving of them within the statute by the vendee (*u*). A dealer in London, in the habit of delivering goods at a wharf in London, delivered a parcel at the wharf on a parol order, and the goods having been lost, it was held that the vendee could not recover (*x*). Again, where a verbal order was given to the agent of the vendor for goods, which were to remain in the possession of the vendor till called for, and the agent measured the goods, and set them apart, it was held that there was no acceptance within the statute (*y*).

*490 *In order to satisfy the statute there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take possession as owner (*z*).

Where the law can pronounce on the facts of the case, whether they constitute an acceptance within the statute, the question is of course a question of law (*a*); but in other cases the question of law may depend upon the

requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away, and pay the price; to this *B.* assented. The horse died before *A.* paid the price or took it away; held, that there was no acceptance of the horse within the meaning of the Statute of Frauds. *Tempest* v. *Fitzgerald*,[1] 3 B. & A. 680. A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for twenty days, without any charge to the vendee; at that time the horse was sent to grass by the direction of vendee, and, by his desire, entered as the horse of one of the vendors. Held, that there was no acceptance of the horse by the vendee. *Carter* v. *Toussaint*,[2] 5 B. & A. 855. Where a vendee verbally agreed at a public market with the agent of the vendor to purchase twelve bushels of tares (then in vendor's possession, constituting part of a larger quantity in bulk), to remain in vendor's possession till called for, and the agent on his return home measured the twelve bushels, and set them apart for the vendor; held, that this did not amount to an acceptance by the latter, so as to take the case out of the statute. *Howe* v. *Palmer*,[3] 3 B. & A. 321.

(*s*) *Hart* v. *Sattley*, 3 Camp. 528, where it was held at Nisi Prius, that a delivery on a parol order to a carrier who had been in the habit of carrying goods from the vendor to the vendee, was a delivery to the vendee. See also *Dutton* v. *Solomonson*, 3 B. & P. 583; *Dawes* v. *Peck*, 8 T. R. 330; [and Mr. Howe's note to *Hart* v. *Sattley*.]

(*t*) *Howe* v. *Palmer*, 3 B. & A. 321; *infra*, note (*y*); *Hanson* v. *Armitage*,[4] 5 B. & A. 557.

(*u*) *Baldney* v. *Parker*,[5] 3 B. & C. 37; *supra*, 488. *Carter* v. *Toussaint*, 5 B. & A. 855; *supra*, note (*r*). And see *Tempest* v. *Fitzgerald*,[1] 3 B & A. 680; *supra*, note (*r*).

(*x*) *Hanson* v. *Armitage*,[4] 5 B. & A. 557.

(*y*) *Howe* v. *Palmer*,[3] 3 B. & A. 321. And see *Astey* v. *Emery*, 4 M. & S. 262. *Anderson* v. *Hodgson*, 5 Price, 630. Where goods bought abroad were delivered at a foreign port on board a ship chartered by the purchaser, it was held to be no acceptance. *Acebal* v. *Levy*,[6] 20 Bing. 376; 4 M. & S. 217.

(*z*) *Phillips* v. *Bistolli*,[7] 2 B. & C. 513. Bulk samples were sent by coach pursuant to contract, the defendant returned them as not answering the samples by which he bought; the jury found that they did answer the samples, but the Court held that there was no acceptance. *Johnson* v. *Dodgson*, 2 M. & W. 663. The use of more than was necessary for ascertaining the quality of goods does not amount to an acceptance. *Elliott* v. *Thomas*, 3 M. & W. 170.

Where the defendant ordered a machine to be made without stipulation as to price, and paid money on account when he saw it finished, admitted that it was made to order, requested the plaintiff to send it home, and afterwards (the maker having refused to deliver the machine without receiving the full amount, and having directed his attorney to proceed) said that he would endeavour to arrange if they would give him time, it was held to be a sufficient acceptance to enable the plaintiffs to recover for goods bargained and sold. *Elliot* v. *Pybus*,[8] 10 Bing. 512; 4 M. & S. 389.

A. employed *B.* to make a wagon, and *before it was finished* employed a workman to fix upon it some iron-work and a tilt, and it was held that this did not amount to an acceptance. *Maberly* v. *Skeppard*,[9] 10 Bing. 99. But per Tindal, C. J., it might have been otherwise if, at the time, the wagon had been finished.

(*a*) *Vide* Vol. I. tit. Law and Fact.

[1] Eng. Com. Law Reps. v. 419. [2] *Id.* vii. 280. [3] *Id.* v. 303. [4] *Id.* vii. 191. [5] *Id.* ix. 16. [6] *Id.* xxv. 170. [7] *Id.* ix. 162. [8] *Id.* xxv. 222. [9] *Id.* xxv. 43.

conclusion of the jury, whether there has or not been a delivery and acceptance in point of fact (*b*) (1).

The detaining goods sent for approval, beyond a reasonabte time, affords a p resumption of acceptance (*c*).

Or giving something in earnest to bind the bargain, or in part payment.—The putting a shilling into the hand of the servant of the vendor, which is immediately returned, is not sufficient (*d*). Earnest.

Some note or memorandum.—It is sufficient if a contract can be collected from several different and separate documents, if they can be sufficiently connected (*e*). A bill of parcels, in which the vendor's name is printed, may be connected with a subsequent letter written by the vendor to the vendee (*f*). So an order for goods, written and signed by the vendor in a *book of the vendee's, but not naming the latter, may be connected with a letter written by the vendor to his agent, mentioning the name of the vendee (*g*); but where the letter, subsequently written by the vendee, recognized Note or memorandum. *491

(*b*) *Blenkinsop* v. *Clayton*,[1] 7 Taunt. 597. Where an article was sold at an auction, by the conditions of which the purchaser was to pay 30 *per cent.* on the price, on being declared the highest bidder, and the residue before the goods were removed, and an article was knocked down to *A.* as the highest bidder, and delivered to him immediately, and after it had remained in his hands for a few minutes, he said he had mistaken the price, and refused to keep it, it was held to be a question of fact for the jury whether there had been a delivery by the seller, and an acceptance by the buyer, with intent to transfer the right of possession. *Phillips* v. *Bistolli*,[2] 2 B. & C. 511. *Chaplin* v. *Rogers*, 1 East, 194. On an action for goods sold and delivered, the defendant, after a parol purchase of a stack of hay, sold part of it to a third person, by whom it was taken away without the vendor's approbation; it was left by Hotham, B. to the jury, to say whether there had been an acceptance by the defendant. After a verdict for the plaintiff, on a motion for a new trial, one ground of which was that the judge had left matter of law as a fact for the jury, a new trial was refused; and Lord Kenyon and the rest of the Court held that the specific finding by the jury, that there was an acceptance, put an end to the question of law. But what constitutes an acceptance is frequently a question of law. Thus in *Hinde* v. *Whitehouse* (7 East, 558) it was held, that the accepting of samples of sugar delivered as part of the property purchased at an auction, was a sufficient acceptance in point of law.

(*c*) *Coleman* v. *Gibson*, 1 Mo. & R. 168. (*d*) *Blenkinsop* v. *Clayton*,[1] 7 Taunt. 597.

(*e*) *Infra*, 493.

(*f*) *Saunderson* v. *Jackson*, 2 B. & P. 238; *supra*, 483. The purchaser of a hundred sacks of good English seconds flour, at 45*s.* a sack, wrote to the vendors as follows: "I hereby give you notice, that the corn you delivered to me in part performance of my contract with you for 100 sacks of good English seconds flour, at 45*s.* per sack, is of so bad a quality that I cannot sell it, or make it into saleable bread; the sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To which the vendors answered by their attorney, "Messrs. *L.* and *L.* consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder; and unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount;" held, that a jury was warranted in concluding that the contract mentioned in the vendor's answer was the same as that particularized in the purchaser's letter, and that therefore the two writings constituted a sufficient memorandum of the contract, under the 17th sect. of the statute. *Cobbold* v. *Caston*,[3] 1 Bing. 399. And see *Jackson* v. *Lowe*, *infra*,[4] note (*m*). (*g*) *Allen* v. *Bennett*, 3 Taunt. 169.

(1) [Though a virtual or constructive delivery may be tantamount to an actual one, yet the circumstances, which are to be held tantamount, must be so strong and unequivocal as to leave no doubt of the intent of the parties.

An agreement with the vendor about the storage of goods, and the delivery by him of the export entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery or to afford an *in licium* of ownership. *Bailey et al.* v. *Ogden*, 3 Johns. 399. Where the defendant agreed to purchase of the plaintiff a quantity of bagging, after which he was told that it remained in the plaintiff's store, at his risk, whereupon he ordered and had some of it turned out, which he afterwards returned, and then refused to take any part of it—it was held that this was not a sufficient delivery within the statute. *Jackson* v. *Watts*, 1 M'Cord, 288. If a contract for the sale of goods, to be delivered within a certain time, be within the statute,—a delivery and acceptance of a part of the goods, after the expiration of the stipulated time, will not take the contract out of the statute as to the remainder. *Semb. Damon* v. *Osborn*, 1 Pick. 480.

If the vendor give the vendee an order on a third person, who has possession of the goods, for their delivery, it is sufficient to take the case out of the statute. *Hollingsworth* v. *Napier*, 3 Caines' Rep. 185. See also *Wilkes* v. *Ferris*, 5 Johns. 335.

Where, on a sale of cattle no earnest money was paid, nor any memorandum in writing made, and the cattle were to remain in the vendor's possession, at the vendee's risk, until he called for them, and the vendee afterwards came and took away the cattle, without saying anything to the vendor—it was held that there was a sufficient delivery within the statute. *Vincent* v. *Germond*, 11 Johns. 283.]

[1]Eng. Com. Law Reps. ii. 230. [2]*Id.* ix. 162. [3]*Id.* viii. 358. [4]*Id.* viii. 222.

the order, but at the same time insisted that the terms of it had not been performed, inasmuch as the goods had not been delivered in time, it was held that it could not establish a previous defective memorandum (*h*). And it was held that parol evidence was inadmissible to show that there had been no stipulation as to time (*i*) (A) (1).

A material alteration of a written agreement by an oral one, substituting another day as the last of a period within which goods were to be delivered, is not binding (*k*).

Bargain. *If the said bargain be made or signed.*—It has been held, that the word *bargain*, as used in this clause, does not render so strict a statement of the constituent and essential members of the contract necessary, as the word *agreement* does under the fourth section: a memorandum is sufficient to bind the defendant as the vendee, although it does not express the *consideration* for the promise (*l*), except by implication from the promise itself: but the note must express the names of both the contracting parties, and the price (*m*); and therefore a note signed by the vendor of goods, but not mentioning the buyer's name, is insufficient (*n*).

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Signed by the parties. **Made or signed (o) by the parties.*—A bill of parcels, in which the vendor's name is *printed*, is, it seems, a sufficient making or signing to bind

(*h*) *Cooper* v. *Smith*, 15 East, 103. So where the letter stated the goods had not arrived, and that if they did not arrive in a few days, the defendant (the alleged vendee) must get some elsewhere. *Richards* v. *Porter*,[1] 6 B. & C. 437. See *Jackson* v. *Lowe*,[2] 1 Bing. 9.

(*i*) *Cooper* v. *Smith*, 15 East, 103.

(*k*) *Stead* v. *Dawber*, 2 P. & D. 447. Where the written contract stated a time and place for the delivery of goods, held that an alteration as to the time, to be binding, must be in writing. *Marshall* v. *Lynn*, 6 M. & W. 109; overruling *Cuff* v. *Penn*, 1 M. & Selw. 21.

(*l*) *Egerton* v. *Matthews*, 6 East, 307, and Mr. Day's note. But there the consideration did appear by necessary inference. *Vide supra*, 483.

(*m*) A memorandum given by the buyer assenting to take a horse if it turned out to be of the age represented, but which was silent as to price; held insufficient. *Elmore* v. *Kingscote*,[3] 5 B. & C. 583. In the case of *Kain* v. *Old*,[4] 2 B. & C. 627, which was one of contract for the sale of a ship, the Court seem to have been of opinion that the contract was imperfect, because it did not mention the price, and that the defect was not supplied by any extrinsic proof; for though the bill of sale mentioned the price, it did not mention any previous contract or agreement. In an action by the vendee of goods against the vendor, for breach of contract, a letter written by the plaintiff stating the terms of contract, coupled with an answer written by the defendant's attorney, insisting that the contract has been performed *pro tanto*, is sufficient evidence of the contract. *Jackson* v. *Lowe*,[2] 1 Bing. 9.

It seems, however, that the rule as to price is subject to this distinction and question, viz.: whether the omission be according to the intention of the parties to stipulate for a reasonable price, or be an imperfection in the statement of the contract, which in the latter case would be insufficient, whilst in the former, an intention to contract for a reasonable price may be presumed. *Hoadley* v. *M'Laine*,[5] 10 Bing. 482; 4 M. & S. 340. In *Acebel* v. *Levy*,[6] 10 Bing. 382, a further distinction was made in the latter case, between an *executed* and an *executory* contract; this, however, does not seem to be warranted by *Hoadley* v. *M'Laine*.

(*n*) *Champion* v. *Plummer*, 1 N. R. 252; *vide supra*, 483.

(*o*) A signature in pencil is, it seems, sufficient. *Geary* v. *Physic*,[7] 5 B. & C. 234. Note, that that was the case of an indorsement of a bill of exchange.

(A) (A note or memorandum of sale within the Statute of Frauds and Perjuries, must state expressly, or by reference, the subject of sale, the terms and the parties with such certainty as to furnish evidence of a complete agreement. *Nichols* v. *Johnson*, 10 Day, 192.)

(1) [A memorandum of a contract for the sale of a certain number of bales of cotton, at a certain price per pound, was held to be sufficient, though it did not specify the weight of the bales, nor refer to any invoice by which the weight might be ascertained. *Penniman* v. *Hartshorn & al.* 13 Mass. Rep. 87. Where a common bill of parcels is given, at or after the purchase of goods, it does not preclude either party from resorting to other evidence to prove the contract. *Bradford* v. *Manly*, 13 Mass. Rep. 133. If after a parol contract for the sale of goods, the vendor deliver to the vendee a bill of parcels, it will be a sufficient memorandum in writing to take the case out of the statute—and if the contract originally made differ from that proved by the bill of parcels, it will be of no effect. *Whitwell & al.* v. *Wyer & al.* 11 Mass. Rep. 6. The form of the memorandum is not material; but it must state the contract with reasonable certainty, so that the substance of it can be understood from the writing itself, without recourse to parol proof. *Bailey & al.* v. *Ogden*, 3 Johns. 399.]

[1] Eng. Com. Law Reps. xiii. 229. [2] *Id.* viii. 222. [3] *Id.* xii. 327. [4] *Id.* ix. 205. [5] *Id.* xxv. 208. [6] *Id.* xxv. 170. [7] *Id.* xi. 213.

the vendor (*p*), as a signing by him. But at all events a letter subsequently written to the vendee, admitting a contract, may be connected with the bill of parcels, to take the case out of the statute (*q*). So in *Schneider* v. *Norris*, (*r*), where the name of the vendor (the defendant) in the bill of parcels was *printed*, but the defendant had written the vendee's name upon it, it was held to be a sufficient signature. An agreement, beginning "I, *A. B.* agree to sell," although not otherwise signed by the party, is sufficient to bind the vendor (*s*) (1) (A).

By the parties *to be charged.*—It is sufficient if the memorandum be signed by the defendant, the vendor; though it was not signed by the plaintiff, the vendee; and although it could not have been enforced against the latter (*t*) (2). Signature.

A memorandum signed only with the initials of the vendor, the name of the vendor nowhere appearing, is not sufficient (*u*).

Or their agents thereunto lawfully authorized.—A broker is an agent for both parties, and they are bound by the contract which he makes, of which the bought-and-sold notes and his book are evidence (*v*) (B). The authority of an agent who makes a contract in writing may be conferred (*x*) or ratified (*y*) orally. By agent.

In the case of sales by auction, it seems to be now settled that the auctioneer is an agent lawfully authorized by the buyer to sign a contract for him (*z*), though it is otherwise where the auctioneer himself brings the action (*a*). The authority in such case is given by bidding aloud; and

(*p*) *Saunderson* v. *Jackson*, 2 B. & P. 238. Note, in this case a letter referring to the contract was afterwards written by the vendor to the vendee; and note also, that the vendee's name appeared in the bill of parcels. See 1 N. R. 154.

(*q*) Ibid. In *Schneider* v. *Norris*, 2 M. & S. 286, Dampier, J. intimated that in the case of *Saunderson* v. *Jackson*, the case was taken out of the operation of the statute by the subsequent letter only.

(*r*) 2 M. & S. 286. (*s*) *Knight* v. *Crockford*, 1 Esp. C. 190.

(*t*) *Allen* v. *Bennett*, 3 Taunt. 169; *supra*, 485.

(*u*) *Jacob* v. *Kirk*, 2 M. & R. 221.

(*v*) *Heyman* v. *Neale*, 2 Camp. 337; *Rucker* v. *Cammeyer*, 1 Esp. C. 105; [*Merrill* v. *Mason*, 12 Johns. 102. 14 ib. 484.] Copies of an unsigned entry in the broker's book delivered to each party, held sufficient. *Goom* v. *Aflalo*,[1] 6 B. & Cr. 117. Vide *infra*, 493, and tit. VENDOR AND VENDEE.

(*x*) *Acabel* v. *Levy*,[2] 10 Bing. 378. (*y*) *Maclean* v. *Dunn*,[3] 4 Bing. 722.

(*z*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558; *Simon* v. *Motivos*, 1 Bl. 599; *Kenworthy* v. *Schofield*,[4] 2 B. & C. 945; *Phillimore* v. *Barry*, 1 Camp. 513. But where it was agreed between the owner of goods and his creditor that the price of goods bought by the latter should be set against the debt, it was held that the creditor was not bound by the printed conditions of sale, that purchasers should pay part of the price at the sale, and the rest on delivery. *Bartlett* v. *Purnell*,[5] 4 Ad. & Ell. 792. It is sufficient if the agent's name appear in the contract; as where the auctioneer signs the name of an agent employed to purchase lands. *Kemesy* v. *Proctor*, 1 J. & W. 350; *White* v. *Proctor*, 4 Taunt. 209.

(*a*) Where an auctioneer wrote down the defendant's name, by his authority, opposite to the lot purchased; held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. *Farebrother* v. *Simmons*,[6] 5 B. & A. 333. {*Davis* v. *Robertson*, 1 Rep. Com. Ct. 71. *M'Comb* v. *Wright*, 4 Johns. Ch. Rep. 659.}

(1) [An entry made by the vendor, in a memorandum book, of the name of the vendee, and of the terms of the contract, which was read to the vendee's agent who made purchase, and assented to by him as correct, was held to be insufficient—not being signed by the party to be charged, or by his agent. *Bailey et al.* v. *Ogden*, 3 Johns. 399. *Query*, whether the vendor is bound by such memorandum so that the vendee could enforce the contract? *Ibid.* It is not a valid objection that the name of the party to be charged is written above the body of the memorandum. *Penniman* v. *Hartshorn et al.* 13 Mass. Rep. 87. A memorandum of a contract written by the broker employed to make the purchase, with a lead pencil, in his memorandum book, in the presence of the vendor—the *names* of the vendor and vendee, and the terms of the purchase, being in the body of the memorandum, but not subscribed by the parties—was held to be sufficient. *Merrit & al.* v. *Clason*, 12 Johns. 102—affirmed on error, 14 Johns. 484.]

(A) (See *Sewall* v. *Fitch*, 8 Cow. 215.)

(2) [*Penniman* v. *Hartshorn & al.* per Parker, C. J. 13 Mass. Rep. 62. *Merritt & al.* v. *Clason*, 12 Johns. 102. 14 ib. 484. *Douglas* v. *Spears*, 2 Nott & M'Cord, 207, *acc.* See *Weightman* v. *Caldwell*, 4 Wheat. 85.]

(B) (*Russell* v. *Nicoll*, 3 Wend. 112.)

[1]Eng. Com. Law Reps. xiii. 116. [2]*Id.* xxv. 170. [3]*Id.* xv. 129. [4]*Id.* ix. 286. [5]*Id.* xxxi. 180. [6]*Id.* vii. 120.

where the name of the purchaser of different lots is written by the auctioneer opposite to the different articles for which the purchaser is the highest bidder, on the sale-bill, the memorandum is sufficient to satisfy the
*493 *statute (*b*) (1). So where the auctioneer wrote the initials of the agent of the buyer's name, together with the prices, opposite to the lots purchased, in the printed catalogue, and the principal afterwards, in a letter to the agent, recognized the purchase (*c*). But where the auctioneer signs the name of a buyer on a mere catalogue of the goods, which is neither connected with nor refers to the conditions of sale, which are read at the time of sale, it seems that this is not a memorandum of a contract of sale according to those conditions (*d*). A broker is the agent of both parties. Where regular bought-and-sold notes have been made out, they are the proper evidence of the contract (*e*). And the bought note alone is evidence of the contract for the purchaser (*f*). If the bought-and-sold notes materially differ (*g*), there is no contract (*h*). If no bought-and-sold notes have been made out, the broker's book signed by him will be evidence of the contract (*i*).

Where both the parties had agreed that *A. B.*, a broker, should manage a sale between them, for which they were in treaty, and the vendee some days afterwards informed *A. B.* that he had made the bargain, and desired him to put down the terms, which *A. B.* accordingly did, and then sent a sale-note to the vendor, and the vendee did not return the note, but in a conversation with *A. B.* some days afterwards regretted that she had sold the goods, it was held to be evidence to the jury of authority from the vendor to *A. B.* (*k*). But although the owner has authorized a broker to sell, and the latter has made a verbal contract with the vendee, the owner may revoke his authority to the broker at any time before the sale-note is made out (*l*).

Where the agent of the vendor wrote the note in the vendor's order-book, in the presence of the vendee, although he afterwards, at the desire of the vendee, the defendant, read it over to him, it was held that the signature was not sufficient (*m*) (A); and it has been held, that one of the contracting parties could not be considered as the agent of the other, although the other overlooked him, and gave him directions as to the terms (*n*). Where the traveller of the vendor having, at a customer's request, signed his own name to the memorandum of the items ordered in his own book, it was

(*b*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558; *Simon* v. *Motivos*, 1 Bl. 599.
(*c*) *Phillimore* v. *Barry*, 1 Camp. 513.
(*d*) *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*,[1] 2 B. & C. 945. And see *Utterton* v. *Robbins*,[2] 1 A & E. 423.
(*e*) *Thornton* v. *Meux*,[3] M. & M. 43; *Goom* v. *Aflalo*,[4] 6 B. & C. 117.
(*f*) *Hawes* v. *Forster*, 1 M. & R. 368. If the vendor insists on a variance he must produce the sold note. But see *Smith* v. *Sparrow*,[5] 2 C. & P. 544.
(*g*) Where the broker in the bought-and-sold notes described the sellers' firm as *A.*, *B.* and *C.*, but the firm had in fact unknown to the broker been changed to *A.*, *D.* and *E.*, it was held that the latter might sue, the defendant suffering no prejudice by the mistake, and there being some evidence to show that the defendant recognized the subsistence of the contract. *Michael* v. *Lapage*,[6] Holt's C. 253.
(*h*) *Grant* v. *Fletcher*, 5 B. & C. 436; *Thornton* v. *Meux*, M. & M. 43; *Bold* v. *Rayner*, 1 M. & W. 343.
(*i*) *Grant* v. *Fletcher*,[7] 5 B. & C. 436; *Henderson* v. *Barnwall*, 1 Y. & J. 387.
(*k*) *Chapman* v. *Partridge*, 5 Esp. C. 256. Cor. Mansfield, C. J.
(*l*) *Farmer* v. *Robinson*, 2 Camp. 339, n. (*m*) *Cooper* v. *Smith*, 15 East, 103.
(*n*) *Wright* v. *Dannah*, 2 Camp. 303.

(1) {The original memorandum made by the auctioneer must be produced, if in existence: A copy of it is not evidence. *Davis* v. *Robertson*, 1 Rep. Con. Ct. 71.}
(A) (A memorandum kept by a clerk of a vendor, who sells goods at auction, of the articles sold, and the prices bid for them, is a sufficient note in writing to bind the vendee. *Frost* v. *Hill*, 3 Wend. 386.)

[1]Eng. Com. Law Reps. ix. 286. [2]*Id.* xxviii. 111. [3]*Id.* xxii. 243. [4]*Id.* xiii. 116. [5]*Id.* xii. 253. [6]*Id.* iii. 91. [7]*Id.* ii. 265.

held that, in the absence of any evidence of his being the agent of the vendor, it was not sufficient to bind him (*o*).

Where the defendant, a foreigner, carried on business in this country by an agent, who transacted the business in his own name, it was held, that the defendant having authorized the agent to deal for him in that name, it did not lie in his mouth to deny that the agent's name inserted by the *broker in the sold-note was his own name of business, and that the statute, *494 therefore, was sufficiently complied with; and that he remained liable on the agent's contracts until notice given to the world of his revocation of the authority (*p*).

It was held also, that it was not competent to him to show that in the particular trade, by custom, a party may reject the undisclosed principal, and look to the agent for the completion of the contract (*q*).

FRAUDULENT CONVEYANCE.

According to the general rule of law, a man may not only dispose of his own property as he chooses, where there are no claims which ought in justice to be satisfied out of it, but even where such claims exist he may still elect which of his creditors he will satisfy in preference to others, who have not by any legal process acquired any lien (*r*) upon such property, or he may dispose of it by way of exchange or sale.

Thus far the law permits; but it would be contrary to the first principles of natural justice and considerations of policy and convenience to allow a debtor to defeat just claims, either by any voluntary transfer of his property by way of gift, or on a secret trust for his own use. And therefore the question between an execution creditor and one who claims as assignee from the debtor, usually is, whether the transfer was fraudulent as against creditors or purchasers. Fraud in such cases may be either an inference of law from the facts, or it may be a conclusion of fact for the jury.

Where the fraud can be collected from the instrument itself, or from the deed coupled with extrinsic circumstances, without any finding by the jury as to the intention of the party transferring, it is a question of law arising upon the facts; but when it depends on the real intention of the parties, that intention is a question of fact for the jury (A). Question of law, when.

A voluntary conveyance of land without valuable consideration is fraudulent and void, as against a subsequent purchaser, under the stat. 27 Eliz. c. 4, without any finding of a fraudulent intention (*s*), and though he had notice of the prior conveyance (B).

(*o*) *Graham* v. *Musson*,[1] 5 Bing. N. C. 603.

(*p*) *Trueman* v. *Loder*, 3 P. & D. 267. (*q*) *Ibid.*

(*r*) See *Holbird* v. *Anderson*, 5 T. B. 236; *Estwicke* v. *Caillaud*, 5 T. R. 240; *Nunn* v. *Wilsmore*, 8 T. R. 521; *Pickstock* v. *Lyster*, 3 M. & S. 371; *Meux* v. *Howell*, 4 East, 1. [See *Sturtevant* v. *Ballard*, 9 Johns. 337. *Smith* v. *Niel*, 1 Hawks, 341.]

(*s*) *Doe* d. *Otley* v. *Manning*, 9 East, 59, where the authorities on this subject are collected; and see *House* v. *Bullock*, 5 Co. 60. But although a purchaser for value may defeat a mere voluntary settlement, even where the purchaser had notice; yet it may be a question whether, considering the inadequacy of the price paid, the second conveyance was not in effect also a voluntary settlement contrived for the purpose of getting rid of the first. *Doe* d. *Parry* v. *James*, 16 East, 212. In 1772, a fourth part of an advowson was conveyed in consideration of 20*s.*; held, that it was not to be deemed a mere formal sum, but that, coupled with "faithful service," might have been at the time an adequate consideration, and must prevail against a

(A) (Where it was attempted to impeach a conveyance on the ground of fraud, evidence that the grantor made other conveyances about the same time, which were fraudulent, was held to be admissible to prove his fraudulent design in the case on trial. But it would not affect the grantee, unless followed up by evidence of his participation in some way in the fraud. *Howe* v. *Read*, 3 Fairfield, 515. See also *Jackson* v. *Zimmerman*, 12 Wend. 299.)

(B) (A voluntary conveyance, not actually fraudulent as relates to the grantee, may become valid by

[1] Eng. Com. Law Reps. xxxv. 243.

But the question under the stat. 13 Eliz. c. 5 (*t*), is usually one of fact for
*495 *the jury, who are to decide on the question of intention, whether the act was a *bonâ fide* transaction, or was a trick and contrivance to defraud creditors (A).

Proof of fraud, continuing possession.

It has been held, that the absolute transfer of personal chattels without a delivery of possession, is not merely *evidence* of fraud, but is actually void for fraud (*u*) (B); and therefore where a *creditor* took an absolute bill

subsequent purchaser. *Gully* v. *Bp. of Exeter*,[1] 5 Bing. 171; and 2 M. & P. 266. A party tenant for life, with power of jointuring, executed a settlement to trustees, vesting in them a term for securing pin-money to the wife for his life, and a jointure after his death, and by a separate deed covenanted not to sell or encumber the premises, or that if he should, or attempted to do so, that then the trustees might receive the rents, &c., and apply them for the maintenance of the wife and children, as they should think fit; the tenant for life afterwards granted certain redeemable annuities for valuable consideration, charged upon the same premises; held, that as against such incumbrances, the covenant was fraudulent and void. *Phipps* v. *Ld. Ennismore*, 4 Russ. 131.

(*t*) This stat. recites, that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been contrived of malice, fraud, covin, collusion, &c. to delay, hinder or defraud, creditors and others of their just and lawful actions, suits, debts, accounts, damages, &c. enacts that every feoffment, &c. of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution made for any intent or purpose before declared and expressed, shall be, as against that person, his heirs, successors, executors, &c. whose actions, suits, &c. are or might be in any wise disturbed, hindered, delayed or defrauded, *utterly void*. By sec. 6, the Act is not to extend to any estate or interest in lands, &c. on good consideration, and *bona fide* lawfully conveyed to any person, &c. not having *notice* of such covin, &c. A conveyance not fraudulent within this statute, may yet be void in case of bankruptcy. *Semble*, that a fraudulent assignment within the meaning of the statute 13 Eliz. c. 5, in reality is none at all; a mere formal transfer, executed not to give the alienee the property, but only to induce a belief that it is vested in him, that he may hold it in trust for the debtor. *Pickstock* v. *Lyster*, 3 M. & S. 371. In all cases, however, the question of fraud must be decided by reference to the motives of the party making the deed of assignment. *Nunn* v. *Wilsmore*, 8 T. R. 521. A secret transfer is always a badge of fraud. *Mace* v. *Cammel*, Lofft, 782. A conveyance by a bill of sale is good against the party executing it, and against his assignees, although it be void as to third persons. *Robinson* v. *M'Donnell*, 2 B. & A. 134.

(*u*) *Edwards* v. *Harben*, 2 T. R. 587. *Bamford* v. *Baron*, cited in the note. *Reid* v. *Blades*,[2] 5 Taunt. 212; where it was held that a conveyance of chattels, unaccompanied by possession, was void, although the same instrument contained a valid mortgage of leasehold buildings in which the chattels were situated.

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matter *ex post facto*, as by a purchase for valuable consideration, or by the marriage of the grantee, if a *feme:* marriage, if the conveyance forms an inducement thereto, renders the conveyance valid not only as against a subsequent purchaser, but against the creditors of the grantor. *Wood* v. *Jackson*, 8 Wend. 9. If in the purchase of land, the consideration money be advanced by the husband and a deed taken in the name of the wife, the transaction will in the first instance be deemed an advancement to the wife; but it is open to explanation, and if it be shown that the object of the husband was to defraud creditors, he will be deemed to have a resulting interest in the premises, which may be sold by execution. *Guthrie* v. *Gardner*, 19 Wend. 414. A voluntary conveyance is a deed without any valuable consideration. If anything valuable passes between the parties, it is a purchase; and it was accordingly holden that a bond executed by a son to his parent for $500, with interest annually, if demanded, was a valuable consideration, and would sustain a conveyance of land as a purchase; the securing to the grantor an annuity or rent equal to the legal interest of the bond being deemed sufficient, even though it had been the intention or expectation of the parties that the principal of the bond should not be exacted. *Jackson* v. *Peck*, 4 Wend. 300. Want of possession of real estate is not, as it is of personal estate, a presumption of fraud. *Pettiplace* v. *Sayles*, 4 Mason's C. C. R. 312.)

(A) (See *Vernon* v. *Morton*, 8 Dana, 263. Where a sale of property under an execution is brought about by the defendant, in concert with others, with the avowed object of defeating the interest of a third person in such property, such sale will be deemed fraudulent and void, although the execution be issued on a valid and unsatisfied judgment. *Crury* v. *Sprague*, 12 Wend. 41.)

(B) (Every conveyance of personal chattels in the possession, or under the control of the vendor, whether absolute or conditional, is presumed to be fraudulent and void against creditors and subsequent purchasers, unless the conveyance is accompanied by an immediate delivery of the goods, and followed by an actual and continued change of possession. *Randall* v. *Cook*, 17 Wend. 53. But possession by a vendor of personal property after a transfer by bill of sale or assignment, though the conveyance be absolute in its terms, or possession by a mortgagor after forfeiture, is only *prima facie* evidence of fraud, and not conclusive; the possession may be explained, and if the transaction be shown to have been upon sufficient consideration, and *bona fide*, that is, without any intent to delay, hinder or defraud creditors or others, the conveyance is valid. *Hall* v. *Tuttle*, 8 Wend. 375. *Barrow* v. *Paxton*, 5 John. R. 258. *Beals* v. *Guernsey*, 8 John. R. 446. *Butts* v. *Smartwood*, 2 Cow. 431. Merely leaving property levied upon in the possession of the defendant in the execution, though with the plaintiff's consent, is not *per se* fraudulent, either as against subsequent creditors or purchasers. *Rew* v. *Barber*, 3 Cow. 272. Actual possession is not necessary to a transfer of personal property, nor is the want of it even an *indicium* of fraud, where, from circumstances, it cannot be

[1] Eng. Com. Law Reps. xv. 408. [2] *Id.* i. 81.

of sale of the debtor's goods, but left the debtor in possession, and after his death took possession of his goods, it was held that he was liable as executor *de son tort* (*x*). So if the possession taken be merely colourable, as where a creditor took possession on the 4th of April of the goods of a publican under a bill of sale, and the person in possession allowed the publican to serve out liquors and receive money as usual till the next day, when the goods were seized under an execution (*y*). So where the vendor remains jointly in possession with the servant of the vendee, the assignment is fraudulent and void against creditors (*z*). This however is a legal presumption, which is not absolutely conclusive as to fraud. The law is exceedingly jealous in cases where, notwithstanding an absolute sale, the former owner is permitted to retain the possession, especially where the transaction is of a secret nature. And justly so; for as, in the ordinary course of such dealings, a change of possession accompanies the transfer, the deviation naturally induces a suspicion of some improper practice or contrivance. And in the next place, such secret dealings are eminently calculated to deceive creditors, who are induced to give credit or to sue by the visible possession of property. Still the law does not prohibit a purchaser from permitting the owner from retaining possession; and in strictness it seems that such a transaction, though it may furnish strong evidence, yet still is not conclusive as to fraud. In the case of *Latimer* v. *Batson* (*a*),

(*x*) *Edwards* v. *Harben*, 2 T. R. 587.

(*y*) *Paget* v. *Perchard*, 1 Esp. C. 205. [And Mr. Day's note.]

(*z*) *Wordall* v. *Smith*, 1 Camp. 333, per Lord Ellenborough. To defeat the execution by a bill of sale, there must appear to have been a *bona fide* substantial change of possession. It is a mere mockery to put in another person to take possession conjointly with the former owner of the goods; there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors. And see *Cadogan* v. *Kennett*, Cowp. 432. *Jarman* v. *Woollaton*, 3 T. R. 618. *Darley* v. *Smith*, 8 T. R. 82.

(*a*) 4 B. & C. 652.[1] So in the case of *Eastwood* v. *Brown*,[2] 1 Ry. & M. 312, where there was an assignment of property without any change of possession, Abbott, L. C. J. left it to the jury to say whether it was done with intent to defeat or delay creditors.

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obtained. Possession of goods at sea by the master, is the possession of whosoever is, or may become the owner of them. *United States* v. *The Delaware Ins. Co.* 4 Wash. C. C. R. 418. And where the parties do not stand in the relation of debtor and creditor, and the object is not to defeat creditors, goods may be left in the hands of the original owner, without its being considered fraudulent. *M'Instry* v. *Tanner*, 9 John. R. 135. [The doctrine that the vendor's remaining in possession, after an absolute immediate conveyance of chattels, is conclusive evidence of fraud, or fraud *per se*, has been adopted, or strongly countenanced by the Supreme Court of the United States, and the courts of Virginia, Kentucky, and Pennsylvania. *Hamilton* v. *Russell*, 1 Cranch, 309. *Alexander* v. *Deneale*, 2 Munf. 341. *Thomas* v. *Soper*, 5 Munf. 28. *Fitzhugh* v. *Anderson & al.* 2 Hen. & Mun. 289. *Baylor* v. *Smithers*, 1 Littell's Rep. 112. *Clow* v. *Woods*, 5 Serg. & R. 278. *Dawes* v. *Cope*, 4 Binney, 258. {*Babb* v. *Clemson*, 10 Serg. & R. 419. *Martin* v. *Mathiot*, 14 Serg. & R. 214.} See also *Croft* v. *Arthur*, 4 Desauss. 229, in the Court of Chancery in South Carolina.] See also *Brummel* v. *Scockton*, 3 Dana, 134; *Williamson* v. *Furley*, Gilm. 15. And where a wife is living separately from her husband, property lent or intrusted to her by a friend or stranger, is not in his possession within the statute. *Chiles* v. *Bernard's Ex'rs*, 3 Dana, 95. [But possession by the vendor is held, in Massachusetts, New Hampshire, North Carolina, {Connecticut,} to be only strong *prima facie* evidence of fraud, and legally susceptible of an explanation consistent with good faith. *Brooks* v. *Powers*, 15 Mass. Rep. 247. *Bartlett* v. *Williams*, 1 Pick. 295. *Badlam* v. *Tucker & al.* 1 Pick. 399. *New England Marine Ins. Co.* v. *Chandler & Trustee*, 16 Mass. Rep. 279. {*Wheeler* v. *Train*, 3 Pick. Rep. 255.} *Haven* v. *Low*, 2 N. Hamp. Rep. 13; *Trotter* v. *Howard*, 1 Hawkes, 320. *Cox* v. *Jackson*, 1 Hayw. 423. {*Burrows* v. *Stoddard*, 3 Con. Rep. 160}.] See also *Callen* v. *Thompson*, 3 Yerger, 475. *Young* v. *Pate*, 4 Yerger, 164. *Howell* v. *Elliott*, 1 Dev. 76. *Hornbeck* v. *Vannetre*, 9 Ohio R. 153. *Talcott* v. *Wilcox*, 9 Day, 134. But the fact that a tenant is in open possession of stock and farming utensils belonging to his landlord, is not a badge of fraud, the possession of the tenant being the possession of the landlord, furnishes no evidence that the former is the owner of the property. Ibid. [In case of a mortgage of chattels, the mortgagor's remaining in possession is held not to be necessarily fraudulent. *Haven* v. *Low*, and *Barrow* v. *Paxton*, ubi sup. *Cortelyou* v. *Lansing*, 2 Caines' Cas. in Error, 206. *Bissell* v. *Hopkins*, 3 Cow. 166. *Waybornes* v. *Hill*, 1 Wash. 177. *Holmes & al.* v. *Crane*, 2 Pick. 607. {*Catten* v. *Smith*, 4 Conn. Rep. 450.} Sed Vide *Clow* v. *Woods*, ubi sup. *contra.*

Where a deed, absolute on its face, is made of chattels, a defeasance made at the same time, but separate from it, shall not operate as a mortgage to the prejudice of third persons. *Gaither* v. *Mumford*, 2 Taylor, 167. See also *Gorham* v. *Herrick*, 2 Greenleaf, 87].)

[1]Eng. Com. Law Reps. x. 432. [2]*Id.* xxi. 446.

the goods of the Duke *of Marlborough were sold by the sheriff under an execution to the judgment creditor, who sold the goods to the plaintiff, who put a man into possession; the goods remained in the Duke's mansion, and were used by him as before the execution, but the circumstance of the execution was notorious in the neighbourhood; the sheriff again seized the goods under an execution against the goods of the Duke at the suit of another creditor. On an action brought against the sheriff, it was left by the learned Judge to the jury to say whether the sale to *B.* was a *bonâ fide* sale, for money paid by the plaintiff, and that if it was, he was entitled to the verdict, but that if the money was in reality paid by the Duke, and the sale to the plaintiff was colourable, they should find for the defendant. The jury found for the plaintiff; and the Court afterwards held that the jury were properly directed to give their verdict for the plaintiff, or the defendant, as they should find that the transaction was fair or fraudulent.

In *Twyne's* case (*b*) the continuance of the vendor's possession was considered to be merely evidence of fraud. There, *A.* being indebted to *B.* and also to *C.* who brought his action, made a secret conveyance of his goods to *B.*, but continued in possession, and the conveyance was held to be fraudulent within the Act (*c*): 1st, because the gift was general; 2dly, because the donor continued in possession of the goods and used them as his own; and 3dly, because it was made pending the writ (*d*): and in the law of *Nisi Prius* (*e*) it is laid down that the donor's continuance in possession is not always a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes the bill of sale of them for securing the money (*f*). Great stress is always laid on the notoriety of the circumstances under which the party retains the possession: where it is known that he is not the real owner, his possession cannot mislead (*g*).

In the case of *Kidd* v. *Rawlinson* (*h*), *K., the plaintiff,* bought the
*497 goods *of *A.* from the sheriff, who sold publicly under an execution against *A.* (*K.* not being a creditor), and afterwards allowed *A.* (being a publican),

(*b*) 3 Rep. 80. (*c*) 13 Eliz. c. 5.

(*d*) B. N. P. 258. And it was said that it was not within the proviso of the Act; for although made on good consideration, it was not made *bona fide.*

(*e*) B. N. P. 258, cites Ca. R. B. 287.

(*f*) *Meggot* v. *Mills,* 1 Ld. Raym. 286; where Lord Holt said, that if the goods had been assigned to any other creditor, the keeping possession of them would have made the bill of sale fraudulent as to other creditors; but that since the agreement was originally made for securing the money lent, it was good and honest.

(*g*) *Latimer* v. *Batson,*[1] 4 B. & C. 652; *Leonard* v. *Baker,* 1 M. & S. 251. *Watkins* v. *Birch,* 4 Taunt. 823. In the case of *Jezeph* v. *Ingram,*[2] 8 Taunt. 838, the sheriff having seized the property of *Newman,* a farmer, under a *fi. fa., Dunk,* a creditor of *Newman's,* advanced upwards of 400*l.* for *Newman,* to liberate the goods, and took an assignment from *Newman* of the lease and stock, to enable him to take possession of the farm and discharge the sum advanced. *Newman* continued to reside on the premises, but *Dunk* managed the farm, and it was notorious in the neighbourhood that he had the management, though *Newman* continued to do some joint acts of ownership. In an action against the sheriff for a false return at the suit of a subsequent judgment creditor after a verdict for the plaintiff, Gibbs, C. J., on a motion for a new trial, admitted the general principle contended for by the plaintiff, that if a man sell goods and continue in possession, the sale was void, but thought the present case was distinguishable. A new trial was granted, and evidence was given that *Dunk* had paid all rates and taxes for the farm; had purchased stock; that *Newman,* as well as *Dunk,* had attended the markets; given orders respecting the cultivation of the farm; paid rents and taxes, and managed the business, but that *Dunk* had received all the proceeds, though he had not made all the payments; the jury, with the approbation of Dallas, J., found a verdict for the defendant, against which the plaintiff did not move.

(*h*) 1 B. & P. 59, cor. Lord Eldon. So if the goods of *A.* be sold under a *fi. fa.* to *B. bona fide* on a valuable consideration, and *B.* permit *A.* to remain in possession, on condition that he shall deliver over to *B.* the product from the sale of goods, the possession will not render the execution fraudulent; and on a subsequent bankruptcy the goods will not pass to the assignees of *A.* (*Cole* v. *Davies,* 1 Ld. Raym. 724.) So where a creditor took the goods of the debtor, who had confessed a judgment, in execution, and bought them at a public auction, and then let them to the debtor for rent actually paid. *Watkins* v. *Birch,* 4 Taunt. 823. And a bill of sale, although unaccompanied by possession, is valid against a creditor with whose knowledge and assent it was given. *Brown* v. *Parry,* 1 Taunt. 381.

[1]Eng. Com. Law Reps. x. 432. [2]*Id.* iv. 303.

to remain in possession, and afterwards *A.* made a bill of sale of the goods to *R. the defendant*, who took possession; the jury negatived any intention on the part of the plaintiff to defeat any execution by any creditor of *A.*, and the Court afterwards held that the plaintiff was entitled to recover. The case was distinguished from *Twyne's* by two circumstances, the notoriety and *publicity* of the sale, and the fact that *K.* the purchaser was not a *creditor*; and it was assimilated to the case in Buller's *Nisi Prius*, above referred to, and said that *K.* might be considered to have lent the money to *A.* and to have taken the bill of sale as a security.

It is to be observed, also, that there is another circumstance in the above case (which does not appear to have been adverted to) which very materially distinguishes it from *Twyne's*, viz. that the sale was not made by the party himself, but by the sheriff. The object of the statute was to prevent covinous and fraudulent sales by the owner to the prejudice of creditors, and not, as it seems, to sales made by a third person, as a sheriff under an execution, or a landlord under a distress, without proof of some fraud or collusion on the part of the owner, which in effect makes such a sale his own act. Where the sale is made *bonâ fide* by a third person, the subsequent possession by the debtor will not render it fraudulent, for the Act was not intended to prevent the legal owner of goods from allowing another person to keep possession of them.

Where a trustee, under an assignment by a tenant, for the benefit of creditors, bought the goods of the tenant out of the trust funds, under a sale by the landlord on a distress for rent, and afterwards allowed the tenant to continue in possession, it was held, in the absence of any evidence that the sale was colourable and fraudulent, that the goods were protected from an execution by a judgment creditor; and Lord Ellenborough said that the doctrine of possession did not apply to a case of conveyance, not by the party himself, but by a third person (*i*).

But a possession by the vendor, which *follows* and accompanies the deed, where the sale is not to take place immediately, but at a future specified time, or on a particular condition, does not avoid the transfer (*k*). But in *such cases, although the want of possession may cease to be a badge and *498
evidence of fraud, yet the transaction is still liable to be impeached by other evidence of fraud, and it is particularly open to the inquiry, whether the interposing a delay between the execution of the transfer, and the time of taking possession, may not be part of the fraudulent contrivance (A).

(*i*) *Guthrie* v. *Wood*,[1] 1 Starkie's C. 367. So, where the goods of a debtor were sold publicly by trustees under an assignment for the benefit of creditors, and the son of the wife of the debtor purchased the goods, and removed part, but left the rest in the possession of his mother, and for her accommodation, it was held that these were protected against an execution by a judgment-creditor, who had notice of the assignment. *Leonard* v. *Baker*, 1 M. & S. 251 (1).

(*k*) Per Curiam, *Edwards* v. *Harben*, 2 T. R. 587; where the distinction between possession on an absolute sale, and possession under a conditional sale, was considered as having been long and decidedly established. And *Stone* v. *Grubham*, 2 Bulstrode, 218, was referred to, and *Bucknal* v. *Roiston*, Pr. in Ch. 287; and also the following cases, *Ld. Cadogan* v. *Kennett*, Cowp. 432, *Haslington* v. *Gill*, Trin. 24 Geo. 3, B. R., were cited to show that the bill of sale is not fraudulent for want of possession, where possession has *followed* the deed, although there was no immediate possession by the assignee. See also *Estwick* v. *Caillaud*, 5 T. R. 420; *Manton* v. *Moor*, 7 T. R. 67; and *supra*, tit. BANKRUPTCY.

(1) {*Latimer* v. *Batson*,[2] 7 Dowl. & Ryl. 106. See *Jezeph* v. *Ingram*,[3] 8 Taunt. 838. 1 J. B. Moore, 189. *Armstrong* v. *Baldock*, *Esq.* Gow's N. P. Rep. 33, and the Reporter's note.}

(A) (A voluntary conveyance is not void as against creditors, on the ground that the grantor at the time of conveyance was indebted, if it be shown that the residue of the real estate of the grantor was amply sufficient to pay his debts. *Jackson* v. *Post*, 15 Wend. 588. And a post nuptial voluntary settlement made by a man, who is not indebted at the time upon his wife, is valid against subsequent creditors. *Sexton* v. *Wheaton*, 8 Wheat. 229. See also *Doyle* v. *Sleeper*, 1 Dana, 531. *Magniac* v. *Thompson*, 1 Baldwin, 357. *O'Brien* v.

[1]Eng. Com. Law Reps. ii. 430. [2]*Id.* x. 432. [3]*Id.* iv. 303.

It has been said that no conveyance shallbe deemed to be fraudulent under the above statute, unless it can be proved that the party conveying the goods was indebted at the time of the conveyance, or nearly so (*l*), although there have been decisions to the contrary (*m*); for there would be a difficulty in showing that the object of the conveyance was to delay the creditor. Still it seems, that if a conveyance could be proved to have been made with a view to defraud a future creditor, it would be void under the statute (*n*).

An assignment by a defendant, pending the plaintiff's suit, of all his effects, for the benefit of his creditors, under which possession is immediately taken, is not fraudulent (*o*), although made to delay the plaintiff's execution: neither is it fraudulent to confess a judgment to one creditor in order to defeat the pending execution of another creditor (*p*), for a debtor, as well as an executor, may give preference to a particular creditor (*q*) (A).

A conveyance is binding as to a party, though cancelled for fraud on one not a party (*r*) (B).

(*l*) B. N. P. 257. *Waller* v. *Burrows*, in Canc. 1745. *Taylor* v. *Jones*, 1743, Ibid. And see *Lush* v. *Wilkinson*, 5 Ves. 384; where, on a bill against the widow, by one who became a creditor subsequent to the settlement, Ld. Alvanley intimated that the proof of a single anteeedent debt would not do, and that it must depend upon this, whether the husband was in insolvent eireumstanees at the time. And see *Russell* v. *Hammond*, 1 Atk. 15. *Middlecome* v. *Marlow*, 2 Atk. 220. *Ld. Townsend* v. *Wyndham*, 2 Ves. J. 10. In *Hungerford* v. *Earle*, 2 Vern. 216, the question as to the validity of a settlement against subsequent creditors was ordered to be tried at law. But see *White* v. *Hussey*, Pree. in Chan. 14.

(*m*) Both by Sir J. Jekyl and Forteseue, M. R., B. N. P. 257.

(*n*) See *Estwick* v. *Caillaud*, 5 T. R. 420. As to conveyances made to defraud a purchaser, see the stat. 37 Eliz. c. 4, and the notes, Evans's St. Vol. I. p. 382. *& sequent.* [*Aston* v. *Wells*, 4 Wheat. 466; *Bean* v. *Smith*, 2 Mason, 252; *Anderson* v. *Roberts*, 18 John. R. 515.]

(*o*) *Pickstock* v. *Lyster*, 3 M. & S. 371. See also *Meux* v. *Howell*, 4 East, 1.

(*p*) *Holbird* v. *Anderson*, 5 T. R. 424.

(*q*) Ibid. and see *Tolputt* v. *Wells*, 1 M. & S. 395. *Estwick* v. *Caillaud*, 5 T. R. 424. *Stilman* v. *Ashdown*, 2 Atk. 477.

(*r*) 1 Madd. Ch. 345.

Coulter, 2 Blaekf. 421. A wife has her lawful elaim upon her husband for her maintainanee, and if during the pendeney of her petition for a divorce and alimony, a conveyance of his land be exeeuted by the husband in order to defraud his wife of her right to a support, and be received by the grantee with the same fraudulent design, the conveyence as to her is void. *Frakes* v. *Brown*, 2 Blaekf. 295. A subsequent sale, without notice, by a person who has made a settlement not on a valuable consideration, is presumptive evidence of fraud, whieh throws on those claiming under suehsettlement the burthen of proving that it was made *bona fide*. *Cathcart* v. *Robinson*, 5 Peters, 264. Where the question of faet to be determined by a committee in chancery, on a bill to redeem mortgaged premises, was whether a deed from *A.* to *B.* was fraudulent, the plaintiff in support of the deed, attempted to prove that it was exeeuted in consideration of more than 700 dollars in money, loaned and paid by *B.* to and for *A.*, and to contradiet this evidenee the defendant offered testimony to prove that at the time of the loan and payment elaimed, *B.* was a man of little or no property, that he did not possess estate real or personal unincumbered of the value of 300 dollars, and that suehestate as he had purchased was mortgaged for the whole amount of the purchase money, it was held that such testimony was admissible. *Olmsted* v. *Hoyt and others*, 11 Conn. R. 376.

Levy v. *Wallis*, 4 Dall. 167, and n. (a) to last ed. *Water's executors* v. *M'Clellan et al.*, 4 Dall. 208, and n. (a) to last ed.)

(A) (If there are no bankrupt laws, a debtor may make a voluntary assignment containing a preferenee to some creditors, and a stipulation for a release. *Burd* v. *Smith*, 4 Dall. 76; *Mather* v. *Pratt*, Id. 224; *Lippincott et al.* v. *Barker*, 2 Binn. 174; *M'Alister* v. *Marshall*, 6 Binn. 338; *Passmore* v. *Eldridge*, 12 Serg. & R. 201; *Hower* v. *Geesumen*, 17 Id. 251; *Harman's Lessee* v. *Reese*, 1 Browne, 11; *Pearpoint* v. *Graham*, 4 Wash. C. C. R. 232; *Marbury* v. *Brooks*, 7 Wheat. 556. But any reservation for the advantage of the debtor or his family is fraudulent, and it would seem totally invalidates the deed. *Austin* v. *Bell*, 20 John. R. 442; *Passmore* v. *Eldridge*, *supra*; *M'Clurg et al.* v. *Lecky*, 3 Penns. R. 73; *Hyslop et al.* v. *Clarke et al.* 14 John. R. 458; *Tacker* v. *Welsh*, 17 Mass. R. 164; *Harris et al.* v. *Summer*, 2 Pick. R. 129; but see *Murray* v. *Riggs et al.* 15 John. R. 571; *Prince* v. *Shepard*, 9 Priee, 176; *Winn et al.* v. *Patterson*, 9 Peters, 679. And where the property reserved was a house and lot, the title to which was encumbered beyond its fee simple value, its reservation will not vitiate the assignment. *Fassit* v. *Phillips*, 4 Whart. 399.)

(B) (Where a contract is entered into for fraudulent or illegal purposes, the law refuses its aid to enable either to disturb such parts of it as have been executed or carried into effect; and as to such parts as remain executory, it will not compel the contractor to perform his engagements or pay damages for non-performance; thus, in both cases, leaving the parties where it finds them. *Nellis* v *Clark*, 20 Wend. 24.)

FRIENDLY SOCIETY (*s*).

Friendly society, proof of Rules.

By the stat. 33 G. 3, c. 54, s. 13, all the rules, orders and regulations from time to time made by any such society in the manner directed by the Act, shall be forthwith entered into a book or books to be kept by one or more of the members of such society, to be appointed for that purpose, and shall be signed by the said members, and that such rules, orders and regulations, so entered and signed, shall be deemed original orders, and shall be received in evidence as such.

It seems that upon an indictment for not obeying an order of two justices *under 33 Geo. 3, c. 54, s. 15, commanding the defendants, as stewards and principal officers of a friendly society, to restore *A. B.* as a member, it must be shown, that by the constitution of the society, the defendants have the power to restore him (*t*). *499

Upon an indictment for disobedience of an order of justice, to re-admit a party into a friendly society, reciting that it had appeared to the said justices that the rules had been enrolled; it was held, that as the justices would have had no authority, under the 33 Geo. 3, c. 54, s. 52, to make the order, unless the rules had been enrolled at the sessions, it was necessary to substantiate that fact by legal proof, and that the recital in the order was not, as against the defendants, legal evidence of that fact (*u*).

A bond given to the treasurer of a friendly society is good as at common law, though the rules have not been confirmed at the sessions, as required by the stat. 33 G. 3, c. 54 (*v*).

But plaintiffs cannot sue as stewards or trustees where they have been appointed under new rules, which have not been confirmed at the sessions (*x*).

By the rules, a medical attendant was to be entitled to a certain allowance for each member, and there was a clause that all disputes, &c. were to be settled by a committee, subject to an appeal to two justices; the plaintiff, the medical attendant, having been dismissed by the committee, another was appointed against his consent, and without any meeting of the members at large, but the majority of the members approved of him and still were attended by him: disputes having arisen as to the payment of the plaintiff's successor, upon reference to the justices they recommended a general meeting which was accordingly held, at which the plaintiff was by a large majority declared to be the surgeon; held, that the dismissal having

(*s*) See the st. 32 Geo. 3, c. 54, s. 13; 49 Geo. 3, c. 125; 59 Geo. 3, c. 128; 10 Geo. 4, c. 56; 3 & 4 Vict. c. 73. Those societies alone are contemplated by the Friendly Society Act, 33 Geo. 3, c. 54, whose objects are confined to the charitable relief and maintenance of their old, sick, and infirm members. *Rex* v. *Justices of Staffordshire*, 12 East, 280. Where the members have long ceased to act under their rules, held that they become dissolved, and the Court no longer has jurisdiction under the 33 Geo. 3, c. 54. *Norrish, Ex parte*, 1 Jac. (CH.) 162. As to actions on bonds given to such societies by innkeepers, and the construction of such bonds, see *Wyberg* v. *Ainsley*, 1 M. & Y. 669. An advance by the society of money to the highest bidder was held not to be usurious, although the interest exceeded the legal rate. *Silver* v. *Barnes*, 6 Bing. N. C. 180.

(*t*) *R.* v. *Inge*, 2 Smith, 56; but see *R.* v. *Gash*,[1] 1 Starkie's C. 441. The jurisdiction of the justices, under 33 Geo. 3, c. 54, s. 15, is confined strictly to the subject-matter of the *complaint* by the party aggrieved: where, therefore, the complaint against the stewards stated only the refusing relief to which the complainant was entitled, and the justices had awarded that the stewards should pay the sum due, with costs; and further that the party should be continued a member of the society: held, that the latter part of such order was illegal and void; and that an indictment, alleging that he had been expelled the society as well as deprived of relief, and that being aggrieved *thereby* he made complaint *thereof*, &c. was not supported in evidence by production of the order reciting the complaint and summons to answer one ground of complaint only; and the defendants entitled to an acquittal on this ground. *R.* v. *Soper*,[2] 3 B. & C. 857; 5 D. & R. 669.

(*u*) *R.* v. *Gilkes*,[3] 8 B. & C. 439; and now see 10 Geo. 4, c. 56.

(*v*) *Jones* v. *Wollam*,[4] 5 B. & A. 769. See *Cartridge* v. *Griffiths*, 1 B. & A. 37; *infra*, tit. VARIANCE.

(*x*) *Batty* v. *Townrow*, 4 Camp. 5.

[1]Eng. Com. Law Reps. ii. 462. [2]*Id.* x. 253. [3]*Id.* xv. 261. [4]*Id.* vii. 254.

been without authority, and the proceeding of the committee not *bona fide* for the investigation of any grievance, the plaintiff was entitled to recover from the treasurer the allowance received from the members for his services, notwithstanding he had paid it over to the wrong person (*y*).

GAME.

Information for using, &c. *500

Upon an information under the stat. 1 & 2 W. 4, c. 32, s. 23 (*z*), for using *any dog (*a*), gun or other engine or instrument (*b*), for the purpose of searching for or killing or taking of game without a certificate, the proofs relate, 1st, to the keeping or using of the dog or instrument as alleged;

Proof of keeping a dog, &c., to kill game.

2ndly, within the county, &c.; 3dly, by an uncertificated person (*c*); and, 4thly, the commencement of the proceedings within due time (*d*).—1st, Whether the defendant *used* a dog or instrument for the destruction of game, it is a question of fact depending on the acts done, and the *intention* (*e*) of the agent as collected from his declarations and conduct.

It is not necessary to prove an *using* in the very act of destroying game; the walking about with a gun, with the *intent* to kill game, is an using of it for the purpose (*f*). The intent, of which the magistrate ought to be satisfied in order to convict, is a fact to be presumed and inferred from the conduct of the defendant, and all the circumstances of the particular case. It is enough, if, upon the face of the conviction, such reasonable and *primâ facie* evidence of the intent appear as would have been sufficient in an action to have been left to a jury (*g*). This is sufficient to *support* the conviction; but to warrant the magistrate in convicting, the evidence ought to be such as to satisfy his conscience of the intent of the party to pursue *game* (*h*).

Evidence that the defendant, being an unqualified person, went out to course hares with one who was qualified, and that he took an active part in the sport, beating the bushes to find a hare, and in afterwards securing a hare which had been killed, was held to be insufficient evidence of an using by the defendant, under the stat. 5 Anne, c. 14; for he did not use dogs

(*y*) *Garner* v. *Shelly*,[1] 5 Bing. 477.

(*z*) The stat. 1 & 2 W. 4, c. 32, s. 23, enacts that if any person shall kill or take any game*, or use any dog, gun, net, or other engine or instrument for the killing or taking of game, such person not being authorized so to do for want of a game certificate, he shall, on conviction before two justices, forfeit for every offence such sum of money not exceeding 5*l.* as to the said justices shall seem meet, together with the costs of the conviction.

(*a*) It was held that a hound was not within the stat. 5 Ann. c. 14; *Hooker* v. *Wilks*, 2 Str. 1126; nor within the stat. 22 and 23 C. 2, c. 25, s. 3; and therefore that a gamekeeper could not seize a hound within the manor. *Grant* v. *Hulton*, 1 B. & A. 134.

(*b*) The word engine applies to any instrument by which game may be destroyed. *R.* v. *Filer*, Str. 496. *Reason* v. *Lisle*, 2 Com. 576. Where an engine may be kept for either of two purposes, the one lawful, the other unlawful, the presumption will be in favour of the legal purpose. *Wingfield* v. *Stentford*, 1 Wils. 315.

(*c*) See the st. 28 G. 3, c. 50, s. 2; 52 G. 3, c. 93, s. 1, 10, 12, 13.

(*d*) By sec. 41, the prosecution for every offence punishable upon a summary conviction, shall be commenced within three calendar months after the commission of the offence.

(*e*) An accidental killing of game is not penal: *Molton* v. *Cheesely*, 1 Esp. C. 123; but it was penal to take away the game so killed. Ibid. The mere keeping of a dog or instrument, though with intent to use it for the destruction of game, is not penal under the late Act.

(*f*) *R.* v. *King*, Sess. C. 88, per Parker, C. J. See also *Hebden* v. *Hentey*, 1 Ch. 607.

(*g*) *R.* v. *Davis*, 6 T. R. 177.

(*h*) See Mr. Christian's observations, in his Game Laws, 157, 158.

* If several join in the act of killing a hare, but one penalty can be recovered (*R.* v. *Bleasdale*, 4 T. R. 809; *Hardyman* v. *Whitacre*, B. N. P. 189; 2 East, 573, in note); but if the acts be several and distinct, as if each use a gun, or set a snare, each is subject to a distinct penalty (Christian's G. L. 161). It has even been held, that if a person kill several hares in the same day, he forfeits but one penalty (*R.* v. *Matthews*, 10 Mod. 26; and per Ld. Kenyon, in *R.* v. *Lovet*, 7 T. R. 153; *Marriott* v. *Shaw*, Com. 274; *R.* v. *Blaney*, And. 240); but he may be convicted at the same time in several penalties, in respect of so many offences committed on several days. *R.* v. *Swallow*, 8 T. R. 284. *See* below, tit. JUSTICES.

[1] Eng. Com. Law Reps. xv. 510.

himself (*i*), they were not under his control. But it seems that if an unqualified* person had used his own greyhound for the purpose of sporting, *501
although in company with a qualified person, the case would have admitted of a different consideration (*k*). If an unqualified person sought to protect himself by the qualification of another, it was incumbent upon him to give strict proof of the qualification (*l*). The same principles would probably be applied to the case of an uncertificated person under the late Act (*m*.)

The plaintiff may rely on any offence committed by the defendant within three months before the commencement of the action, although the fact was not then known to the plaintiff (*n*).

2dly, *Within the county, &c.*—If a man, standing in one parish or county, shoot at game in another, he uses the gun in the district in which he stands (*o*). County, parish, &c.

The late Act, s. 37, enacts, that every penalty and forfeiture for any offence against that Act, the application of which has not otherwise been provided for, shall be paid to some one of the overseers of the poor, or to some other officer, as the convicting justice or justices may direct, of the parish, township or place in which such offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate, of the county, riding or division, in which such parish, township or place shall be situate, whether the same shall or shall not contribute to such general rate. But that no inhabitant of such county, riding or division, shall be deemed an incompetent witness in any proceeding under the Act, by reason of the application of such penalty or forfeiture to the use of the said general rate.

3dly, *The want of a certificate.*—After proof has been given of the keeping or using, &c. it lies on the defendant to prove his certificate. The late stat. s. 42, expressly provides, that it shall not be necessary, in any proceeding against any person under that Act, to negative by evidence any certificate, license, consent, authority, or other matter of exception or defence, but that the party seeking to avail himself of any such certificate shall be bound to prove the same (*p*). Want of certificate.

If the defendant justify killing game as a gamekeeper, he must produce and prove his deputation from the lord of the manor (*q*), and show that he As gamekeeper.

(*i*) *Lewis* v. *Taylor*, 16 East, 49, overruling a case said to have been ruled by Lawrence, J., Stafford. Lent Ass. 1804. And see *R.* v. *Taylor* 15 East, 462; where it was held that a groom attending his qualified master whilst he used dogs for killing game, and pursuing it by his master's command, was not liable to the penalties of the stat. And see *R.* v. *Newman and others*, Loft's R. 178, and *Molton* v. *Rogers*, 4 Esp. C. 217; where Lord Ellenborough gave his opinion that an unqualified person joining in the sport with the owner of the dogs who was qualified, was not liable to the penalty.

(*k*) Per Ld. Ellenborough, *Lewis* v. *Taylor*, 16 East, 49. But though an unqualified person bring his own dogs into the field, the penalty does not attach if he brought them as a loan to the qualified person. Ibid. Where the defendant, alleged to have been acting ast he steward of a qualified person sporting himself, used the gun and killed game, held, that such could not be deemed the act of the master, and that he was properly convicted. *Ex parte Sylvester*,[1] 9 B. & C. 61.

(*l*) *Clarke* v. *Broughton*, 3 Camp. C. 328.

(*m*) By the stat. 54 G. 3, c. 141, such of the duties in the schedule of the Act 52 G. 3, c. 93, as relate to persons assisting or intending to aid and assist in taking or killing of any game, woodcock, snipe, quail, landrail, or coney, shall cease and determine, provided the assistance is given to another who has obtained his certificate, and then use his own dog, gun, or other engine, and who shall act by virtue of any deputation or appointment.

(*n*) *Rushworth* v. *Craven*, 1 M. & Y. 417.

(*o*) *R.* v. *Alsop*, 1 Show. 339. See tit. Penal Action.

(*p*) So in actions, and even informations before justices, under the stat. of Anne, for using a gun, &c. without qualifications, it was held to be unnecessary to negative the qualifications by evidence.

(*q*) See the stat. 22 & 23 C. 2, s. 25, 9 Anne, c. 25, s. 1, and 48 G. 3, c. 93, repealed by the stat. 1 & 2 W. 4, c. 32; and the provision of the latter statute as to gamekeepers, *infra*, 505. Although the gamekeeper be appointed by one who is not in fact lord of the manor, yet if he be considered such, the gamekeeper will not be personally liable to penalties. *Smyth* v. *Jefferies*, 9 Price, 257. *Hunt* v. *Andrews*,[2] 3 B. & A. 341.

[1]Eng. Com. Law Reps. xvii. 331. [2]*Id.* v. 312.

is the lord of such manor (*r*). Where the defendant proved a deputation to
*502 *kill game for the use of the lord of the manor, it was held that it might be presumed that the game which he killed was intended for the use of the lord, there being no evidence to the contrary (*s*).

Title to the manor. The courts will not allow the title to a manor to be tried in an action for penalties, although the parties consent to do so (*t*). It is sufficient, therefore, to show a colourable title as lord of a manor, as by proof of seisin in fact, and the exercise of manorial rights (*u*), the appointment of gamekeepers from time to time, the enrolment of their deputations with the clerk of the peace, and the grant of certificates to such gamekeepers. And for this purpose the enrolment books of deputations kept in the office of the clerk of the peace are admissible in evidence, without the production and proof of the deputations themselves (*x*). So the holding of manor courts (*y*), and acts of cutting down timber on the wastes (*z*), are admissible in evidence for the purpose of establishing the title to the manor. But it is no defence that the defendant acted as gamekeeper under a *bonâ fide* belief that his principal was really entitled to the manor, there being no ground for the claim (*a*). And evidence of the real title to the manor is admissible, in order to negative the evidence of a colourable title (*b*), and, as is said, to show that the claimant *knew* that he had no real title (*c*); and for this purpose it is competent to the plaintiff to show, by the enrolment book of the deputations, kept in the office of the deputy clerk of the peace, that manorial rights had been long exercised by the party, and his ancestors, who were legally entitled to the manor.

The boundaries of a manor cannot be tried in an action for penalties (*d*).

Within due time. 4thly, *Within due time.*—That is, within three calendar months, by sec. 41 of the late Act. In the case of an information under the stat. 5 Anne, c. 14, it was necessary that the conviction should be within three months. As to proof of the commencement of a prosecution for penalties, see tit. TIME.

*503 *The stat. 1 & 2 W. 4, c. 32, s. 4, enacts, that if any person (though

(*r*) *Calcraft* v. *Gibbs*, 4 T. R. 681. *Hawkins* v. *Bailey*; *Blunt* v. *Grimes*, cited ibid. A college may appoint a gamekeeper under their seal. *Spurrier* v. *Vale*, 10 East, 413.

(*s*) *Spurrier* v. *Vale*, 10 East, 413; *i. e.* in an action for sporting without a qualification. The defendant had a deputation under New College, Oxford, was a gardener, and lived in the house of a stranger to the manor.

(*t*) *Blunt* v. *Grimes*, 4 T. R. 682. *Calcraft* v. *Gibbs*, Ibid. 681.

(*u*) Ibid. Evidence of reputation alone is not sufficient. *Rushworth* v. *Craven*, 1 M. & Y. 417. Neither is the mere production of a deed, not enrolled (though in a register county), a sufficient foundation for such evidence. Ib.

(*x*) *Hunt* v. *Andrews*,[1] 3 B. & A. 341. For the Act of Parliament directs a certificate to be made upon a stamp, and it is the duty of the officer to keep a list of the certificates granted; and as it is his duty to register deputations, the register is a public document made by an authorized officer. Ibid. And it seems that they are not evidence merely to show that such enrolments were made, but also to show that those who caused them to be made exercised rights as lords of the manor. Ibid. per Bayley, J. See *Kinnersley* v. *Orpe*, Doug. 56.

(*y*) But a court is a matter of distinct grant, and does not necessarily belong to a lord of a manor. [1]3 B. & A. 348.

(*z*) But the felling of timber is a right belonging to the owner of the soil, and not to the lord of the manor. Per Abbott, C. J. [1]3 B. & A. 347.

(*a*) *Calcraft* v. *Gibbs*, 4 T. R. 681; 5 T. R. 19. Mr. Roebuck had purchased from the plaintiff (lord of the manor of Northfleet) an estate called Ingress, lying within the manor, and it had been agreed that Mr. Roebuck should have the deputation, and two certificates had been granted to the defendant as the gamekeeper of Mr. Roebuck.

(*b*) *Hunt* v. *Andrews*,[1] 3 B. & A. 341.

(*c*) Ibid.

(*d*) It appeared that the defendant, as gamekeeper to Sir H. Hoare, of his manor of Brixton, had constantly shot over the place where the pheasant was killed. No evidence having been given to show that the place was out of the manor, Buller, J. nonsuited the plaintiff, saying, that he would not in such an action try the boundaries of the manor. *Hawkins* v. *Bailey*, 4 T. R. 681, in the note.

[1]Eng. Com. Law Reps. v. 312.

licensed to deal in game as the Act directs) shall buy or sell, or knowingly (*f*) have in his house, shop, stall, possession or control, any bird of game after the expiration of ten days, one inclusive and the other exclusive, from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively; or if any person, not being licensed to deal in game by virtue of that Act, shall buy or sell any kind of game after the expiration of ten days, one inclusive, the other exclusive, from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively, or shall knowingly have in his house, possession or control, any bird of game (except birds of game kept in a mew or breeding place), after the expiration of forty days, one exclusive, the other inclusive, from the respective days in each year on which it shall become unlawful to kill or take such birds of game as aforesaid, he shall forfeit for every head of game, &c. such sum not exceeding 1*l.* as to the convicting justices shall seem meet, together with the costs of conviction. Information for buying or selling, &c.

It was held under the stat. 9 Anne, c. 25, s. 2 (now repealed), that a mere possession of game by an unqualified person might be explained by evidence to be a lawful possession, for otherwise no case could be stated in which an unqualified person could innocently come in contact with game. And therefore, where the defendant, being a carpenter, employed by the lord of a manor, and having directions from him to detect poachers, took a hare from the dog, which the plaintiff had killed in coursing on the master's manor, and carried it to his master's steward, according to his directions, notwithstanding the claim made by the plaintiff, it was held that this was not an unlawful possession within the statute, being rather for the protection of game than a breach of the laws for preserving it (*g*). "It might as well be said (observed Lord Ellenborough), that if a qualfied person, returning home with a bag of game, were to fall from his horse, another could not lawfully take up the bag in order to assist the owner; or, that if a person seized an offender, who had naval stores unlawfully in his possession, and took them away in order to bring them before a magistrate, that would be an unlawful possession against the Acts of Parliament made for protecting the King's stores."

With a view to costs (*h*) it is frequently necessary to prove, as alleged, that *the trespass was wilful and malicious, or that the defendant is an *504 Proof as to costs.

(*f*) Under the former statute, knowledge of the fact of possession was held to be immaterial. *R.* v. *Marsh*,[1] 3 B. & C. 719. Possession by the servant of a carrier was deemed to be a possession by the carrier, in the absence of proof of fraud on the part of the servant. Ib. In *R.* v. *Turner*, 2 M. & S. 206, possession by a carrier was held to be presumptive evidence that he knew the game to be there.

(*g*) *Warneford* v. *Kendall*, 10 East, 18. In the case of *Molton* v. *Cheeseley*, 1 Esp. C. 124, where, according to the report, the defendant's dog killed a pheasant by accident, and the defendant took it away, Mr. J. Buller held that the taking away the pheasant constituted an unlawful possession, so as to subject the defendant to a penalty. The report of the case is very short, and the decision itself does not appear to be inconsistent with the principles laid down in the case of *Warneford* v. *Kendall;* for although the accidental killing of the bird by the defendant's dog was no offence in the defendant, yet his subsequent possession of the game might either be lawful, as for the purpose of conveying it to the lord of the manor on whose land it was killed, or unlawful, as if he took it for the purpose of sale; and (*semble*) it was incumbent on the defendant to explain his subsequent possession of the game.

Where the servant of a qualified person set a trap for killing hares, in the presence and by the orders of his master, and was seen in the possession of a hare, which he was conveying to his master, the Court held that the action was improperly brought against the servant, the taking and possession being that of the master. *Walker* v. *Mills*,[2] 2 B. & B. 1.

(*h*) Under the stat. 4 & 5 Will. 3, c. 23, s. 10, which, in case of a wilful trespass, by such person coming on the land to hunt hares, &c. gives the plaintiff full costs of suit. The stat. 1 & 2 W. 4, c. 32, s. 46, declares it shall not preclude actions of trespass for damages under former Acts.

[1] Eng. Com. Law Reps. ix. 232. [2] *Id.* vi. 1.

inferior tradesman (*i*), apprentice (not being in company with his master, duly qualified), or dissolute person (*k*).

Trespass. Trespass lies for breaking in the plaintiff's close, and taking his game there (*l*). The right of property in game is in the owner of the land, so long as the game abides there (*m*). So, though the defendant does not enter on the plaintiff's land, but knowingly and maliciously fires a gun on his own land with intent to prevent ducks from coming to the plaintiff's decoy, an action on the case lies (*n*).

Although the general rule be that the owner of a dog is not liable for any mischief which the animal commits, unless he be aware of his mischievous propensities, yet if the owner be a trespasser, he is responsible for such mischief independently of the fact of knowledge (*o*). As where the defendants, trespassing on the plaintiff's field, with dogs and guns, their dogs, contrary to their will, killed a deer of the plaintiff's (*p*).

Free warren. A right of free warren is an exclusive privilege to the owner of the soil to take beasts and fowls of warren (*q*) within the privileged place created by the King's grant or prescription (*r*). The right may be created and exist

*505 **alieno solo* (*s*). The evidence relating to proof of such a right is seldom direct by the production of the grant itself, but is usually established by evidence of enjoyment and usage (*t*). And it seems that a non-user of

(*i*) It would not be easy to frame terms more ambiguous and indefinite than those which are used in the making of this statute. In the case of *Buxton* v. *Mingay*, 2 Wils. 70, the Judges were divided upon the question, whether a surgeon and apothecary, not being qualified to kill game, came within these words. See Com. 26.

(*k*) In *Pallant* v. *Roll*, 2 Bl. R. 900, it was held, that a huntsman going out with the hounds of his master (a qualified person) by his order, was not a dissolute person. In Mr. Christian's G. L., Lord Ellenborough is reported to have said that he should direct the jury to find that the defendant was a dissolute person, if he came to kill game for the purpose of selling it; or if he was drunk or abusive; or if, being questioned where he lived, or what was his name, he gave a false account of himself.

(*l*) *Sutton* v. *Moody*, 1 Ld. Ray. 250. In an action of trespass against the huntsman of the Berkeley Hunt, it was held that the jury were to give damages, not only in respect of his own individual trespass, but for the whole damage done by the concourse of people who attended him. *Hume* v. *Oldacre*,[1] 1 Starkie's C. 351.

(*m*) If *A.* start a hare in the land of *B.* and hunt it and kill it there, the property continues all the while in *B.*; but if *A.* start a hare in the ground of *B.* and hunt it into the ground of *C.* and kill it there, the property is in *A.* the hunter; but *A.* is liable in an action of trespass for hunting in the grounds of *B.* as well as of *C.* But if *A.* start a hare in a forest or warren of *B.* and hunt it into the ground of *C.*, and there kills it, the property remains all the while in *B.*, the proprietor of the warren, because the privilege continues. Per Holt, C. J., in *Sutton* v. *Moody*, 1 Ld. Ray. 258, upon the authority of 12 H. 8, 9; and in the case of *Sutton* v. *Moody*, judgment was given for the plaintiff, in an action for breaking and entering his close and taking his conies, because he had a property by the possession; and see *Pollexfen* v. *Ashford*, 1 Vent. 122, cited by Holt, C. J., as in point. But *qu.* as to the second position of the learned Judge, for this would be to allow *A.*, a mere trespasser, to profit by his own wrong; see *Keble* v. *Hickringill*, 11 Mod. 74, and Christian on the Game Laws, 104. By the stat. 1 & 2 W. 4, c. 32, s. 7, the landlord under existing leases (with certain exceptions) is entitled to the game. By s. 36, provision is made for the seizure of game in possession of any person found on any land, &c. in search or pursuit of game, and having in his possession game which shall appear to have been recently killed, after demand made by the party entitled to kill the game on such land.

(*n*) *Keble* v. *Hickringill*, 11 Mod. 74; and see *Carrington* v. *Taylor*, 11 East, 571.

(*o*) *Beckwith* v. *Shoredike*, 4 Burr. 2092. (*p*) *Ibid.*

(*q*) *i. e.* the hare, pheasant, coney and partridge. 1 Inst. 233. Manwood, 362.

(*r*) See 1 Inst. 233. A grant is made of a crown manor and hundred, with all its rights and other things to the said manor and hundred belonging, and also to have free-warren in all their demesne lands in the manor, hundred, &c., although within the King's forest; held, that the term *demesne lands* applied only to the lands of the manor which the lord either actually or potentially might have in *propriis manibus*, and that such grant conferred the right of free-warren in such demesne lands and other tenemental lands held in fee of the King or other lord, within the limits mentioned in the grant, but not in any lands of the Crown, whilst in the occupation of the Crown. *Attorney-General* v. *Parsons*, 2 C. & J. 279.

(*s*) Year Books, 3 H. 6, f. 28. 34 H. 6, f. 34. 5 H. 7, f. 10. Bur. Ab. tit. Warr. pl. 9. *Lord Dacre* v. *Tebb*, 2 Bl. R. 1151.

(*t*) See tit. Prescription. Or in the King's lands. *Morris* v. *Dimes*,[2] 1 Ad. & Ell. 654. *Qu.* whether it passes as appurtenant to a manor. *Ib.*

[1] Eng. Com. Law Reps. ii. 422. [2] *Id.* xxviii. 178.

the right for twenty years would afford *primâ facie* evidence of an extinguishment of the right, especially where it was claimed in the land of another.

An exception in a conveyance of free liberty of hawking and hunting upon the premises, to a party (not the party conveying) and the heirs of his body, and his and their friends, servants and followers, though it may not be good as a reservation, yet being sealed with the seals of the parties, operates as a grant to the party and his heirs (*u*). But such a grant of the liberty to hawk and hunt does not give liberty to shoot feathered game (*x*).

Justification, killing dogs, &c.

A defendant cannot justify the killing a dog in pursuit of game on his the defendant's premises, unless he can show that the hare was put in such peril as to render the destruction of the dog necessary for the preservation of the hare (*y*). But it seems to be one of the privileges of a free warren and a park, that the owners or their servants may kill dogs which enter the warren or park and chase the game (*z*).

Trespass.

A man cannot justify the digging in another's land in order to destroy a badger (*a*); and though it has been held that a man might justify the riding over another man's land in *following* a fox which could not otherwise be killed (*b*), yet in a later case (*c*) Lord Ellenborough, C. J. is said to have ruled, that if the jury thought, from the evidence, that the defendant pursued the fox for his own pleasure and amusement, and that the good of the public was not his sole and governing motive, they ought to find for the plaintiff.

By the stat. 1 & 2 Will. 4, c. 32, s. 13, any lord of a manor (*d*), lordship or royalty, or any steward of the Crown of any manor, lordship or royalty (*e*) appertaining to his Majesty, by writing under hand and seal, or in the case of a body corporate, under the seal of such body corporate, may appoint one or more gamekeepers to preserve or kill game (*f*) for the use of such lord *or steward; and to authorize such gamekeepers, within the said limits, *506
to seize and take (*g*), for the use (*h*) of such lord or steward, all such dogs (*i*), nets, and other engines and instruments for the killing of game (*k*), as shall

(*u*) *Moore* v. *Lord Plymouth*,[1] 7 Taunt. 614; S. C. not S. P. 3 B. & A. 16. See 3 Buls. 66.

(*x*) Ibid. and see Manw. c. 18, s. 10.

(*y*) *Vere* v. *Lord Cawdor*, 11 East, 568. *Janson* v. *Brown*, 1 Camp. 41; and see *Wright* v. *Ramscott*, 1 Saund. 84. *Athil* v. *Corbet*, Cro. J. 463.

(*z*) *Wadhurst* v. *Dumure*, Cro. J. 45. Christian on the Game Laws, 265.

(*a*) *Gedge* v. *Mine*, 2 Buls. 60. (*b*) *Gundry* v. *Feltham*, 1 T. R. 334.

(*c*) *Earl of Essex* v. *Capel*, Hertford Summ. Ass. 1809. Christian on the Game Laws, 114.

(*d*) The lord of a manor cannot depute to another the power of appointing a gamekeeper. *Calcraft* v. *Gibbs*, 4 T. R. 631; 5 T. R. 19. Such a power is a mere emanation from the manor, and inseparable from it. Per Lord Kenyon, 5 T. R. 20.

(*e*) Other royalty means such as is *ejusdem generis* with a manor; and therefore it seems that the lord of a hundred or wapentake cannot, as such, appoint a gamekeeper. *Lord Aylesbury* v. *Pattison*, Doug. 28. *Bowkey* v. *Williams*, Lutw. 484.

(*f*) Where a gamekeeper kills game within a manor, it will be presumed that the act was done for the use of his principal. *Sparrow* v. *Vale*, 10 East, 413. A deputation granted and enrolled prior to the Act's taking effect, does not entitle a defendant to the privileges conferred with notice of action and giving evidence under the general issue. *Bush* v. *Green*,[2] 4 Bing. N. C. 41.

(*g*) Such seizure is a ministerial act, and need not be done by the gamekeeper himself, but may be done by another under his *immediate direction*. *Bird* v. *Dale*,[3] 7 Taunt. 570. But not under a general authority. *Ib.*

(*h*) The dog or engine seized becomes the property of the person having authority to seize it, and may be destroyed. *Kingsnorth* v. *Bretton*,[4] 5 Taunt. 416.

(*i*) The former statute, which authorized the seizure of dogs, &c. kept for the destruction of game, did not authorize the seizure of any dog such as was not prohibited from being kept, *e. g.* a hound. *Grant* v. *Hulton*, 1 B. & A. 134; and see *Hooker* v. *Wilkes*, Bl. 1126, where it was held that a hound was not within the statute 5 Anne, c. 14, because it was not mentioned there.

(*k*) The repealed statute 5 Anne, c. 14, authorized the lord of a manor to take game from unqualified persons, which he could not do before. *Bird* v. *Dale*,[3] 7 Taunt. 560; 1 Moore, 290. The present statute does not extend to *game*, except in cases within sec. 36.

[1]Eng. Com. Law Reps. ii. 238. [2]*Id.* xxxiii. 276. [3]*Id.* ii. 220. [4]*Id.* ii. 139.

be used within the said limits, by any person not authorized to kill game for want of a certificate (*l*).

Indictment. Under an indictment on the stat. 57 Geo. 3, c. 90 (*m*), against several, for being found armed at night in a wood, which they had entered with intent (*n*) to kill game, it appeared that the prisoners were shooting in the wood at night, and the flash of one of their guns was seen by a keeper who was on the watch for them, but before they were seen they had abandoned their guns in the wood, and were creeping away on their knees; and it was held by the Judges, on a case reserved, that the statute applied, although they had not then arms in their possession, or within their reach when they were discovered (*o*). So it is sufficient if the prisoner be *discovered* in the wood,

*507 *plantation or close, &c. although he be not *apprehended* until he has regained the highway.

If any one be armed with the knowledge of the rest, they are all within the statute (*p*); but it is otherwise where some are armed without the knowledge of the rest, for then those only who are armed are within the statute (*q*).

Competency. An informer is not a competent witness (*r*) where he is to have any part of the penalty. Although the statute speaks of a conviction on the oath of one or more credible witnesses, a conviction on *confession* before a justice (*s*), or even upon a confession made to a third person, when proved before the justice, has been held to be a sufficient ground for conviction (*t*).

(*l*) The lord of a manor cannot seize the gun of a gamekeeper of another lord, although he be upon the manor of the first without authority. *Rogers* v. *Carter*, 2 Wils. 387. Where a lord of a manor is also a justice of the peace, he is entitled to a month's notice of an action brought against him for taking away a gun from the house of an unqualified person, for it will be presumed that he acted as a justice. *Briggs* v. *Evelyn*, 2 H. B. 114. Under the stat. 5 Anne, c. 14, before seizure of game on the land of an unqualified person, the justice, &c. was bound to exercise his judgment, whether the person possessing the game be qualified or not; afterwards he may seize by the hands of another. See *Bird* v. *Dale*,[1] 7 Taunt. 566. Where a magistrate convicts an unqualified person for killing game under the stat., and causes his dog to be brought for the purpose of seizing it, he may order the dog to be killed without any formal adjudication of seizure. *Kingsnorth* v. *Bretton*,[2] 5 Taunt. 416. The demand by a gamekeeper of the certificate need not be made on the land, but it must be made immediately after the party has left it, so as to make it one transaction; and it is not necessary the party demanding should produce his own; and if the other refuses he does so at his peril, if the party demanding it be duly authorized; and if the party refuses to give his name, it is unnecessary to go on, and ask in what place, if any, he is assessed: held also, that the conviction reciting it was sufficient evidence of the information. *Scarth* v. *Gardener*,[3] 3 C. & P. 438: *cor.* Tenterden, L. C. J.

(*m*) This statute is repealed by the stat. 9 Geo. 4, c. 60, which (sec. 6) makes an unlawful entry by three or more armed persons into any land, &c., for the purpose of taking or destroying game or rabbits, a transportable misdemeanor. By sec. 1 of the same Act, the unlawful taking or destruction of game or rabbits by night is also a misdemeanor punishable by imprisonment; and in case of conviction for a third offence, by transportation. By stat. 1 & 2 W. 4, c. 32, s. 30, trespass on another's land in search of game or woodcocks, &c., subjects to a fine of not exceeding 5*l*. As to apprehension of poachers by gamekeepers, see 9 Geo. 4, c. 69, s. 1. Under the stat. 9 Geo. 4, c. 69, s. 2, a keeper may apprehend poachers, though there be three or more armed. *R.* v. *Ball*, 1 Moody's C. C. L. 330; ib. 333. He may arrest without giving notice. *R.* v. *Payne*, ib. 378.

(*n*) It was necessary to prove the intent as to that particular close. *Barham's Case*, 1 Ry. & M. (c. c.) 150. Where the indictment charged the prisoner with being in a certain wood called Old Walk, belonging to and then in the occupation of *W.*; held, that although, if the name of the occupier were stated, it was unnecessary to give the place and name, yet that having done so, a variance in the name was fatal. *Owen & Prickett's Case*, 1 Ry. & M. (c. c.) 118.

(*o*) *R* v. *Nash & Weller*, cor. Bayley, J. Maidstone Spring Ass. 1819. So where there was evidence to show that the defendant had been armed in the place, although he had not actually been seen there. *Worker's Case*, 1 Rv. and M. C. C. 105.

(*p*) *R.* v. *Smith & Others*, Burn's J., tit. GAME, Append. 225.

(*q*) *R.* v. *Johnson & Coulburne*, 1b. 226.

(*r*) *R.* v. *Stone*, Ld. Raym. 1545. *R.* v. *Blaney*, 2 Andr. 240. See the provisions of the late statute as to competency, *supra*, 501.

(*s*) 1 T. R. 320. *R.* v. *Gage*, 1 Str. 546. Saund. 262.

(*t*) Ibid.

[1]Eng. Com. Law Reps. ii. 220. [2]*Id.* ii. 139. [3]*Id.* xxiv. 201.

GAMING (*u*).

Upon a conviction for keeping a gaming-table (*x*), the evidence was, that the defendant was the master of the house, and acting as master of a hazard-table there on the 25th of August, but no mention was made of any dice being then used; but on the 26th of August one witness saw a dice-box and dice on the table, round which many persons were assembled, the play having been discontinued on the witness's entering the room. It was held by the Court that this was evidence to warrant the convicting justices in their conclusion that the game of hazard had been played there on the latter day. Under the statute 9 Ann. c. 14, s. 5, the defendant may be convicted of winning at one sitting a less sum than that which is alleged in the indictment (*y*), and although it appear in evidence that he was paid in bills of exchange, and not in money (*z*). To lose 10*l.* at one time is to lose it by a single stake or bet; to lose it at one sitting is to lose it in a course of play, where the company never part, though the person may not be actually gaming the whole time (*a*). Where two persons played from Monday *evening to Tuesday evening, without any interruption, except for an hour or two at dinner, it was held to be at one sitting within the statute (*b*). *508

Proof of keeping a gaming-table.

Winning more than 10*l.* at one sitting.

Under the statute 18 Geo. 2, c. 34, s. 1, against keeping gaming-houses, persons may be witnesses although they have played, betted or staked at any of the prohibited games (*c*).

The statute 9 Ann. c. 14, s. 2 (*d*), does not absolutely void the contract where money is won at play (*e*); and therefore where the plaintiff lost a mare of the value of 25*l.* by tossing up, and did not bring his action until the three months were expired, it was held that he could not recover (*f*).

(*u*) See Wager.—Assault.

(*x*) Under the stat. 12 G. 2, c. 28. The charge in the information was for setting up, maintaining, and keeping a certain game, to be determined by the chance of dice, called hazard. *R.* v. *Liston*, 5 T. R. 338.

(*y*) *R.* v. *Hill, Darley & Others*, 1 Starkie's C. 359. And see *R.* v. *Gilham*, 6 T. R. 265; 1 Ld. Raym. 149. *R.* v. *Baynes*, Ld. Raym. 1265. A horse-race is within this stat. *Goodburn* v. *Marley*, 2 Str. 1159. Although for a legal plate. *Blaxton* v. *Pye*, 2 Wils. 309. So is a foot-race. 2 Wils. 36. So also, *semble*, is a wager on the game of cricket. 1 Wils. 220. A foot-race being within the 9 Anne, c. 14, where it appeared that monies were advanced by the defendant for the purpose of making good losses by betting on such a race in pursuance of previous engagements, although not paid until after the event, for securing which a mortgage was given, and subsequently the estate was valued and conveyed to a trustee for the defendant, subject to the previous mortgage; it was held, that the statute applies both to the mortgage and conveyance, and that the heir at law was entitled under the statute, and a demurrer for want of equity overruled. *Parker* v. *Alcock*, 1 Younge, 361. The 13 Geo. 2, as relates to horse-racing, is repealed by 3 & 4 Viet. c. 5. Hazard, by the 12 Geo. 2, c. 28, s. 2 & 3, and 18 Geo. 2, c. 34, s. 2, is illegal, even though it be played in private, and the players are liable to a penalty of 50*l.* See *M'Kinnel* v. *Robinson*, 3 M. & W. 434.

(*z*) [1] Starkie's C. 359; and see above, 456.

(*a*) Per Blackstone, J., *Bones* v. *Booth*, 2 Black. R. 1226.

(*b*) 2 Bl. 1226.

(*c*) By sec. 5. See tit. Infamy and Witness.

(*d*) Which enacts, that if a person, by playing at cards, or any other game, shall lose to any one person the sum or value of 10*l*, he shall be at liberty within three months to sue for and recover the same.

(*e*) By sec. 5, persons who have lost their money at play are the only persons entitled, under the stat. 9 Ann. c. 14, s. 3, to file a bill for a discovery, and not a mere common informer in aid of a *qui tam* action. *Orme* v. *Crockford*, 13 Pri 376; 1 M. & Y. 185.

(*f*) *Vaughan* v. *Whitcomb*, 2 N. R. 411. Nor does the statute wholly avoid a security given in respect of money won at play. Where Reilly procured a bill drawn by Duckworth, payable to the order of Duckworth, and afterwards generally indorsed by Duckworth, to be accepted by Benson, the defendant, for a gaming debt due from the defendant to Reilly, it was held that the plaintiff, a subsequent *bona fide* holder for value, could not recover. *Henderson* v. *Benson*, 8 Price, 283. But the statute does not preclude such *bona fide* holder from recovering against the drawer of a bill accepted for a gaming debt *won* by him. The proper effect to be given to the Act is to prevent the *winner*, or any one who derives title from him, from making the *loser* pay. *Edwards* v. *Dick*, [2] 4 B. & A. 212.

[1] Eng. Com. Law Reps. ii. 426. [2] *Id.* vi. 405.

GENERAL ISSUE.

As to Evidence under, *see* The New Rules.

The general issue shall not be taken to be a plea under statute, unless By Statute be noted in the margin. 4 Bing. N. C. 816.

GOODS SOLD AND DELIVERED.

See Vendor and Vendee.

GRANT. *See* tit. Deed.—Presumption.

GUARANTY.

Proof of guaranty.

A guaranty in writing (*g*) must be produced, properly stamped, and proved as in other cases (*h*) according to the averments (*i*).

(*g*) See Frauds, Statute of. The plaintiff distrained goods for rent, which he was about to sell; the defendants gave an undertaking, that if he would give up the distress, and allow them to sell them for the tenant, they would pay the rent legally due; held, that it was not a promise to answer the debt of another within the statute of frauds. *Edwards* v. *Kelly*, 6 M. & S. 204. And see *Williams* v. *Leper*, 3 Burr. 1886; *Houlditch* v. *Milne*, 3 Esp. 59; *Castling* v. *Aubert*, 2 East, 325.

(*h*) See Assumpsit.—Stamp.—Written Instrument, Proof of. A sufficient consideration must appear on the face of the instrument, or by internal reference. See *Pace* v. *Marsh*,[1] 1 Bing. 216; *Boehm* v. *Campbell*,[2] 3 Moore, 15; and Frauds, Statute of, *supra*. The guaranty may be connected by reference in the indorsement containing the guaranty to an agreement written on the other side of the same paper. *Stead* v. *Liddiard*,[3] 1 Bing. 196. And where the guaranty itself does not state the consideration, it may be collected from a previous correspondence to which the guaranty refers. *Coe* v. *Duffield*,[4] 7 Moore, 254. On a note in these terms,—"Messrs. *M.* and Co (plaintiffs), we hereby promise that your draft on *C.* and Co. due at *M.*'s at six months on, &c. shall be paid out of the money to be received from *P.*; say —*l*" signed "*C.* and *B.*" (defendants); held, that no sufficient consideration appearing on the face of the instrument for the promise of *C.* and *B.*, it was as against them, void. *Morley* v. *Boothby*, 3 B. 107.

A guaranty in the terms, "I engage to pay *A. B.* for all the gas supplied at *M*, during the time it is occupied by *N.*; and I do also engage to pay for all arrears which may be now due;" held, that no sufficient consideration appearing for the latter part of the engagement, it could not be sustained, but that it might as to the former. *Wood* v. *Benson*, 2 C. & J. 94. Where an action pending between *A.* and *B.* the defendant joined with the latter in a memorandum, which, after stating the parties to the action, and the amount of the debt and costs, was in the terms, "we jointly and severally undertake and agree to pay *G. C.* (the attorney of the plaintiff in the action) the debt and full costs in this action, provided, on or before the —— day of ——, the sum of —— be not paid to the said *G. C.*, at his office, as the attorney for the said plaintiff," held that the consideration for which the guaranty was given being uncertain, whether for staying the action or giving time of payment, was not sufficiently expressed to take it out of the Statute of Frauds. *Cole* v. *Dyer*, 1 C. & J. 461.

The plaintiff having given to the defendants two notes and a cognovit, the defendants by a guarantee in consideration of the money so secured to be paid to them, undertook to indemnify the plaintiff against a certain bill; held that the plaintiff might sue on the guarantee, although the notes had not been paid, the security, and not the payment, being the consideration of the guarantee. *Ikin* v. *Brook*,[5] 1 B. & Ad. 124.

"I agree to bind myself to be security to you for *J. C.*, late in the employ of *J. P.*, for whatever you may entrust him with whilst in your employ;" held that the consideration sufficiently appeared, viz. to give credit for *J. C.* prospectively, and in consideration of his being employed and entrusted. *Newbury* v. *Armstrong*,[6] 6 Bing. 201; 1 M. & M. 389.

A letter of guarantee was given by the defendant to the plaintiff in the terms, "that *P. C.* shall faithfully and honestly discharge any duty assigned to, or trust reposed in him;" the plaintiff received him into his employ; it was held that a sufficient consideration appeared on the face of the guarantee. The plaintiff employed the party first at *B.* and afterwards at *Z.*, and upon his removal from *B.* he was indebted to the plaintiff in a large sum, and from his accounts it appeared that sums remitted whilst employed at *Z.*, were remitted as the proceeds of sales there; held that the Judge was not bound to direct the jury as matter of law, that such remittances were to be considered as in discharge of the former balance, but that he was right in leaving it to the jury under all circumstances to what account they were to be applied. *Lysaght* v.

(*i*) See tit. Variance. Where the consideration was alleged to be the advance of money to *T. G.* by the plaintiff, and it appeared on the trial that the money had not been advanced by the plaintiff, but by him and his partners, who were bankers, by debiting *T. G.*, who was also their customer, with it in their books; held, that the declaration was not sustained by the proof, and a non-suit therefore right. *Garrett* v. *Handley*,[7] 3 B. & C. 462; 5 D. & R. 319.

[1] Eng. Com. Law Reps. viii. 302. [2] *Id.* iv. 245. [3] *Id.* viii. 294. [4] *Id.* xvii. 72. [5] *Id.* xx. 357. [6] *Id.* xix. 55. [7] *Id.* x. 152.

*In an action brought upon a guaranty, unless the instrument given in evidence as such, purport to be an absolute and conclusive engagement, the *plaintiff must show that he gave notice to the defendant, that he accepted *510 it as such (*n*) (A). Proof of a mere offer or proposal to guarantee is not

Walker, 1 Dow's C. 211. A guarantee in the terms, "I hereby undertake to secure you the payment of any sums of money you have or may hereafter advance to *D.* and *C.*, on their account with you;" held, 1st, that it not appearing from the terms of the instrument that the future advances were the consideration for guaranteeing the past advances, the actual consideration was left too uncertain to render the guaranty sufficient within the Statute of Frauds; 2dly, that under the general issue, the defendant might show that the consideration alleged in the declaration was not the actual one, without pleading it specially; and, lastly, that the creditor having proved against the estate of the principal to a larger amount than that covered by the guarantee, the defendant had a right to deduct the dividends from the amount claimed under the guarantee. *Raikes* v. *Todd*, 1 P. & D. 138. The defendant being attorney for a debtor to the plaintiff, remits an acceptance of his client in a letter, stating that his client had been disappointed in receiving his remittances, which the plaintiff refused to take unless the defendant would put his name to it, and he accordingly wrote on the back of the letter, "I will see the bill paid for *W.*;" the consideration sufficiently appears. *Emmott* v. *Kearns*,[1] 5 Bing. N. C. 559; 7 Sc. 687; and 7 Dowl. 630. So where the defendant signed a memorandum in the terms, "I hereby guarantee the payment of all goods consigned to *T.*, in consideration of 2*s.* 6*d.* paid me." *Dutchman* v. *Tooth*,[2] 5 Bing. N. C. 577. "I hereby guarantee you, Messrs. *K.* & Co., the sum of 250*l.* in case *P.* of, &c. should make default in his capacity of agent and traveller to you," sufficiently shows the consideration of a future agency, and default. *Kennaway* v. *Treleaven*, 5 M. & W. 498. The defendant being surety by deed for his brother for goods supplied by *M.*, whom the plaintiff succeeded in his business, by letter acknowledged his readiness to become also a like surety to the plaintiff, upon being satisfied of the solvent state of his brother; adding, "In the meantime I will hold myself responsible to you for 200*l.*, in the event of his inability to meet it; to be void when the full statement of his affairs being laid before me, and such proving satisfactory, I then enter into the security you require;" held, the letter was void as a guarantee. *Bentham* v. *Cooper*, 5 M. & W. 621. A guaranty of payment of the debt of *B.* is conditioned to be void, if the party do not avail himself to the utmost of a bill held by him as a deposit; and also in case anything should prevent the defendant from receiving and retaining the proceeds of an execution he has levied on the goods of *B.*; it is not avoided by the plaintiff not putting the bill in suit against the acceptor, who was an insolvent and in prison; nor by part of the goods being withdrawn, which, being the goods of other parties, had been improperly taken in execution. *Musket* v. *Rogers*,[3] 5 Bing. N. C. 728; and 8 Sc. 51. Where *M.* had agreed to supply timber to *W.* to complete a contract with *H.*, on *H.* signing the following undertaking, "I agree to pay *M.* for timber to house in *A. C.* out of the money that I have to pay *W.*, provided *W.*'s work is completed;" held, that it was not a collateral, but a direct undertaking to pay on the completion of the work, which being proved, the plaintiff was entitled to recover. *Dixon* v. *Hatfield*,[4] 2 Bing. 439.

(*n*) *Mac Iver* v. *Richardson*, 1 M. & S. 557; where the defendant wrote to the plaintiff thus: "I understand that *A.* has given you an order for rigging; I can assure you that you will be safe in crediting him; indeed, I have no objection to guarantee you against any loss from giving him this credit." Held, that without notice, &c. this did not amount to a guaranty. See also *Symmons* v. *Want*,[5] 2 Starkie's C. 371. *Gaunt* v. *Hill*,[6] 1 Starkie's C. 10. The construction of a guaranty is of course a question of law; but it may be observed that the rule is, that the words are to be taken as strongly against the party giving the guaranty as their sense will admit. *Mason* v. *Pritchard*, 12 East, 227. A guaranty in the terms, "if you give him credit he will be responsible that his payments shall be regularly made to the extent of ——*l.*;" held that it was to be constructed as such reasonable credit as the principals might agree upon, and not according to the terms of the trade. *Simpson* v. *Manley*, 2 C. & J. 12. A guaranty for any goods which the plaintiff "hath or may supply to *W. P.* to the amount of 100*l.*" is a continuing guaranty, and extends to any goods supplied till the credit be recalled, although goods exceeding 100*l.* in value have been supplied. A bond for advances to be made to a specified amount is not a continuing guaranty. *Kirby* v. *The Duke of Marlborough*, 2 M. & S. 18. *Secus*, where a warrant of attorney is given to secure 4,000*l.*, and there is nothing to manifest an intention that it was given to secure an existing balance at the time. And see *Williams* v. *Rawlinson*, 1 R. & M. 233. "I agree to guarantee the payment of goods to be delivered to *J. & A. S.* at, &c., according to the custom of their trading with you;" the custom having been shown to be a monthly accounting, held that it was to be construed to be a continuing guaranty. *Hargreave* v. *Smee*, 6 Bing. 244. A guaranty given to a firm is determined by a change of the firm, unless the change is expressly provided for. *Dry* v. *Davy*, 2 Perr. & D. 249; and 10 Ad. & Ell. 30. "I hereby agree to be answerable to *K.* for the amount of five sacks of flour, to be delivered to *T.*, payable in one month; Nov. 18." The plaintiff accordingly, on the 19th, delivered five sacks to *T.*, and made a like delivery on the 21st; on the 24th *T.* returned part of the first delivery as of bad quality; held, that it was properly left to the jury to say whether the second delivery was under a new contract or not, and whether the whole quantity guaranteed had been furnished on the 19th; the defendant's liability began to run on the 19th, and could not be prolonged by a subsequent delivery, without evidence of express assent on his part. *Kay* v. *Groves*,[7] 6 Bing. 276. Debt on an indemnity bond to bankers, to secure advances; the condition was, that the obligors should pay the

(A) (A guaranty is a mercantile instrument, and to be construed according to what is fairly to be pre-

[1]Eng. Com. Law Reps. xxxv. 227. [2]*Id.* xxxv. 236. [3]*Id.* xxxv. 289. [4]*Id.* ix. 471. [5]*Id.* iii. 388. [6]*Id.* ii. 272. [7]*Id.* xix. 82.

sufficient; the plaintiff must also show that he has complied with the condition of the guaranty, if it be conditional, for such a claim being against
*511 a surety, is **strictissimi juris* (*o*) (A). If the guaranty import that eighteen months' credit was to be given to the vendee, it is not sufficient to show that twelve months' credit was given, although six more have

balance already due, and such further advances as the bankers should make "not exceeding ——*l.*;" the restrictive words in the condition do not avoid the bond, though the obligees advance beyond the sum stated. *Parker* v. *Wise*, 6 M. & S. 239. A continuing guaranty is countermandable by parol. *Brocklebank* v. *Moore*, cor. Abbott, C. J., Guild. Sitt. after Trin. 1823. See, as to guaranty of bills drawn on the credit of shipments by an agent, *Ogden* v. *Aspinall*,[1] 7 D. & R. 637. With respect to the construction of guaranties, and conditions as to their extent in point of time and amount, see *Liverpool Water Works Company* v. *Atkinson*, 6 East, 507. *Wardens of St. Saviour, Southwark*, v. *Bostock*, 2 N. R. 175. *Hassell* v. *Long*, 2 M. & S. 363. [*Sturges & al.* v. *Robbins*, 7 Mass. Rep. 301. *Duval* v. *Trask*, 12 ib. 154. *Clark's Ex'ors* v. *Carrington*, 7 Cranch, 300. *Lanusse* v. *Barker*, 3 Wheat. 101. *Grant* v. *Naylor*, 4 Cranch, 224. *Lawrason* v. *Mason*, 3 Cranch, 492. *Rogers* v. *Wurner*, 8 Johns. 119. *Meade* v. *M'Dowell*, 5 Binney, 195. *Clarke* v. *Russel*, 3 Dallas, 415. Mr. Wheaton's note to *Lanusse* v. *Barker*, *ubi sup.*]

(*o*) Per Ld. Ellenborough, C. J., *Bacon* v. *Chesney*,[2] 1 Starkie's C. 192.

sumed to have been the understanding of the parties, without any strict technical nicety. *Lee* v. *Dick*, 10 Peters, 482. In an action founded upon a letter containing this clause, "the object of the present letter is to request you, if convenient, to furnish them, (*S.* and *H.*) with any sum they may want, as far as fifty thousand dollars, say fifty thousand dollars. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it; and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount." *Held*, this was not an original, absolute undertaking, but a guaranty, that it covered advances only to *S.* and *H.* (who were then partners) on partnership account, and not advancess to either of the parties separately, on his separate account, that the authority thus given by the guarantor was revoked by a dissolution of the partnership; and no advances made after a full notice of such dissolution, were within the guaranty, that the letter did not amount to a continuing guaranty, for money advanced *toties quoties*, from time to time, to the amount of fifty thousand dollars; but for a single advance of money to that amount; that when once advances were made, to the amount of fifty thousand dollars, no subsequent advances were within the guaranty, although at the time of such further advances, the sum actually advanced, had been reduced below fifty thousand dollars, by the reimbursement of the debtors. *Cremer* v. *Higginson*, 1 Mason's C. C. R. 323. Where an individual introduced a friend to a merchant and directed him, the merchant, to let his friend have what goods he should at any time want, and charge them to him, and he would see him paid; and goods were delivered from time to time, and charged to him, although his friend kept up a long running account and made various payments which were credited, he is liable to pay a balance which has accrued. *Graham* v. *O'Neil*, 2 Hall. 474. See also *Aldricks* v. *Higgins*, 16 Serg. & R. 212. In an action upon the following letter of guaranty, written by the defendants and delivered to the plaintiffs: "Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or endorsement of his paper, or advances in cash; in order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said *C. H.* fail to do so." One count in the declaration was for money lent, and money had and received. *Held*, that upon a collateral undertaking of this sort, no such suit is maintainable. *Douglas* v. *Reynolds*, 7 Peters, 113.)

(A) (Upon a letter of guaranty, addressed to a particular person, or to persons generally, for a future credit to be given to a party in whose favour the guaranty is drawn; to charge the guarantor, notice is necessary to be given to him, that the person giving the credit has accepted or acted upon the guaranty, and has given credit on the faith of it. This is not an open question in the Supreme Court, after the decisions which have been made in *Russell* v. *Clarke*, 7 Cranch, 69. *Edmondson* v. *Drake*, 5 Peters, 624; *Douglas* v. *Reynolds*, 7 Peters, 113; and *Lee* v. *Dick*, 10 Peters, 482; *Adams*, *Cunninghum & Co.* v. *Jones*, 12 Peters, 207; *Cremer* v. *Higginson*, 1 Mason, C. C. R. 323. A promise to pay a debt by the guarantor qualified with a condition which was rejected, is not a waver by the guarantor of his right to notice of the acceptance of the guaranty. *Reynolds* v. *Douglas*, 2 Peters, 497. [And if notice be not given within a reasonable time, he is discharged from all liability. *Cremer* v. *Higginson & al.* 1 Mason, C. C. R. 323. *Russell* v. *Perkins*, ibid. 371. See also *Stafford* v. *Low*, 16 John. R. 67. Where *A.* wrote thus to *B.* "Should you be disposed to furnish my brother with such goods as he may call for, from 300 to 500 dollars worth, I will hold myself accountable for the payment, should he not pay you as he shall agree;" it was held, that *B* could not recover without proving notice to *A.* of the acceptance of the proposition, the amount of credit given under it, the time and term of payment, &c. *Rapelye* v. *Bailey*, 3 Com. R. 438.

A guaranty of the notes of *A.* cannot be applied as a guaranty of the notes of *A. & B. Russell* v. *Perkins*, *ubi sup.* S. P. *Penoyer* v. *Watson*, 16 John. R. 100. A letter of credit addressed by mistake to *John & Joseph A.* and delivered to *John & Jeremiah A.* will not support an action by the latter for goods furnished by them to the bearer on the faith of the letter of credit. *Grant* v. *Naylor*, 4 Cranch, 224. If *A.* address a letter of credit to *B.* in favour of *C.*, and *B.* deliver part of the goods himself, and procure other persons to deliver the residue, *A.* is responsible only for the goods delivered by *B.*, the interest in such letter not being assignable. *Robbins* v. *Bingham*, 4 John. R. 476. S. P. *Walsh* v. *Bailie*, 10 ib. 180].)

[1]Eng. Com. Law Reps. xvi. 306. [2]*Id.* ii. 352.

since elapsed (*p*). Where the defendant had guaranteed the plaintiff against loss, in case his, the defendant's, son became bankrupt, in order to prove the allegation that he had become bankrupt, it was held that the plaintiff was bound to prove that a commission had been actually sued out against him (*q*). Upon a contract to guarantee a bill of exchange for a given sum, the guarantee is not liable even to that amount, if a bill be given for a larger sum (*r*) (A).

Proof of notice.

In an action upon a guaranty of the price of goods to be paid by a bill, the notice of the non-payment of the bill must be given both to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due (*s*) (B); but where *A.* became bound to *B.* for the honesty of *C.*, who embezzled money, it was held that *B.* might maintain an action on the guaranty, although three years had elapsed without any notice having been given by *B.* to *A.* (*t*), and although *B.* had given credit to *C.* for the amount, the jury finding that *B.* had not waived the guaranty (*u*). It is to be observed, that this case differs from that where a bill of exchange is given, the defendant being bound not merely to pay the money, in case *C.* did not pay it, but being bound absolutely to pay the deficiency (*x*). It has been held in equity, that if an obligee enlarge the time of payment to a principal, he thereby discharges the surety (*y*); but this is no defence at law (*z*).

Fraud.

A contract to guarantee will be defeated not only by proof of any unfair and dishonest practice between the other parties, but by concealing from him any part of the contract which he ought to have known; as where the vendor and vendee secretly agree that 10*s.* per ton beyond the market price should be paid for the goods in respect of which the guaranty is given (*a*).

(*p*) Ibid.
(*q*) *Bulkeley* v. *Lord*,[1] 2 Starkie's C. 400.
(*r*) *Philips* v. *Astling*, 2 Taunt. 206.
(*s*) Ibid.
(*t*) *Peel* v. *Tatlock*, 1 B. & P. 419. But note, that *A.* was acquainted with the fact from another source. The jury found that *B.* had not waived the guaranty.
(*u*) Ibid.
(*x*) Ibid. per Heath, J.
(*y*) *Rees* v. *Berrington*, 2 Ves. jun. 544; 10 East, 40.
(*z*) *Trent Navigation Company* v. *Harley*, 10 East, 34. Where the bond was conditioned that the principal obligor should account and pay over from time to time all such tolls as he should collect for the obligees; the obligees had been guilty of laches in not examining their accounts for eight or nine years, and in not calling on the principal so soon as they might have done. See also *Nares* v. *Rowles*, 14 East, 510; where it was held that a bond for the collection and payment over of public duties might be put in force against one of the sureties, although he was not apprised of the default of the principal collector in not paying over the duties, nor called on to indemnify until after the dismissal of the principal from his office. And see *Oxley* v. *Young*, 2 H. B. 613; and vid. *infra*, tit. SURETY.
(*a*) *Pidcock* v. *Bishop*,[2] 3 B. & C. 605.

(A) (A guaranty in these words, "I warrant this note good," endorsed by a payee upon a note, is a guaranty that the note is collectable, and not that it will be paid on demand, and to charge the guarantor it is necessary to show that payment cannot be enforced against the maker. *Curtis* v. *Smallman*, 14 Wend. 231. The legal liability of the assignor of a note, as regards a guaranty, may be established partly by parol, and partly by the written assignment, whenever the parol evidence is in accordance with, and not contradictory to it. *Hinchley* v. *Walters*, 9 Watts, 179. A guaranty of a debt in the form of an endorsement of a promissory note, is obligatory upon the guarantor, and in case of non-payment by the debtor the guarantor is liable for the whole amount of the debt, and not merely for the sum received by him with the interest thereof. *Oakley* v. *Boorman*, 21 Wend. 588. A party who has engaged to guarantee the payment of the paper of another, made payable at a particular bank, is not liable upon a note drawn by such party, although it be deposited for collection in the bank specified in the guarantee previous to its maturity, and notice given thereof to the guarantor; the claim against a surety is *strictissimi juris*. *Dobbin* v. *Bradley*, 17 Wend. 422.)

(B) (The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity; unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and notice of non-payment. *Reynolds* v. *Douglas*, 12 Peters, 497.)

[1] Eng. Com. Law Reps. iii. 404. [2] *Id.* x. 197.

Discharge.

An executor, it seems, is not liable in respect of advances made after notice of the testator's death, for the death is a revocation (*b*).

A guarantee on the sale of goods, who has paid the amount after the bankruptcy of the vendee, who had accepted a bill for the amount, need not prove any demand on the vendee as acceptor of the bill previous to the payment by him as guarantee, for the action is not on the bill itself, *512 and *the insolvency of the vendee is a *primâ facie* warrant to the guarantee to pay the money previous to a demand by the vendor, who held the bill (*c*).

A guarantee will be discharged by any unauthorized extension of the credit given to the party guaranteed (*d*). Mere laches does not operate to discharge (*e*). The assignment of a chose in action cannot discharge an obligation to guarantee (*f*). A party, under a guaranty of indemnity, has no right to defend an action, and put the party guaranteeing him to useless expense, unless authorized by him; held, therefore, that he could only recover the costs of the writ (*g*).

HABEAS CORPUS. *See* SHERIFF.

HAND-WRITING.

Proof of hand-writing.

THE rules which relate to the proof of hand-writing are now so well settled in practice, upon grounds, as it seems, of general convenience, notwithstanding the doubts which formerly prevailed upon this subject, and

(*b*) *Potts* v. *Ward*,[1] 1 Marsh. 366; and see *Cooper* v. *Johnson*, 2 B. & A. 394. Where the obligation was, that J. Knapman shall perform an award, and the award was to pay 20*l.* at Easter, and 10*l.* at Michaelmas, and J. K. died before Michaelmas, it was held that the obligation was forfeited by non-payment of the 10*l.*; *Kinguel* v. *Knapman*, Cro. Eliz. 10; for the sum awarded was become a duty; *secus*, when no duty, as to make a feoffment. *Joyner* v. *Vyner*, T. Raymond, 415.

(*c*) *Warrington* v. *Furbor*, 8 East, 242.

(*d*) The defendant guaranteed to see the plaintiff paid "for any porter you may send to *A.*, until you receive notice to the contrary from me;" and it appeared from the invoices that the course of the plaintiff's business was to give six month's credit, and then sometimes a bill at two months; the plaintiff having, without the knowledge of the defendant, allowed three months to elapse beyond the six, and then accepted a bill at two, virtually extending the credit to eleven months; held, that the surety was exonerated. *Coombe* v. *Woolf*,[2] 8 Bing. 156. Promise to guarantee in consideration of goods being furnished to a third person on credit, in the event of his failure; the renewal by the plaintiff of a bill which had not been paid when due, is not such a failure as was contemplated by the guarantee as to discharge the surety by not having given him notice of such renewal. *Carr* v. *Browne*,[3] 12 Moore, 62. Guaranty for the payment of coals to be delivered to *N. H.* at a credit of two months from the delivery; a dealing by delivery from day to day, and payment on the last day of the month by bill at two months, is not a dealing within the terms of the guaranty, although according to the custom of the trade, the agreement being silent as to that. *Holl* v. *Hadley*,[4] 5 Bing. 54; and 2 M. & P. 136. The defendant guaranteed the plaintiff to the extent of ——*l.* for gold he might supply to *E.* a goldsmith, and the plaintiff discounted bills for *E.*, but not indorsed by him, supplying part of the amount in gold, which was used by *E.* in his trade; such a transaction is not within the meaning of the guaranty; it is a purchase of the bills at his own risk, and the defendant is not liable on his guaranty for the value of such gold. *Evans* v. *Whyle*,[5] 5 Bing. 485.

(*e*) Upon an agreement in April 1825, for the purchase of timber, the defendant subscribed a guaranty for the payment according to the conditions, in the event of the principal not doing so; and after payment of part by bills, and repeated applications, a bill was given by him for the residue, which was eventually dishonoured, and he became bankrupt in December, 1827, but the defendant was never informed of such application, nor of the bill being given; it was held, that mere laches in the party secured did not operate as a discharge to the surety unless it amounted to fraud; secondly, that the Judge correctly informed the jury that, in order to discharge the debt, time must have been given under such circumstances that the plaintiff could no longer sue the original debtor. *Goring* v. *Edwards*,[6] 6 Bing. 95.

(*f*) *Parker* v. *Wise*, 6 M. & S. 239. As to the admissibility of a declaration by the party guaranteed against the party who guarantees, see tit. SURETY.

(*g*) *Gillett* v. *Rippen*,[7] 1 M. & M. 406. The defendant as landlord, in an authority to the plaintiff to distrain certain goods, added an indemnity against all costs and charges that might arise; such indemnity only applies to cases where the distress is illegal, and which the landlord had no right to put in, and not to protect the plaintiff against the consequences of the acts of his own servants. *Draper* v. *Thompson*,[8] 4 C. & P. 84.

[1]Eng. Com. Law Reps. iv. 340. [2]*Id.* xxi. 253. [3]*Id.* xxii. 437. [4]*Id.* xv. 367. [5]*Id.* xv. 514. [6]*Id.* xix. 14. [7]*Id.* xxii. 342. [8]*Id.* xix. 286.

which are still entertained as a matter of theory and speculation, as to render very few observations necessary in this place. The best evidence to prove the hand-writing in question is that of a witness who actually saw the party write it; such direct evidence can, however, seldom be procured. *And, in general, to prove the hand-writing of a person, any wit- *513
ness may be called who has, by sufficient means, acquired such a knowledge of the *general character* of the hand-writing of the party as will enable him to swear, to his *belief*, that the hand-writing in question is the Belief.
hand-writing of that person (*h*) (A).

This knowledge of the general character of the party's hand-writing may Grounds
have been acquired from having seen him write, although but once (*i*); or of belief.
if the witness has never seen him write, it is sufficient if he has obtained a knowledge of the character of the hand-writing from a correspondence with the party upon matters of business, or from any other transactions (*k*) between them, as from having paid bills of exchange according to his written directions, and for which he afterwards accounted. And when letters are sent, directed to a particular person on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose hand-writing it purports to be (*l*); for when letters are so written in the usual and ordinary course of business, it is reasonable to presume *that they were really written by the person by whom they purport *514
to have been written, and that they have not been fabricated to answer a

(*h*) B. N. P. 236. *Lord Ferrers* v. *Shirley*, Fitzg. 195. See the observations made on the above passage in the case of *Doe* v. *Suckermore*,[1] 5 Ad. & Ell. 703. The defendant in ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his. On his cross-examination two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector of the Bank of England, and had no knowledge of the hand-writing of the supposed attesting witness, except from having previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in Court. Lord Denman, C. J., and Williams, J., were of opinion that such evidence was receivable. Per Patterson and Coleridge, Js., that it was not. It is impossible by means of any abstract, to do justice to the very able reasoning of the learned Judges in the above interesting and important case, in which all the material cases bearing on the subject were cited and remarked upon. The question was simply whether the witness had had *sufficient means* of acquiring such a knowledge of the general character of the hand-writing of the party whose signature was disputed, to sanction his testimony. In the course of the discussion, a case was alluded to in illustration of the uncertainty as to testimony of hand-writing, which had been mentioned by Lord Eldon, in the case of *Eagleton* v. *Kingston*, 8 Ves. 473, regarding himself. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord Eldon himself, and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon had never attested a deed in his life.

(*i*) *Garrells* v. *Alexander*, 4 Esp. 37. A witness who has seen a party write, but has forgotten the character of the hand-writing, may refresh his memory by referring to the instrument which he saw the party write. *Burr* v. *Harper*,[2] Holt's C. 420. Where the signature to be proved was by a mark, it was held that it might be proved by inspection by a witness who spoke to having seen the party make her mark, and to some peculiarity in it. *George* v. *Surrey*,[3] 1 M. & M. 516. If, however, his opinion, rests upon a comparison of hands, it is inadmissible. *Garrells* v. *Alexander*, 4 Esp. C. 37. As where he has merely seen the party subscribe his name to another instrument to which he is the attesting witness, and is unable to form an opinion respecting the hand-writing of the party without examining such other instrument. *Filliter* v. *Minchin*, cor. Holroyd, J., Winchester Spring Assizes, 1819.

(*k*) The plaintiff used an affidavit signed by a party, and the defendant's attorney swore that he had observed it, and formed an opinion which enabled him to state his belief as to the signature to an agreement attested by the party; held that it was evidence of hand-writing, as the plaintiff was precluded from questioning the genuineness of the former signature. (Cor. Park, J.) *Smith* v. *Sainsbury*,[4] 5 C. & P. 196.

(*l*) Per Lord Kenyon, *Cary* v. *Pitt*, Peake's L. E. 105. If a party has received letters, and acted upon them, it is a sufficient ground for belief. *Thorpe* v. *Gisburn*,[5] 2 C. & P. 21.

(A) (See *Whittier* v. *Gould*, 8 Watts, 485.)

[1] Eng. Com. Law Reps. xxxi. 406. [2] *Id.* iii. 147. [3] *Id.* xxii. 371. [4] *Id.* xxiv. 275. [5] *Id.* xii. 8.

particular purpose. In such case it is obviously essential that the *identity* of the correspondent whose letters have been received, with the party whose hand-writing is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence (*m*) (1).

In the case of *Lord Ferrers* v. *Shirley* (*n*), where the issue was upon the execution of a deed by Lord Ferrers, a witness was called to prove the hand-writing of Cottington, a subscribing witness, who was dead: he stated that his master had held an estate under the late Lord Ferrers, and that he had seen several letters appearing to have been written by Cottington, for the rent of the estate; and that his master had told him that they were the letters of Cottington, Earl Ferrers's steward. The Court, in this instance, rejected the witness, because he could not prove the identity of Cottington (*o*); but Lord Raymond said that it was not necessary in all cases that the witness should have seen the party write to whose hand he swears; for where there has been a fixed correspondence by letters, and it can be made out that the party writing such letters is the same man that attested the deed, it will enable the witness to swear to that person's hand-writing, although he never saw him write (A). And Page, J., said, if a subscribing witness to a deed live in the West-Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand by having seen the letter of such person written by him to his correspondent in England, because, under the special circumstances of that case, there is no other way, or at least the difficulty will be great of proving the hand-writing of such subscribing witness. The Court, in this case, rejected the testimony, not

(*m*) Where it was proposed to prove the hand-writing of the defendant (Samuel Fry), a witness was produced who stated that he had never seen the defendant, but that he had corresponded with a Samuel Fry, of Plymouth Dock, that he had so addressed his letters, and received answers from him, and had from such correspondence acquired such a knowledge of his hand-writing as enabled him to say that the letter produced was in the same hand-writing; and evidence was given *aliunde* that the defendant lived at Plymouth Dock, and that no other person of the same name resided there; it was held that the evidence was sufficient. *Harrington* v. *Fry*,[1] 1 Ry. & M. 90. Hand-writing is well proved by a witness who has received letters from the party in answer to letters written to him by the witness, although the witness has never done any act in consequence of the receipt of such letters. *Doe* v. *Wallinger*, cor. Holroyd, J., Dorchester Spring Assizes, 1819. And see *Gould* v. *Jones*, 1 Blacks. 384.

(*n*) Fitzg. 195. (*o*) Ibid.

(1) [The hand-writing of a party to a receipt may be proved by a witness who has never seen him write, but who, in a course of dealings with him, has received his notes which he has *paid;* {or letters from him upon which he has acted;} if the witness swears affirmatively, from his own knowledge derived from these facts, that he believes the signature produced to be the proper hand-writing of the party. *Johnson* v. *Daverne*, 19 Johns. 134.

A notary public, who has seen much of the party's acknowledged writing, though he has never seen him write, was held competent to prove his signature as an attesting witness to a will. *Duncan* v. *Beard*, 2 Nott & M'Cord. 400.

The hand-writing of a surveyor to an ancient survey may be proved by a witness who has become acquainted with his hand-writing by inspecting ancient surveys avowedly made by him. *Jackson* v. *Murray*, Anthon's N. P. 77. See also *Taylor* v. *Cooke*, post, p. 657, note (*m*).

In the case of the *State* v. *Allen*, 1 Ruffin's Rep. 6, it was held that a witness, who has never seen a person write, nor received letters from him, and who has no knowledge of his hand-writing, but what he has derived from receiving bank-notes, in the course of business, purporting to be signed by the person, as the president of a bank, and reputed to be genuine, is incompetent to prove his hand-writing, or to prove that a bank-note purporting to be signed by him is counterfeit, at least unless the ordinary occupation of the witness renders it probable that he has received and paid large sums, so as to be a skilful judge.] {See also, *Greaves* v. *Hunter*, 2 Car. & Payne, 477.}

(A) (One of two witnesses to a deed deposed that he did not recollect witnessing it, but knew the attestation to be in his hand-writing, and that the other subscribing witness had a short time previously, but long after the commencement of the suit in which the deposition was taken, left the commonwealth, after advertising his intention so to do, and that though the deponent did not recollect having seen him write his name, he had often received letters from him, and thought the signature in question was his hand-writing. *Held*, that this was sufficient proof of the execution of the deed for the purpose of reading it in evidence. *Russell* v. *Coffin*, 8 Pick. 143.)

[1] Eng. Com. Law Reps. xxi. 388.

on account of the insufficiency of the evidence to prove the hand-writing to be that of the person who had written the letters demanding rent, but because the identity of that person with Cottington, the attesting witness, had not been made out.

The mere seeing the superscription of letters at the post-office, purporting to have been franked by the party, is not a sufficient foundation for this kind of evidence (*p*), for the superscription may have been forged. A witness who swears to his belief of hand-writing must form his judgment from his recollection of the general character of the hand-writing of the party, and not from any extrinsic or collateral circumstances. Mr. Caldecot was allowed to state his belief that the hand-writing was not that of Mr. Mickle, *the author of the Lusiad, because he was a very correct man in making capital and small letters where such were required; and in the writing produced that correctness was not observed; for the observation arose from the character of the hand-writing itself (*q*) (1). But in the later case of *Dacosta* v. *Pym* (*r*), the witness saying that the hand-writing was like the plaintiff's, but that he did not think it was his, because the plaintiff was too much a man of the world to sign such an account, Lord Kenyon held that the answer was improper, and that the witness ought to found his opinion upon the character of the hand-writing only. *515

Where the witness had never seen the defendant (who was sued as the acceptor of a bill of exchange) write his name till after the commencement of the action, and then only for the purpose of showing him the difference between his hand-writing and that of the acceptance on the bill, his testimony was held to be inadmissible (*s*).

Comparison of hands.

It is also a rule that evidence by *comparison* of hands is not admissible. By comparison, is *now* meant an actual comparison of two writings with each other, in order to ascertain whether both were written by the same person (*t*) (A). Here it may be observed, that such evidence is now

(*p*) *Cary* v. *Pitt*, Peake's Ev. 105. And see *Ld. Ferrers* v. *Shirley*, Fitz. 195. And it has been held that the full signature of an acceptor is not sufficiently proved by a witness who has seen the party sign his name but once before, when he used only the initial of his Christian name. *Powell* v. *Ford*,[1] 2 Stark. 64, Ellenborough, C. J., 1817. But this case was overruled by Lord Tenterden, C. J., in the case of *Lewis* v. *Sapio*,[2] 1 M. & M. C. 39.

(*q*) See *Decosta* v. *Pym*, Peake's L. E. 99, 101. (*r*) Ibid.

(*s*) *Stranger* v. *Searle*, 1 Esp. C. 14, 15. Vide 4 Esp. C. 27.

(*t*) *Brookhard* v. *Woodley*, Peake's C. 21. *Macpherson* v. *Thoytes*, Peake's C. 20. *Stranger* v. *Searle*, 1 Esp. C. 14. *Doe* v. *Braham*, 4 T. R. 497. *Clermont* v. *Tullidge*,[3] 4 C. & P. 1. In *Brookhard* v. *Woodley*, a paper was produced, said to be in the hand-writing of a deceased rector; in order to prove the fact, the plaintiff's counsel offered in evidence many of the returns to the Spiritual Court, of the births and burials, made in the time of the rector, and purporting to be signed by him; but Yates, J. said, "I have no doubt to reject their evidence as not admissible. I do not know of any case where comparison of hands has been allowed to be evidence at all." *Sed. vid. infra*, note (*c*); See the observations on the text, in *Doe* v. *Suckermore*,[4] 5 Ad. & Ell. 745.

(1) [In *Smith* v. *Fenner*, 1 Gallison, 175, upon a question whether an altered word in a will was in the hand-writing of the scribe who drafted it—after witnesses, who were acquainted with his hand-writing, had testified that in their opinion the altered word was not written by him, and grounded their opinion mainly on the manner of forming a particular letter, and the use of double hyphens—other witnesses, who were also acquainted with his hand-writing, were allowed to state, that certain deeds, which they produced to the jury, were the hand-writing of the scribe, and contained the peculiarity as to the particular letter and the hyphens observable in the will, and that they had frequently known him to write in this manner. "This," said the Court, "is not a mere comparison of hands. The witnesses swear as to facts and peculiarities of hand-writing, and produce the best possible proof of their own accuracy."]

(A) (In Massachusetts and [Maine.] A comparison of the signature to a written contract with other writings of the party, proved to be genuine, is proper and legal evidence to prove the signature. *Hall et al.* v. *Huse*, 10 Mass. R. 39. *The Salem Bank* v. *The Gloucester Bank*, 17 Mass. R. 1. [*Homer* v. *Wallis*, 11 Mass. Rep. 309. *Hammond's Case*, 2 Greenleaf, 33.

Whether, in New York, papers admitted to be genuine can be delivered to *the jury*, to determine by comparison, the genuineness of the paper in question—*Quære*. *Titford* v. *Knox*, 2 Johns. Cas. 211: But if a *wit-*

[1] Eng. Com. Law Reps. iii. 296. [2] *Id.* xxii. 242. [3] *Id.* xix. 247. [4] *Id.* xxxi. 406.

deemed to be receivable and legal evidence of hand-writing, as distinct from evidence by comparison of hands, seems formerly to have been considered as evidence by comparison of hands, and as inadmissible, at least in criminal cases. In the case of Algernon Sydney (*u*), two of the witnesses who swore to their belief of his hand-writing had *seen* him write, and the third had paid bills purporting to have been indorsed by the defendant. Yet the prisoner in his defence insisted that nothing but *comparison* of hand-writing had been offered in evidence against him. And the statute reversing his attainder (*x*), recites that there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his hand-writing, but which was not proved by any one witness to have been written by him, but that the jury were directed to believe it by *comparing* it with other writings of his. And in the case of the seven Bishops (*y*), evidence by the witnesses, who swore to their belief of the defendants' hand-writing from having seen other letters which had been written by them, was also termed evidence by comparison of hands, and the Court was divided upon the question whether the evidence was sufficient. It appears, however, that at that time it was the common practice to receive such evidence in civil cases. Powell, J., in the same case observes, "In civil actions, a slender proof is sufficient to make out a man's hand, as by a letter to a tradesman, or a correspondent,
*516 or the like, but in criminal matters *such as this, if such a proof is allowed, where is the safety of your life, or of any man's life?" (*z*).

As to the reason of the rule which excludes evidence by actual comparison, it has been said jurors may not be able to read, and are therefore incompetent to make the comparison (*a*). This does not appear to be satisfactory; for if the jurors cannot read, they may nevertheless receive the evidence of witnesses who are able to make the comparison. It has

(*u*) 3 St. Tr. 802, 35 Car. 2.
(*x*) 1 W. & M. c. 7 (private).
(*y*) 4 Jac. 2, 4 St. Tr. 338.
(*z*) 4 St. Tr. 338.
(*a*) *Macpherson* v. *Thoytes*, Peake's C. 20. *Brookhard* v. *Woodley*, 1b. in note.

ness have no previous knowledge of the hand, he cannot be permitted to decide on it in court, from a comparison of hands. *Ibid.*[a] {*Goldsmith* v. *Bane*, 3 Halst. Rep. 87.}

In one case (1 Esp. 351) Lord Kenyon allowed the jury to examine papers admitted to be of the party's hand-writing, and to compare them with the writing in question. The same was allowed in one reported case in Connecticut. *The State* v. *Brunson*, 1 Root, 307. Sed vide *The State* v. *King*, stated by Mr. Day in a note to *Macpherson* v. *Thoytes*, Peake's C. 21, where two justices of the Sup. Court (a third dissenting) rejected evidence of this kind. See also Swift's Ev. 29, 30. And at Nisi Prius, in New York, it has been ruled, that after the hand-writing of a party is in evidence, his hand-writing to another instrument may be proved by calling a witness to compare it with that to be proved, and to state his inference to the jury. *Roger's Adm'r* v. *Shaler*, Anthon's N. P. 79.

The Circuit Court of the United States, sitting in Pennsylvania, have decided that hand-writing cannot be proved by comparison of hands. *Martin* v. *Taylor*, April 1803. {Reported, 1 Wash. C. C. Rep, 1.} *U. States* v. *Johns*, April 1806. Wharton's Digest, 245.[b] But in the State Court, after evidence has been given in support of a writing, it may be corroborated by comparison with an acknowledged writing of the party. *M'Corkle* v. *Binns*, 5 Binney, 349. {*Farmer's Bank, &c* v. *Whitehill*, 10 Serg. & Rawle, 110.} [*Baker* v. *Haines*, 6 Whart. 284.] And on an indictment for forgery—especially where the writing is found in the prisoner's possession—comparison of hands may be permitted. *Pennsylvania* v. *M'Kee*, Addison's Rep. 33. {But comparison of hands alone is not evidence, except in the case of public officers, who have been so long dead that better proof could not be expected. *Vickroy* v. *Skelley*, 14 Serg. & Rawle, 372.}

In South Carolina, comparison of hands is admissible as a circumstance in aid of doubtful proof; but *per se*, and without other proof, it is inadmissible. *Bowman* v. *Plunkett*, 2 M'Cord, 518.

In Vermont, comparison of hands is not admitted, if there be a subscribing witness to the instrument who can be produced. *Pearl* v. *Allen*, 1 Tyler, 4.

{In New Hampshire the doctrine of the State Courts of Pennsylvania has been established. *Myers* v. *Toscan*, 3 New Hamp. Rep. 47.}

See note to *R.* v. *Cator*, at the end of the fourth volume of Mr. Day's Edition of Espinasse's Reports, where this subject is elaborately treated.]

[a] *Acc. Jackson* v. *Phillips*, 9 Cowen, 94.
[b] In a criminal case. . *U. States* v. *Craig*, 4 Wash. C. C. Rep. 729.

also been suggested, that if such a comparison were to be allowed, an unfair selection of specimens might be made for the purpose of comparison. This, however, would be open to inquiry and observation, and scarcely seems to be a ground for the total exclusion of such evidence; and, perhaps, after all, the most satisfactory reason is, that if such comparisons were to be allowed it would open the door to the admission of a great deal of collateral evidence, which might branch out into a very inconvenient length. For in every case it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine; and even in support of a particular specimen (if the present rule were to be broken through) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent (*b*). The ordinary practice is seldom attended with inconvenience; for if the hand-writing be not that of the party, it is more easy for him to disprove it than it would be for his adversary to prove it in case it were genuine; for it must be within his own peculiar knowledge what witnesses have so intimate an acquaintance with his hand-writing as to be able to prove the forgery; but where it is genuine his adversary has the witnesses to seek for. It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of hand-writing, by comparing it critically and minutely with a fair and genuine specimen of the party's hand-writing, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then perhaps, under circumstances which did not awaken his attention.

Notwithstanding the general rule against evidence by comparison of hands, the jury are not prohibited from comparing with the disputed signature writing in evidence before them for other purposes, and proved to be in the hand-writing of the party whose hand-writing is disputed (*c*), and which are not selected by the party for the purpose of comparison (*d*) (A).

In some instances, where the antiquity of the writing makes it impossible *for any living witness to swear that he ever saw the party write, compa- *517

(*b*) See the observations on this passage in *Doe* v. *Suckermore*,[1] 5 Ad. & Ell. 703.

(*c*) Where there was contradictory evidence respecting the defendant's hand-writing, the jury were allowed to compare letters admitted to have been written by him, with the disputed signature. *Allesbrook* v. *Roach*, 1 Esp. C. 351. Cor. Kenyon, C. J. *Goodtitle* v. *Braham*, 4 T. R. 497; and see Co. Litt. 6, b. Where in an action on a breach of promise of marriage after the hand-writing of the defendant had been proved to certain letters, another was offered which was also proved to be so, but was contradicted by the defendant's witness, and the Judge submitted it with the others to the jury to compare; held that it was competent for the jury so to do. *Griffiths* v. *Williams*, 1 J. & C. 47; *R.* v. *Morgan*, 2 M. & M. 133.

(*d*) *Doe* v. *Newton*,[2] 5 A. & E. 514. So in *Solita* v. *Yarrow*, 2 M. & M. 33, a bill drawn and indorsed by the defendant having been read in evidence, the jury were directed by Lord Tenterden to compare with it a letter purporting to have been written by the defendant, but as to which the evidence of hand-writing was contradictory. On an issue that the acceptance was not that of the defendant, held, that letters written by him relating to the transaction, and which had been read in evidence, might be handed to the jury. *Eaton* v. *Jervis*,[3] 8 C. & P. 273. The only exceptions to the rule that evidence of hand-writing by comparison is inadmissible, are cases of necessity; as where genuine documents are already in evidence in the cause, or are ancient, and can be proved in no other way. *Doe* v. *Newton*,[2] 1 Nev. & P.; and 5 Ad. & Ell. 351; questioning *Allesbrook* v. *Roach*, 1 Esp. 351. Upon an issue whether an indorsement was the defendant's, held that the jury could not be allowed to compare other writings with that in dispute; they can only do so with documents which are otherwise in the cause. *Bromage* v. *Rice*,[4] 7 C. & P. 548. But on the trial of an issue out of the chancery of the county palatine of Lancaster, to try whether a document purporting to have been signed by a party deceased was his genuine signature, different documents proved to be in his hand-writing, and in which he spelt his name in a different manner, were submitted to the jury for the purpose of comparison, by Gurney, B. after consultation with Alderson, J Lancaster Spring Assizes, 1833.

(A) (Upon the question as to the genuineness of a signature, the genuine signature of the same person to a paper not otherwise competent evidence in the case is admissible to enable the court and jury, by a comparison of the hands, to determine the question. *Moody* v. *Rowell*, 17 Pick. R. 490.)

[1]Eng. Com. Law Reps. xxxi. 406. [2]*Id.* xxxi. 382. [3]*Id.* xxxiv. 387. [4]*Id.* xxxii. 625.

rison of hand-writing with documents known to be in his hand-writing has been admitted (*e*) (A).

When admissible.

In the case of *Goodtitle* d. *Revett* v. *Braham* (*f*), a clerk from the post-office who had been employed to inspect franks and detect forgeries, was admitted on a trial at bar to give his opinion, as a matter of skill and judgment whether a will was written in a natural or imitative character (B). He admitted in his examination that he had never detected an imitation of the hand-writing of an old person who wrote with difficulty, and who might be supposed frequently to stop; and that he judged principally by seeing whether the letters were what is called painted, or passed over by the pen a second time, which might happen to any person from a failure of ink. After giving it as his opinion that the will was not genuine, a paper was produced, admitted to have been written by the person suspected of having forged the will, and he was asked his opinion whether that paper and the will had been written by the same person, and the question was objected to, but admitted by the Court (1). But in the case *518 of *Cary* v. *Pitt* (*g*), *Lord Kenyon refused to admit the testimony of an inspector of franks at the post-office, to prove that the hand-writing of the acceptance of a bill of exchange purporting to be the defendant's, was genuine; saying, that although such evidence had been received in the case of *Revett* v. *Braham* (*h*), yet, that in his charge to the jury he had laid no stress upon it. And in the case of the *King* v. *Cator* (*i*), an in-

(*e*) By Le Blanc, J., *Row* v. *Rawlings*, 7 East, 282. [Anthon's N. P. 98, note (*a*).] In Buller's N. P. 136, it is stated, that where a parson's book was produced to prove a modus, the parson having been long dead, a witness who had examined the parish books in which was the same parson's name, was permitted to swear to the similitude of the hand-writing, for it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. In *Taylor* v. *Cooke*, 8 Price, 653, it was held that in order to authenticate the hand-writings of former rectors, writings alleged to be theirs might be compared with entries in the parish registers, purporting to be their signatures; for as it was their duty to sign them, it was to be presumed that the signatures are in their hand-writing. It has been said that in order to make ancient signatures available for this purpose, a witness should be produced who is able to swear, from his having examined several of such signatures, that he has acquired a sufficient knowledge of the hand-writing, as to be able, without an actual comparison, to state his belief on the subject. Per Holroyd, J., in *Sparrow* v. *Farrant*, Devon. Sp. Ass. 1819. But in *Doe* d. *Tilman* v. *Turver*,[1] 1 Ry. & M. 141, in order to prove that an account produced was in the hand-writing of Edward Haylis, steward of the manor of Areton, in the year 1727, which account had been transmitted to the present steward amongst other papers and books relating to the manor, by the representative of the late steward; Abbott, L. C. J., directed the person producing the paper to compare it with the hand-writing of Edward Haylis in other papers belonging to the manor, and said that he recollected Mr. J. Lawrence, on a trial at Worcester, directing a Mr. Benjamin Price, then accidentally in court, to compare an ancient writing with other papers purporting to be written by the same person; and to give his opinion on the identity of the writings. See also *Morewood* v. *Wood*, 14 East, 328; and see the observations on the above cases of *Sparrow* v. *Farrant*, and *Doe* v. *Turver*, in that of *Doe* v. *Suckermore*,[2] 5 B. & Ad. 703.

(*f*) 4 T. R. 497. Lord Kenyon mentioned a case where a decypherer had given evidence of the meaning of letters, without explaining the grounds of his art, and where the prisoner was convicted and executed. And Buller, J., said it was like the case of *Wells Harbour*, where persons of skill were allowed to give evidence of opinion.

(*g*) Peake's L. E. Append. After it has been sworn that an acceptance is in the hand-writing of the defendant, the latter must produce another paper copied and drawn by him, and call a clerk from the post-office to state, that from comparing the two instruments, he is of opinion that the acceptance is an imitation. *Stranger* v. *Searle*, 1 Esp. 14. Kenyon, C. J. 1793.

(*h*) 4 T. R. 497.

(*i*) 4 Esp. C. 177.

(A) (*Strother* v. *Lucas*, 6 Peters, 763.)

(B) (The judgment of persons well acquainted with bank-notes, is sufficient evidence to determine whether a note is genuine or forged; the signatures of the president and cashier of a bank may be proved by persons who never saw them write, but whose business makes them conversant with bank bills. *U. S.* v. *Holtsclan*, 2 Hayw. 379. *State* v. *Candle*, 3 Hawks. 393. See also *Moody* v. *Rowell*, 17 Pick. R. 490.)

(1) [In *Abbee* v. *Daniels*, Worcester County [Mass.] Sept. Term, 1811, Parson's, C. J. admitted skilful witnesses, who had never seen the defendant write, to swear that the signature in dispute was not, in their opinion, a natural one, nor written by the same person who made other signatures which were produced and acknowledged to be the defendant's.]

[1]Eng. Com. Law Reps. xxi. 399. [2]*Id.* xxxi. 406.

spector was admitted to swear that the libel was written in a disguised hand, but he was not allowed to give his opinion, upon a comparison of the libel with another writing, whether they had been written by the same person (A).

In order to test the veracity of a witness speaking to the hand-writing of the defendant, another paper purporting to be his writing, and not relative to the issue, cannot be put into the witness's hand, to speak to its being in the defendant's hand-writing or not (*j*).

In the case of *Gurney* v. *Langlands* (*k*), the Court held that the opinion of inspectors of franks at the post-office, whether a writing is written in a natural or imitated character, is of little weight; and refused a new trial, which was moved for on the ground that such evidence had been rejected.

An acknowledgement by a party of his hand-writing, though made pending a treaty for a compromise, is evidence against him (*l*).

To prove an acceptance to have been forged by *J. S.*, the drawee cannot give evidence of similar forgeries committed by *J. S.* (*m*).

The same rules which apply to the proof of hand-writing in civil, apply also to the case of criminal proceedings (*n*), although, formerly, the rule in criminal cases was more rigid than in civil actions (*o*).

HEIR.

Proof of heirship.

Although an heir against whom a will is set up is entitled to an issue, a party setting it up against him is not (*p*).

When *A.* claims to be the heir of *B.*, the fact of heirship is established by proof of the relationship, and of the failure of issue from such branches as would otherwise impede the descent (*q*). And the law not only notices the general rules of descent, but also the particular course of descent according to the custom of gavelkind and borough English (*r*). But where the course *of descent is peculiar to a particular manor, the local custom must be proved (*s*). And although the law of England adopts the laws of all Christian countries as to marriage, it does not adopt all the consequences of such marriages; the right of inheritance to lands is governed by the *lex loci*, and by that alone. By the general law of inheritance to socage lands, it is essential not only that the claimant should be legitimate, but

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(*j*) *Griffiths* v. *Ivory*, 3 P. & D. 179. And see *Doe* v. *Newton*,[1] 4 Ad. & Ell. 514.

(*k*)[2] 5 B. & A. 930. To prove the hand-writing of a member of parliament, the opinion of a clerk employed to inspect franks, who has never had occasion to apply to the member to verify his hand-writing, is insufficient. *Batchelor* v. *Sir John Honeywood*, 2 Esp. C. 714. Dissimilitude of hand-writing is evidence of little weight, and of none whatever when opposed by positive depositions to signature in the actual presence of witnesses. *Young* v. *Brown*, 1 Hagg. 570.

(*l*) *Waldridge* v. *Kennison*, 1 Esp. C. 143.

(*m*) *Balcetti* v. *Serani*, Peake's C. 142; *Viney* v. *Barss*, 1 Esp. C. 293; *Graft* v. *Bertie*, Peake's Ev. 103.

(*n*) *Francia's Case*, 6 St. Tr. 79. *Layer's Case*, Ibid. 275. *R.* v. *Hensey*, 1 Burr. 644. *Ld. Preston's Case*, 4 St. Tr. 446. *De la Motte's Case*, Howell's St. Tr. vol. 21, p. 810. *The Attorney-General* v. *Le Merchant*, 2 T. R. 201, n. *R.* v. *Cater*, 4 Esp. C. 117.

(*o*) Per Kelynge, C. J. *Carr's Case;* and 4 St. Tr. 338.

(*p*) *Lorton* v. *Ld. Kingston*, 4 Cl. & Fi. 269. (*q*) See Pedigree.

(*r*) *Supra*, tit. Custom. The Crown granted the dignity of an Earl to *C.*, "*et heredibus suis masculis in perpetuum*," and the grantee died without issue; it was held that the dignity descended to the male heir of a collateral branch; the rules of construction applicable to grants of lands by the Crown, are not applicable to grants of honours. *Earl of Devon's Case*, 1 Dow. & C. 200.

(*s*) See tit. Custom.

(A) (In an action on the case for a libel contained in an anonymous letter sent through the post-office, comparison of hand-writing is admissible in corroboration of other evidence tending to prove the writing to have been published by the defendant. *Callen* v. *Gaylord*, 3 Watts, 321.)

[1] Eng. Com. Law Reps. xxxi. 382. [2] *Id.* vii. 118.

that he be born during marriage (*t*). And therefore, though a child born in Scotland of unmarried parents, domiciled there, and who afterwards intermarry there, is legitimate, yet he is incapable of inheriting lands in England (*u*).

In an action of covenant (*v*) for quiet enjoyment under a lease by the defendant's ancestor, the declaration alleged that the reversion came to and vested in the defendant by assignment thereof; the defendant pleaded by his guardian, that the reversion did not come to and vest in him *modo et formâ*, &c. The plaintiff proved that the estate descended to the defendant, an infant, as heir at law to the lessor; and that a person had been employed by the defendant's mother to receive the rents, and given receipts for the same to the plaintiffs as tenants of her son, and the Court of King's Bench held that the issue was sufficiently proved (*x*) (1).

Riens per discent.

In an action against the heir, on the bond of the ancestor (*y*), the plea of *riens per discent* admits the obligation, but it is incumbent on the plaintiff to prove assets (2). The substance of the issue is, whether the defendant had assets and a variance as to the county is not material (*z*); and the plaintiff may show that the land was devised to the defendant, provided the devise does not alter the limitation, for then, according to the general rule, the heir takes by descent (*a*); and the charging the estate with debts and legacies makes no difference, if the tenure and quality of the estate be not altered (*b*).

Assets.

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The plaintiff must prove assets according to the averment in the declaration *(*c*); if he declare against the defendant as heir of the *obligor*, he must prove assets as the heir of the obligor; for if it appear that the assets have descended immediately from an intermediate person, the variance will be fatal, the descent ought to have been specially stated (*d*); as where the

(*t*) Co. Litt. 7, b. *Hæres*, in the legal understanding of the common law, implieth, that he is *ex justis nuptiis procreatus;* and again, *heræs legitimus est quem nuptiæ demonstrant.* See *Goodwin's Case*, 7 Co. 1.

(*u*) *Doe* d. *Birthwhistle* v. *Vardill*, 5 B. & C. 438. In *Gordon* v. *Gordon*, 3 Swans. 400, and in the *Strathmore Peerage Case*, it was held that the subsequent marriage of Scotch parents in England, did not entitle their previous issue to Scotch titles or estates.

(*v*) Debt on the specialty of the ancestor lies at common law against the heir. Co. Litt. 209. The remedy was extended to devisees by the 3 & 4 W. & M. c. 14; to covenant by the 11 G. 4, 1 W. 4, c. 47.

(*x*) *Ibid.* And it was held that the defendant's infaney was not available in that stage of the proceeding.

(*y*) This will not lie unless the heir be expressly mentioned; *aliter*, of an executor. Co. Litt. 209, a. 2 Will. Saund. 137, b.

(*z*) B. N. P. 175; 6 Co. 47.

(*a*) 1 Ld. Raym. 728. *Reading* v. *Royston*, 1 Salk. 242. There *H.* having two daughters, one of them had a son, and died, and *H.* devised to the son in fee: and the Court agreed to the rule, that where a devise to an heir gives the same estate which would descend, the devise is unnecessary, and *nihil operatur;* but they held that in the present case the heir must take by devise, for there was not a devise to the heir, since both coparceners made but one heir. See 2 Will. Saund. 7, note (4). Where the heir takes a different estate from that which he would have taken by descent, the disposition by the will must prevail; as where the estate is devised to the heir in tail (Plow. 545), or a man devises to his two daughters (Cro. Eliz. 431); but under the stat. 3 Will. & Mary, c. 14, the devise would be fraudulent against creditors, and an action might be brought against the devisee as heir and devisee. 2 Will. Saund. 7, note (4).

(*b*) *Allam* v. *Heber*, Str. 1270. B. N. P. 175. *Clerk* v. *Smith*, 1 Salk. 241.

(*c*) An allegation of assets in the county *A.* is satisfied by proof of assets in the county *B.* *Dowdale's Case*, 6 Rep. 47, a.

(*d*) *Jenk's Case*, Cro. Car. 151; Lill. Ent. 147; 2 Will. Saund. 7, note. A reversion expectant on an estate-tail is not assets to charge the heir upon the general issue *riens per discent;* but a reversion expectant on an estate for life must be pleaded specially (B. N. P. 176. *Kellow* v. *Roden*, Carth. 126). It seems that a reversion expectant on a term, or lease for years, cannot be pleaded in delay of execution (2 Will. Saund. 7, note (4). *Buckly* v. *Nightingale*, 1 Str. 665; 1 Lutw. 442; Herne, 307). Where there is a mortgage for years, the reversion in fee is legal assets, and the creditor may have judgment with a *cesset executio* until the

(1) [Equity will give relief against the assets in the hands of the heir, where a cause of action arose, on a covenant of the ancestor, after the settlement of his estate in the probate office, and payment of the surplus to the heir by the administrator. *Booth* v. *Starr*, 5 Day, 519.]

(2) [See *Jackson* v. *Rosevelt*, 13 Johns. 97. *Labagh* v. *Cantine*, ibid. 272. *Fisher* v. *Kay*, 2 Bibb. 434. *Pea* v. *Waggoner*, 2 Hayw. Tenn. Rep. 3. *Baird & Co.* v. *Mattox*, 1 Call, 257.]

defendant is the heir of the *heir* of the obligor, but is charged as his heir (*e*). So where the defendant being charged as the heir of *B.*, it appeared that *B.* died seised, leaving the defendant his daughter, and that his wife was with child of a son, who was born alive, and lived for an hour; for the lands came to the defendant as heir to her brother, who was last seised (*f*). It is otherwise where the intermediate heirs were not actually *seised*, for there the defendant takes as heir of the person named (*g*). The defendant under this issue may give in evidence an extent against him, on a debt owing by his father on a bond to the King, but he must prove the bond, or an examined copy of it (*h*).

On issue joined on the plea of *riens per discent al temps del original*, the defendant at common law might show that he had aliened the lands *bonâ fide* before the commencement of the action; but the plaintiff might, under that issue, show that the lands had been aliened by covin (*i*). But under the stat. 3 & 4 Will. & Mary, c. 5, s. 6, the plaintiff to such plea may reply that the defendant had lands, &c. from his ancestor before the original writ brought, or bill filed; and if upon issue joined thereon, it be found for the *plaintiff, the jury shall inquire of the value of the lands, &c. so descended (*k*) (1); and they must, under this statute, find the gross, and not the annual value (*l*). Riens per discent. *521

And by the 11 G. 4 & 1 W. 4, c. 47, s. 7 (*m*), where an action of debt or covenant upon any specialty is brought against any heir, he may plead *riens per discent* at the time of the writ brought, and the plaintiff may reply that he had lands, tenements, or hereditaments from his ancestor before the writ

reversion comes into possession. Where it is a mortgage in fee, the equity of redemption is not legal assets, and the heir may plead *riens per discent*. *Plunkett* v. *Penson*, 2 Atk. 294. Where in debt against the heir, on the bond of the ancestor, the defendant pleaded *non est factum* and *riens per discent*, to which the plaintiff replied, lands descended, &c.; held, that being strictly a replication within the 3 & 4 W. & M. c. 14, s. 6, the jury ought to have inquired the value of the lands found to have descended, and the verdict therefore being imperfect, a *venire de novo* was awarded. *Brown* v. *Shuker*, 1 Cr. & J. 583. As to what shall be considered as assets by the heir, see 2 Will. Saund. 7, note (4); Co. Litt. 374, b.; 3 & 4 W. 4, c. 106. In the case of a mortgage of a copyhold in fee, the equity of redemption is not legal assets, 4 Rep. 22, a. An estate *per autre vie* of which the heir is a special occupant is made assets by the stat. 29 C. 2, c. 3, s. 12.

(*e*) *Ibid.* It is sufficient to charge him generally as heir, without showing *how*. *Denham* v. *Stephenson*, 1 Salk. 355.

(*f*) 2 Roll. Ab. 709, pl. 62. *Kellow* v. *Roden*, 3 Mod. 256; Dy. 68, a.; 2 Will. Saund. 7, note (4).

(*g*) Thus, *A.* being seised in fee, bound himself and his heirs, and having two sons, *B.* and *C.*, limited the estate to himself for life, remainder to *B.* his eldest son in tail, reversion to his own right heirs. *B.* entered and died, leaving *D.*, a son, who died without issue, on whose death the estate-tail became extinct, and the reversion coming into possession, descended on *C.*, *A.*'s youngest son, who was the heir as well of *D.* as of *A.* Held, that *B.* and *D.* were seised of the estate-tail only, and that *C.* was properly charged as heir to his father, and that it was, according to the well-known rule of law, sufficient to charge the defendant as heir to him. See Co. Litt. 11, b. 15, a.; Carth. 126. *Kellow* v. *Roden*, 3 Mod. 253; 1 Show. 244; 3 Lev. 286; Bro. Disc. 14–30.

(*h*) Lord Raym. 734; B. N. P. 175. *Horne* v. *Adderley*, 1 Lord Raym. 734. B. N. P. 175. Payment of another bond to the amount of assets, must be pleaded. *Buckly* v. *Nightingale*, 1 Str. 665.

(*i*) Even before the stat. 13 Eliz. c. 5, which, in this instance, is declaratory of the common law. 1 Roll. Ab. 269; Dyer, 149; 2 Will. Saund. 7, note (4). See also *Gooch's Case*, 5 Co. 60. [See *Hammond* v. *Gaither*, 3 Har. & M'Hen. 218. *Tremble* v. *Jones*, 2 Murphy, 579. *Spaight* v. *Wade*, 1 Car. Law Repos. 284. *Hamilton* v. *Haynes*, Cam. & Nor. 413. *Graff* v. *Smith's Adm'rs*, 1 Dallas, 481. *Morris's Lessee* v. *Smith*, 4 ib. 119. S. C. 1 Yeates, 238.]

(*k*) When the plaintiff replies according to this statute, he is not entitled to a general judgment, as he was at common law, but can recover only to the value of the land sold as found by the jury. *Redshaw* v. *Hester*, Carth. 354; Comb. 344; 5 Mod. 119, 122. If the jury neglect to find the value, the Court will award a *venire de novo*. *Jeffrey* v. *Barrow*, 10 Mod. 18, 19. So under the late stat. 11 G. 4 & 1 W. 4, c. 17, s. 7. *Brown* v. *Shuker*, 1 C. & J. 583. [S. C. Gilb. Cas. 141, 279.]

(*l*) Carth. 354.

(*m*) This sec. corresponds with sec. 5 of the stat. 3 & 4 W. & M. This may be pleaded although the heir had not aliened the lands.

(1) [Sed vide *Cohoons* v. *Purdie*, 3 Call. 431, where a general verdict for the plaintiff (without finding the value of the land) was sustained.]

brought; and if upon the issue joined thereon, it be found for the plaintiff, the jury shall inquire of the value of the lands so descended, and thereupon judgment shall be given. If the jury, on issue joined on the plea of *riens per discent*, find that he has something, however small, the plaintiff is entitled to a verdict and general judgment; it is therefore in such case unnecessary to prove the amount of assets (*n*) descended.

By the stat. 11 G. 4 & 1 W. 4, ss. 2 & 3, an action of covenant lies against a devisee (*o*).

HIGHWAY (*p*).

An indictment for the non-repair of a highway, is, I. either against the inhabitants of a parish; or, II. against the inhabitants of some other district; or, III. against an individual.

Proof against a parish.

I. As against a parish, upon the plea of not guilty, it is necessary to prove, 1st, that the road in question is a *highway*, as alleged, within the parish; 2dly, that it is a *public* highway; 3dly, that it is out of *repair*. For, 1st, the liability of the parish to repair all public highways situate within it, is a matter of common-law obligation (*q*), from which the parish cannot in general discharge itself, except by a special plea, which shows that some other district, or some individual, is liable (*r*), or under some special act of parliament.

Variance.

If the road be improperly described in an indictment or plea, the variance will be fatal; as where a highway leading from *A.* to *B.* and communicating with *C.* by means of a cross road, was described as a road leading from *A.* to *B.* and from thence to *C.* (*s*). But it has been held to be unnecessary to state the *termini* of the highway; and therefore a plea of justification in *522 *trespass, stating that a public highway leading from a public highway from *A.* to *B.*, in, through, over and along the *locus in quo*, to a certain other highway (leading from *C.* to *D.*), was held to be supported by proof that it led from the road from *A.* to *B.* over the *locus in quo* into another road, *E.*, and along that road into the road from *C.* to *D.* (*t*).

Where the *terminus ad quem* was laid to be a public *highway*, and it appeared in proof that it was a public *footway*, it was held that the description was sufficient (*u*). The objection, that the description of the road in the indictment is too general, and is applicable to several other roads, cannot be taken upon the trial under the plea of not guilty, but ought to be taken by a plea in abatement (*x*).

Where a highway was alleged to be a highway for all the liege subjects,

(*n*) 2 Will. Saund. 7, a. (n) B. N. P. 176.

(*o*) At common law a devisee was not liable either in debt or covenant to any specialty creditor. See *Wilson* v. *Kemble*, 7 East, 128. This was partially remedied by the stat. 3 & 4 W. 3, c. 14, s. 2, which did not, however, extend to an action of covenants. It has been held that this Act does not extend to any disposition made by the obligor by *deed* in his lifetime. *Parslow* v. *Weedon*, 1 Eq. C. Ab. 149; 2 Saund. 8, (*e*).

(*p*) See the stat. 55 G. 3, c. 68; 3 G. 4, c. 126; 4 G. 4, c. 95; 7 & 8 G. 4, c. 24. As to evidence of appointing a trustee of a turnpike road, 3 G. 4, c. 126, s. 134. Notice before commencing actions or informations, Ib. s. 103; and see 5 & 6 W. 4, c. 50.

(*q*) This common-law obligation does not extend to an extra-parochial district. *R.* v. *Kingsmoor*,[1] 2 B. & C. 190.

(*r*) 1 Vent. 90, 183, 189; 2 T. R. 106. No agreement with others will discharge the parish (3 East, 86). Where the inhabitants of a township, bound by prescription to repair all the roads within it, were expressly exempted by an act of Parliament from the repairing of a new road, it was held that the burthen devolved upon the parish at large. 2 T. R. 106.

(*s*) *R.* v. *Great Canfield*, 6 Esp. 136.

(*t*) *Rouse* v. *Bardin*, 1 H. B. 351, Loughborough *dissent.*

(*u*) *Allen* v. *Ormond*, 8 East, 4. But it was said that the description might have been held to be insufficient on special demurrer.

(*x*) *R.* v. *Inhab. of Hammersmith*,[2] 1 Starkie's C. 357.

[1]Eng. Com. Law Reps. ix. 60. [2]*Id.* ii. 425.

with horses, carriages, &c., it was held to be sufficient, although the way passed under an arch, and could not be used by carriages unless laden in a particular way (*y*).

2dly. That it is a public highway.—The proof is either *direct* or *presumptive; direct*, as by showing that the highway has been constituted a public one by competent authority, or *presumptive*, by evidence of the use of a road which is of public convenience, by the public, which affords a presumption of their right so to use it, as against a private claimant. Proof that it is a public highway.

The proof is *direct* where the road is proved to have been made under some statute or proceeding by writ of *ad quod damnum* (1).

By the stat. 13 Geo. 3, c. 78, s. 19 (*z*), where any highway has been diverted or turned above twelve months, either from necessary or other causes, and new highways, &c. have been made for the benefit of the public, and no suit or prosecution has been commenced for the diverting or turning the same, the new highway shall from thenceforth be the *public* highway to all intents, and persons liable to the repair of the old highway shall also be liable to the repair of the new in the same manner as of the old. This clause, it has been held, is retrospective only (*a*).

By another clause of the same section (*b*), provisions are made for future Direct evidence.

(*y*) *R.* v. *Lyon*,[1] 5 D. & R. 497.

(*z*) This clause is not repealed by the stat. 55 Geo. 3, c. 68.

(*a*) *Waite* v. *Smith*, 8 T. R. 133.

(*b*) This has been repealed by the stat. 55 Geo. 3, c. 68, which requires more public notices in such cases, gives greater facility of appeal to the sessions, and gives power to the justices, under certain regulations, to stop up unnecessary highways, &c. See as to the proceedings under this stat. *R.* v. *Sheppard*,[2] 3 B. & A. 414. The stat. 55 G. 3, c. 68, does not repeal the stat. 13 G. 3, c. 78, s. 62; and therefore notice to the justices of holding a special session, at which an order is made, is necessary; *R.* v. *Justices of Worcestershire*, 2 B. & A. 228. Where the order for stopping up an useless old road referred to a plan annexed, but the notice affixed merely described the number of yards of such road to be stopped, without stating the *termini*, or referring to any plan; held that the former was sufficient, but not the latter. *R.* v. *Horner*, 2 B. & Ad. 150. Where the trustees upon a new road being made over the plaintiff's land, for which he was to be compensated by receiving the old road in exchange, by one and the same order for stopping up, directed the soil to be given up to the plaintiff, held, that as in the case of a party, *sui juris*, agreeing for the sale of the lands, no conveyance was necessary under sec. 84 of 3 Geo. 4, c. 126, so in the case of an exchange by the permission of such a party to the making of a new road over his soil, it became effectually dedicated to the public without an actual conveyance, and that he might maintain an action of trespass in respect of the old road. *Allnutt* v. *Pott*,[3] 1 B. & Ad. 302, and 3 M. & Ry. 439, *n.* Where an order for diverting a highway substituted a line of road, part newly made under the order, and part along a new turnpike road, held, that it not appearing on the face of the order that the public would have secured to them as permanent a right on such new turnpike road as they had before, the order was bad. The Court could not intend that the new turnpike was a public highway; if the Act made it a turnpike road for a limited period only, it would subsist as a public road for that period only. And *quære*, whether an old road can be diverted for carriages and continued for foot passengers. *R.* v. *Winter*,[4] 8 B. & C. 785. Under the 55 Geo. 3, c. 68, an order may be made by justices for stopping up an unnecessary footway, without ordering a sale; the words of the latter branch of sec. 2 are to be taken distributively, and the effect is, that justices may stop up in all cases, but must direct a sale in those cases only where a highway or bridleway has been stopped up. *R.* v. *Glover*, 1 B. & Ad. 483; overruling the construction put on that section in *R.* v. *Kenyon*, 6 B. & C. 640. Where the order for stopping up a highway stated that the justices "having upon view found, *or*, it having appeared to us," &c. that the highway was an useless and unnecessary one; held bad under 55 Geo. 3, c. 68, s. 2, which makes it necessary that it should appear upon view to the justices. *R.* v. *Justices of Worcestershire*,[5] 8 B. & C. 254; S. C. *R.* v. *Rogers*,[6] 2 M. & Ry. 289. An order for diverting a highway, containing also an order for stopping up the old highway, and not any statement that the justices have viewed the course proposed for the new one; held invalid. *R.* v. *Kent Justices*,[7] 10 B. & C. 477. As to the surveyor's authority. *Bouverie* v. *Miles*,[8] 1 B. & Ad. 48. *Witham Navigation Co.* v. *Padley*,[9] 4 B. & Ad. 69. *Lowen* v. *Kaye*,[10] 4 B. & C. 3. *Alston* v. *Scales*,[11] 9 Bing. 3. As to the form of the order, *R.* v. *Glover*,[12] 1 B. & Ad. 483. *R.* v. *Kenyon*,[13] 6 B. & C. 640. *R.* v. *Justices of Worcestershire*,[5] 8 B. & C. 624.

(1) {See *Colden* v. *Thurber*, 2 Johns. 424. *Stiles et al.* v. *Curtis*, 4 Day, 328. *Canaan* v. *Greenwoods Turnpike Company*, 1 Conn. Rep. 1. *The People* v. *Lawson*, 17 Johns. 277. *Commonwealth* v. *Inhabitants of Charleston*, 1 Pick. 180.}

[1] Eng. Com. Law Reps. xvi. 243. [2] *Id.* v. 330. [3] *Id.* xx. 393. [4] *Id.* xv. 338. [5] *Id.* xv. 210. [6] *Id.* xvii. 303. [7] *Id.* xxi. 119. [8] *Id.* xx. 340. [9] *Id.* xxiv. 26. [10] *Id.* x. 260. [11] *Id.* xxiii. 242. [12] *Id.* xx. 432. [13] *Id.* xiii. 290.

*diversions of highways, by two justices at special sessions, by the consent of the owner of lands.

It has been held, that in an action of trespass, on issue taken on a plea that the *locus in quo* was a public highway, the legality of an order of justices in ordering the old highway to be stopped up before a new one has been made and put into a proper state, might be questioned, although the order of justices for stopping up the old road had been appealed against and confirmed at the sessions (*c*); and that evidence was admissible to show that a new road, such as the Act requires, had not been made previously to the order for stopping up the old road (*d*).

Where a highway lies in an open field, and the passengers are accustomed to turn out of the principal track when it is founderous, these outlets are part of the highway (*e*).

Where a man assigns a road out of his own land, because the highway is founderous, it does not become a highway till it be so found by writ of *ad quod damnum* (*f*).

Where trustees are authorized to make a road from one point to another, the making the old road is a condition precedent to any part becoming a highway repairable by the public (*g*).

Presumptive evidence.

Or next, the evidence is presumptive, and presumptions are to be derived from the *termini* and other circumstances of the road itself, and from the use and enjoyment of it by the public.

Termini.

It is not essential that the *termini* of the road should be either market-towns or public roads, provided it be proved that the public are entitled to use it, and that it has been of public convenience. The public may have a

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*right to a road as a common street, although there be no thoroughfare (*h*), or to a road terminating in a common (*i*).

So it may be a highway, although it is circuitous (*k*), and although it is used by the public but occasionally, and although it does not terminate in any town, or in any other public road (*l*); and on the contrary, it is not necessarily a public highway, although it does lead from one market-town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions (*m*).

Enjoyment.

Evidence to prove a public highway consists usually in showing that the public have used and enjoyed the road; and their actual occupation of it without interruption for a considerable space of time affords a strong presumption of a right to use it; and, as will afterwards appear, a much shorter

(*c*) *Welsh* v. *Nash*, 8 East, 394. As to the form of the order, see *Davidson* v. *Gill*, 1 East, 64. The stat. as to the residence of the justice within the hundred is merely directory. 8 East, 399.

(*d*) The notice of appeal against an order should state that the appellant is *aggrieved*. *R.* v. *Justices of Essex*,[1] 5 B. & C. 431. Notices to the justices of the district, signed by the chief constables and by their authority served on the justices, are notices on the justices within the statute 13 G. 3, c. 78, s. 62. *R.* v. *Justices of Suffolk*.[2] 6 B. & C. 110.

(*e*) 1 Roll. 390, l. 10. (*f*) Cro. Car. 267.

(*g*) *R.* v. *Cumberworth*,[3] 3 B. & Ad. 108. *R.* v. *Hepworth, cor.* Hullock, B., York Lent Assizes, 1829. (Addition in Appendix). *R.* v. *Inhabitants of Mellor*, Lancaster Assizes.

(*h*) *Rugby Charity* v. *Merryweather*, 11 East, 375. But see *Woodyer* v. *Haddon*,[4] 5 Taunt. 125. The plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoing close, which was separated from the end of the street for twenty-one years (during nineteen of which the houses had been completed, and the street watched, cleansed and lighted, and both the footways, and half the causeway, paved at the expense of the inhabitants) by the defendant's fence. The defendant then pulled down his wall; but it was held that he could not use the highway as a public highway from his own close.

(*i*) *R.* v. *Wandsworth*, 1 B. & A. 63. [See 7 Johns. 106.]

(*k*) *R.* v. *Lloyd*, 1 Camp. 261; 3 T. R. 265. (*l*) *R.* v. *Inhab. of Wandsworth*, 1 B. & A. 63.

(*m*) See 11 East, 376, note (*a*).

[1]Eng. Com. Law Reps. xi. 264. [2]*Id.* xiii. 113. [3]*Id.* xxiii. 38. [4]*Id.* i. 34.

period of possession will suffice to indicate a right in the public, than to show that a private person has a title to the estate of which he is possessed (1). The particular manner in which it has been used, as where it has been used for some public purpose, as for conveying materials for the repairs of other highways (*n*), or upon any occasion likely to attract notice, is very material; for such instances of *user* would naturally awaken the jealousy and opposition of any private owner who was interested in preventing the acquisition of any right by the public, and consequently acquiescence affords a stronger presumption of right than that which results from possession and *user* in ordinary cases. Although the *termini* of a road afford no conclusive evidence as to its being a highway (*o*), yet the circumstances of its leading from one market-town to another, or from one public road to another, coupled with *user* by the public, and without decisive evidence of interruption and permission by a private owner, are conclusive as to the right of the public (*p*).

Repairs.

Proof of the repair of the road by a parish is strong evidence to show that it is a public highway (*q*); and evidence of repairs done by a parishioner, *under an agreement with the parish that he shall therefore be excused his statute-duty, is virtually evidence of repairs by the parish (*r*). *525

Length of time.

The enjoyment and *user* of a road by the public is frequently evidence of a right in the public, although the *user* is of modern date, provided that *user* has been attended with circumstances of *publicity*, from which an acquiescence on the part of the original owner, and a dedication by him of the road to the public, may be inferred. Thus it has been held, that a permission to the public for the space of eight, or even of six years, to use a street in London, without bar or impediment, is evidence from which a dedication to the public may be inferred (*s*) (2). So where a court situated on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another,

(*n*) *R.* v. *Wandsworth*, 1 B. & A. 63.

(*o*) 2 East, 375; 1 Camp. 262. The Strand and Covent Garden are connected by a road which, in point of law, is a private road, although constantly used by the public.

(*p*) 1 Vent. 189.

(*q*) *R.* v. *Wandsworth*, 1 B. & A. 63. But where a local Turnpike Act required the inhabitants to do statute duty upon the new roads set out and made by the trustees under the Act, the powers of which were limited to twenty-one years, and the Act expired, the common-law obligation to repair only attaches in respect of such roads as have been made by the trustees and adopted by the public; and the fact of having done statute duty, as required by the Act, during its continuance, does not furnish a ground for presuming an adoption to render them liable. *R.* v. *Mellor*,[1] 1 B. & Ad. 32. Where private roads, set out under an Inclosure Act, were improperly directed by the commissioners to be repaired by the inhabitants and occupiers in the same manner as public highways, it appeared that a road, set out as a private road, had been used by the public and repaired by the parish above twenty years; held, first, that the commissioners had no power to make such order, nor were the inhabitants bound to obey; and secondly, that if the inhabitants had repaired under a mistaken notion of their liability, and not on a voluntary disposition to repair the road, as one useful and convenient for the public, the defendants were entitled to be acquitted. (Tenterden, L. C. J.) *R.* v. *Edmonton*, 2 M. & M. 24.

(*r*) *Ibid.*

(*s*) *Trustees of Rugby Charity* v. *Merryweather*, cited 11 East, 376. But see *Woodyer* v. *Haddon*,[2] 5 Taunt. 125; *supra*, 524, note (*s*); and see *Jarvis* v. *Dean*, 3 Bingh. 447.

(1) [A road used as such for forty years, and repaired, is to be considered as regularly laid out, though no record can be found. *Ward* v. *Folly*, 2 Southard's Rep. 582. See also *Galatian* v. *Gardner*, 7 Johns. 106. *Todd* v. *Inhab'ts of Rome*, 2 Greenleaf, 55. {But in *Massachusetts* it has been held, that a public *town* way can only be established in the mode prescribed by *St.* 1786, *c.* 67; and the record of the establishment of such a way cannot, it seems, be presumed from a user for any length of time. *Comm.* v. *Low*, 3 Pick. Rep. 408}.]

(2) {The principle of dedication of a way has not been adopted in *Massachusetts*. *Hinckley* v. *Hastings*, 2 Pick. Rep. 162.}

[1] Eng. Com. Law Reps. xx. 337. [2] *Id.* i. 34.

a dedication to the public was presumed (*t*). Where a lease was granted of certain ground to be a passage for fifty-six years, evidence of an *user* of the road by the public three or four years after the expiration of the lease, was held to be evidence of a gift to the public (*u*). Presumptions thus derived may be rebutted by proof that the owner did not acquiesce in the use by the public. The acquiescence of a lessee will not bind the reversioner, without such evidence of acquiescence on his part as will afford a presumption of a grant by him (*x*). So the erection of a bar upon the road is evidence to rebut the presumption of a dedication to the public (*y*), although the bar has been long broken down (*z*). And although the bar does not exclude foot-passengers, no right to a public footway can be presumed, since there cannot, it is said, be a partial abandonment to the public (*a*).

But where land is vested in trustees for public purposes, they may dedicate the use of the surface to the public as a highway, provided such use be not inconsistent with the purpose for which the land is vested in them (*b*).

Where a road has been set out under a local Act, by commissioners, for the use of particular persons, but in fact has been used by the public for many years, this is not, it seems, sufficient evidence of a dedication, without evidence of acquiescence on the part of the parish (*c*).

And it has been held, that in order to charge a parish with the repairs of
*526 *a road as a public highway, it was necessary to show that the parish had adopted the highway by proof of repairs done (*d*): the contrary, however, had since been decided; the adoption of a parish is no more than the use of the road by the public, the parish being part of the public (*e*).

Reputation. Evidence of reputation is admissible to prove that the way is public (*f*); but evidence of this nature arising *post litem motam*, is not admissible (*g*). So a verdict upon issue taken on a public right of way, and finding it to be

(*t*) *R.* v. *Lloyd*, 1 Camp. 261; 3 T. R. 265. (*u*) *R.* v. *Hudson*, Str. 909.

(*x*) 11 East, 376. And see tit. PRESUMPTION. Where a way, situate in Westminster, which was not a thoroughfare, had been treated as a highway for a century, and been enumerated in a public Act as a public road, but had during the whole period been let on lease, it was held that the jury were right in deciding that it was not a public way, inasmuch as there could be no dedication to the public by the tenants for ninety-nine years. *Wood* v. *Veal*,[1] 5 B. & A. 454, and *qu.* whether that could be public highway which is not a thoroughfare. *Ibid.* Where the road adjoining to houses had been used by the public for four or five years, leading from White Conduit-street, and communicating with a public highway, it was left to the jury to say whether there had been a dedication to the public, and on the jury finding that there had, the Court refused to disturb the verdict. *Jarvis* v. *Dean*,[2] 3 Bing. 447.

(*y*) *Roberts* v. *Karr*, 1 Camp. 262; 11 East, 375. *Lethbridge* v. *Winter*, 1 Camp. 263. And it has been held that the owner of the soil may replace the bar after it has been broken down twelve years.

(*z*) *Ibid.*

(*a*) 1 Camp. 263, n. *Barraclough* v. *Johnson*, 3 N. & P. 233.

(*b*) *R* v. *Inh. of Leake*,[3] 5 B. & Ad. 469. *Jarvis* v. *Dean*,[2] 3 Bing. 447.

(*c*) *R.* v. *St. Benedict*,[4] 4 B. & A. 447; see *Campbell* v. *Wilson*, 3 East, 294. But where a public Act recognizes a public highway, no adoption of it by the parish is necessary. *R.* v. *Lyon*,[5] 5 D. & R. 497.

(*d*) *R.* v. *St. Benedict*[4] 4 B. & A. 450; and see *R.* v. *Cumberworth*,[6] 3 B. & Ad. 312.

(*e*) *R.* v. *Leake*,[3] 5 B. & Ad. 469.

(*f*) Vent. 189. But an award made under a submission by a tenant for years, as to his liability to repair *ratione tenuræ*, is not evidence against another, for it was made *pos litem motam*. *R.* v. *Cotton*, 3 Camp. 444. But on an issue as to a right of way, where the road had been used by the public for thirty years, the defendants having put in a document forty years old, drawn up at a parish meeting called to resist the repairs then attempted to be thrown on them, stating the lane to be private property, subject to a foot and bridleway, and signed by thirteen inhabitants, twelve of whom were dead, and the other was called as a witness; it was held to be admissible evidence, although slight, of reputation; it appearing also that twenty-two years before the action an agreement had been made between the owner of the soil and a colliery company, to allow them the use of the road, paying 5*s.* a year, and supplying cinders for the repair, which the parish were to spread; held, that although the acts of user, taken alone, might be evidence from which to infer a dedication, yet, being all referable to the agreement, it amounted only to a license, upon compliance with the terms imposed. *Barraclough* v. *Johnson*, 3 Nev. & P. 233.

(*g*) *Ibid.*

[1]Eng. Com. Law Reps. vii. 158. [2]*Id.* xiii. 45. [3]*Id.* xxvii. 107. [4]*Id.* vi. 482. [5]*Id.* xvi. 243. [6]*Id.* xxiii. 38.

such, is afterwards evidence (*h*), although such issue be taken in an action of trespass between private parties, and be offered in evidence to prove the fact between other parties in a civil action, (*i*), and the rule applies to all cases of public prescription (*k*).

By the stat. 5 & 6 W. 4, c. 50, s. 23, no road to be thereafter made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be thereafter set out as a private drift-way or horse-path, in any award of commisioners under an Inclosure Act, shall be deemed or taken to be a highway (repairable by the parish), without three calendar months' notice of the proposal to dedicate such highway, nor unless the same shall have been made in a substantial manner, and of the width required by the Act, to the satisfaction of two justices of the peace of the division, who are required to view the same, and certify, &c., such certificate to be enrolled at the sessions; and after twelve months' use of such road by the public, being kept in repair in the meantime by the party dedicating it, is to become a highway repairable by the parish.

Against some other district.

II. Upon an indictment against the inhabitants of some other district than a *parish*, or against an individual, the prosecutor, on the plea of "Not guilty," must prove, in addition, the obligation upon the defendants to repair the road, as alleged in the indictment, since it is not founded on a presumption of law (*l*). The obligation in such a case arising from inhabitancy must be *prescriptive* (*m*), and must be proved as in other cases of prescription, to have existed time out of mind. The evidence in such case will depend, in some measure, upon the way in which the prescription is alleged. If a prescriptive obligation to repair the particular road be alleged, *the evidence will be confined to proof of the repairing of that particular road (*n*). If a prescriptive obligation to repair all public roads within the district be alleged, proof must be given of such repairs within the division, and in such case it is unnecessary to prove that the road in question is an ancient road (*o*); but if it should appear that there is any road within the township or other division, which is not repaired by the township or division, but by the parish at large, the variance would be fatal, unless the exception were specially alleged (*p*). Again, if the indictment alleged a division of the parish into particular districts, and averred a custom for each district to repair its own roads, independent of the rest, evidence of such a general custom would be admissible; but in such case, if it appeared that any one road in the parish was repaired by the parish at large, the variance would be fatal (*q*). It is not necessary to aver, in a special plea by a parish, which alleges that a sub-division is liable by prescription to repair the roads within it, and it is also unnecessary to prove, under such a plea, or in an indictment, any *consideration* for the liability (*r*).

Proof of a prescriptive obligation.

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(*h*) *Reed* v. *Jackson*, 2 East, 355; vide *supra*, Vol. I. tit. REPUTATION. (*i*) *Ibid.*

(*k*) Per Ld. Kenyon, 2 East, 357. See Vol. I. p. 30.

(*l*) *R.* v. *Martin*, Andr. 226. The inhabitants of a town, &c. cannot be liable to the repair of a bridge, &c. *ratione tenuræ*, for they cannot hold lands. *R.* v. *Inhabitants of Pennegoes*,[1] 2 B. &. C. 166.

(*m*) Doug. 421.

(*n*) As to the nature and extent of such proof, see tit. PRESCRIPTION.

(*o*) *R.* v. *Netherthong*, 2 B. & A. 179; 2 T. R. 106.

(*p*) *R.* v. *Ecclesfield*,[2] 1 Starkie's C. 393. The allegation of an obligation to repair all roads within the township, which, but for the said custom, would be repairable by the inhabitants of the parish at large, was introduced in order to prevent surprise from proof of the existence of roads repairable *ratione tenuræ*. P. C. in *R.* v. *Fylingdales*,[3] 7 B. & C. 438.

(*q*) *Ibid.*

(*r*) *R.* v. *Inhabitants of Ecclesfield*, 1 B. & A. 348. *R.* v. *Inhabitants of St. Giles, Cambridge*, cited Ibid. *Gateward's Case*, 6 Co. 810; vide *etiam*, *R.* v. *Inhabitants of W. R. of Yorkshire*,[4] 4 B. & A. 623. *Secus*,

[1]Eng. Com. Law Reps. ix. 52. [2]*Id.* ii. 442. [3]*Id.* xiv. 476. [4]*Id.* vi. 543.

A county liable to the repairs of a public bridge, is liable to the repairs of the road for 300 feet at each end of the bridge (*s*).

Of liability ratione tenuræ.

III. Upon an indictment against an individual, in addition to the proof that the road is a public highway, and that it is out of repair, the prosecutor must prove the obligation to repair as alleged in the indictment. To show a liability *ratione tenuræ*, the defendant must be proved to be the occupier of the lands in respect of which the obligation arises, since the law looks to the visible occupier, and not to the owner (*t*), whom it may be difficult to ascertain, for the performance of the duty. But since the obligation to repair *ratione tenuræ* implies a prescription (*u*), the prosecutor must prove the prescription by showing acts of repair by the defendant, or by former occupiers; and according to the number of instances in which repairs have been made by the occupiers for the time being, a stronger or weaker degree of presumption arises as to the obligation, as in other cases of prescription. Where the defendant, being charged *ratione tenuræ*, pleaded that his liability arose from an encroachment which had been removed, it was held that evidence of repairs done by the defendant for twenty-five years after the removal of the encroachment was presumptive evidence that the defendant repaired *ratione tenuræ* (*x*).

*528 *Where an entire estate is liable to the repair of a road, and the estate is divided into several parts, the occupier of each part is liable to the whole duty (*y*).

Obligation by reason of inclosure.

By reason of inclosure or encroachment.—The prosecutor must prove the fact of inclosure on one or both sides of the highway; and since the public had before the inclosure a right to use the field for passage, when the highway was out of repair, the law, after the defendant has by inclosure deprived the public of that right, imposes upon him the burden of repairing it (*z*). If he inclose on both sides, he will be liable to the repair of the whole of the road; if he incloses on one side only, leaving the other side open, he is bound to repair one moiety only (*a*); but although he inclose on one side only, yet if there be an ancient inclosure on the other, he will be bound to repair the whole (*b*). This obligation remains no longer than the inclosure or encroachment; and therefore the defendant may show in defence, that before the alleged offence he had thrown down the inclosure, and restored the road to its former state (*c*).

Defence by a parish, not guilty.

A parish cannot, under the plea of "not guilty," enter upon any defence which does not negative one of the allegations in the indictment, viz. that the road is a public road, is situated within the parish, and is out of repair. In order to discharge themselves from the obligation to repair, the inhabitants must plead specially that some other persons are liable, and upon

where the road is not within the parish, *R.* v. *St. Giles's, Cambridge*, and P. C. B. R. Sittings after T. T. 1823.

(*s*) *R.* v. *W. R. of Yorkshire*, 7 East, 588, 22 H. 8, c. 5; *semble*, that in general the party liable to repair the bridge is also liable to repair the adjoining highway. *Ibid.*

(*t*) 1 Roll. 390, l. 60; and see *R.* v. *Watts*, 1 Salk. 357. As to the liability to repair *ratione tenuræ* where a road has been diverted or widened, see *R.* v. *Balme*, Cowp. 648; 13 G. 3, c. 84, s. 62, 63; 4 G. 4, c. 95.

(*u*) Upon an issue of liability to repair *ratione naturæ* of an ancient mill, which was shown not to exist before the time of Hen. 8, held, that it could not be supported; it is essential to prove the liability from time out of memory. *R.* v. *Hayman*,[1] 1 M. & M. 401.

(*x*) *R.* v. *Skinner*, 5 Esp. C. 219. *R.* v. *Stoughton*, 2 Saund. 157, 12. 2 Keb. 625. Amb. 295. The defendant may be bound by prescription to repair the road before his own house. Mar. pl. 71.

(*y*) *R.* v. *Duchess of Buccleugh*, 1 Salk. 357. 3 Salk. 77. *Supra*, 440.

(*z*) Cro. Car. 366; 1 Roll. 390; Jon. 296.

(*a*) 1 Sid. 464. 2 Starkie's C. per Abbott, C. J.

(*b*) *Ibid.*

(*c*) Per Keeling, 2 Saund. 160. *R.* v. *Skinner*, 5 Esp. C. 219.

[1] Eng. Com. Law Reps. xxii. 341.

issue joined upon such an alleged obligation, are bound to prove it (*d*). Where, however, the parish is relieved from its obligation by a public Act of Parliament, it seems that they may take advantage of the statute, upon the plea of "not guilty" (*e*); but unless the Act expressly discharge the parish from the burden of repairs, it will still remain liable, although the Act directs that trustees shall take tolls, and apply the money to the repair of the road (*f*). So where the trustees of a turnpike road had repaired the road under the authority of the Act for twenty years, it was held that they were not liable to the repair of the road, there being no clause in the Act obliging them to repair the road (*g*). So where a township is bound by prescription to repair all the highways within it, it cannot be discharged without showing *by evidence* some persons certain who are bound to repair the road (*h*). But where a township is charged with a prescriptive obligation to repair a particular road, or an individual is charged *ratione tenuræ*, or *ratione clausuræ*, it is sufficient to negative the special charge by proof that some others are liable, without fixing upon whom in certain (*i*).

Upon an indictment for obstructing a *public* road (*k*) or navigable river, *the defendant may prove, in answer to the charge, that the obstruction was by accident, and did not arise from intention, or through negligence. Where a barge was sunk by misfortune in a navigable river, it was held that no indictment could be supported for not *removing it* (*l*); so it may be proved that the obstruction arose from the exercise of a right by the defendant, as by the holding of a fair there, after an *user* of twenty years (*m*). Indictment for obstruction. *529

It has already been seen, that an acquittal upon a former indictment for not repairing a highway, is not conclusive evidence, if it be evidence at all, to discharge the defendant (*n*); but that a conviction is usually conclusive as to the obligation to repair, unless fraud be shown (*o*). Upon an indictment for the non-repair of a road *ratione tenuræ*, it was held that an award made under a submission by a former tenant of the premises, could neither be received as an adjudication, the tenant having no authority to bind the

(*d*) Plea, that *M. M.* is bound to repair, *absque hoc*, that the defendants are liable, the defendants are to begin notwithstanding the traverse. *R.* v. *Inhabitants of Southampton;* cor. Holroyd, J., Summer Lent Ass. 1818. Manning's Index, 215, 2d edit. P. 672, note (*t*). Vide *etiam*, *R.* v. *Bourbon*, 5 M. & S. 392.

(*e*) *R.* v. *St. George's, Hanover-square*, 3 Camp. 222.

(*f*) *R.* v. *Netherthong*, 2 B. & A. 179.

(*g*) *R.* v. *The Commissioners of Landilo District, Carmarthenshire*, 2 T. R. 232. An agreement with another that he shall repair a road, does not exempt the parish. 1 Vent. 189. Neither does the King's grant. 3 Mod. 69.

(*h*) *R.* v. *Inhabitants of Hatfield*,[1] 4 B. & A. 75. (*i*) *Ibid.*

(*k*) Under the 57 Geo. 3, c. 29, s. 72 (Metropolis Paving Act), the authority given to the surveyor to remove such things as impede the public passage, is to be confined to such things as project upon the public ways, and cannot be extended to rails, &c. standing on a line and enclosing a space over which the public never have had a right of passage. *Bouverie* v. *Miles*,[2] 1 B. & Ad. 38.

(*l*) *R.* v. *Watts*, 2 Esp. C. 675.

(*m*) *R.* v. *Smith*, 4 Esp. C. 109. 2 Saund. 175, n. 2.

(*n*) Vol. I. tit. JUDGMENT. But yet it has been considered to be such evidence, that upon the *acquittal* of the inhabitants of a parish the Court has suspended the judgment, in order that the case might again be tried without any prejudice from the former verdict. *R.* v. *The Inhabitants of Wandsworth*, 1 B. & A. 63. And Lord Ellenborough said, that to maintain the verdict would be to send the parties to a second trial with a mill-stone about their neck, the weight of which it would be impossible to resist. See also *R.* v. *Burbon*, 5 M. & S. 322.

(*o*) Ibid. and see *R.* v. *Wandsworth*, 1 B. & A. 63. *R.* v. *Andrews*, Peake's C. 219. If judgment be given against a parish, whether it be after verdict or by default, the judgment will afterwards be conclusive evidence of liability, unless fraud be shown, and fraud is put by way of example: if other districts can show that they had no notice of the indictment, the defence having been made and conducted entirely by the district in which the highway indicted lay, without their knowledge and privity, the Court will consider it as being substantially an indictment against that district, and give the other districts liberty to plead the prescription, to a subsequent indictment for not repairing the highways in that parish. *R.* v. *Townsend*, Doug. 421. *R.* v. *Lancaster*, Hil. 40 G. 3, 2 Saund. 159, a. note (10).

[1]Eng. Com. Law Reps. vi. 355. [2]*Id.* xx. 340.

rights of his landlord, nor as evidence of reputation, having been made *post litem motam* (*p*).

Competency. Where upon an indictment for the non-repair of a road, which lay in two parishes, the obligation was laid to be *ratione tenuræ*, it was held that the inhabitants within the parishes were not competent witnesses on the part of the prosecution (*q*). It has also been held, that inhabitants of a parish are not competent to give evidence for the parish, although they are so poor as to be excused from the payment of taxes, because, as it is said, although at present they are poor, they may become rich (*r*). It may, however, well be doubted whether any inhabitant would not be competent unless he were liable to some duty in respect of the highway in question (*s*). It has been held, upon an indictment against a parish, that a rated inhabitant of another parish, in which the defendants insisted that the highway was situated, was not competent to prove the contrary (*t*). It seems that the prosecutor is a competent witness, although the Court may award costs against him, if the proceeding shall appear to have been vexatious (*u*).

*530 *A witness is competent to prove a road to be a highway, although he has agreed to let, at an annual rent, a way across his own land, which cannot be used unless the disputed road be established (*x*).

Upon an indictment against the township of Pilling, in the parish of Garstang, charging the inhabitants with the obligation to repair all roads within the township, held that an inhabitant of the adjoining township of Nateby, in the same parish, was competent to prove that the road in question, which extended through Nateby, was a public highway. For although a conviction would discharge the parish, yet it would afford evidence to show that the road was a public one, and so to charge Nateby (*y*).

The statute 5 & 6 Will. 4, c. 50, s. 100, provides that no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence, in any action, suit, prosecution, or other legal proceeding, to be brought or had in any court of law or equity, or before any justice of the peace under or by virtue of this Act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer, appointed by virtue of that Act.

By the stat. 3 Geo. 4, c. 126, s 137, inhabitants of parishes, &c. are competent witnesses on proceedings for the conviction of offenders, for offences against the Act.

A party rated to the highway rates is not rendered a competent witness on an indictment for not repairing a highway, such not being "a matter relating to the rates or cesses," within the 54 Geo. 3, c. 170 (*z*).

But by the late stat. 3 & 4 Vict. c. 26, no person shall be disabled from

(*p*) *R.* v. *Cotton*, 3 Camp. 444. (*q*) *R.* v. *Buckeridge*, 4 Mod. 48.

(*r*) *R.* v. *Inhabitants of Hornsey*, 10 Mod. 150.

(*s*) See the stat. 34 Geo. 3, c. 74, s. 6. *R.* v. *Inhabitants of Terrington*, 15 East, 471. *R.* v. *Kirdford*, 2 East, 559. And tit. INTEREST—INHABITANTS. See also Vin. Ab. Evidence, 17, the *Peterborough Bridge Case*.

(*t*) By Bayley, J. at Nottingham, cited 15 East, 474.

(*u*) See *R.* v. *Inhabitants of Hammersmith*,[1] 1 Starkie's C. 357; for *semble* it will not be presumed that the proceeding is frivolous, especially after a bill has been found by a grand jury. So if the indictment has been removed by *certiorari*. See tit. INTEREST.

(*x*) *Pollard* v. *Scott*, Peake's C. 18.

(*y*) *R.* v. *Inhabitants of Pilling*, Lancaster Summer Ass. 1823, cor. Holroyd, J.

(*z*) *R.* v. *Bishop's Auckland*, 2 Mo. & R. 286. But in *R.* v. *Hayman*,[2] M. & M. 401, Tindal, C. J., is reported to have held that rated parishioners were admissible to prove a liability *ratione tenuræ*, and see *Heudebourck* v. *Langstone*, M. & M. 402 (*n*). But see Vol. I. p. 159; *R.* v. *The Recorder of Bath*,[3] 9 Ad. & Ell. 714.

[1]Eng. Com. Law Reps. ii. 425. [2]*Id.* xxii. 341. [3]*Id.* xxxvi. 249.

giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed to the relief of the poor, or for or towards the maintenance of churches, chapels, or highways, or for any other purpose whatsoever.

Commissioners of a highway cannot maintain ejectment for strips of land by the side of the highway (*a*).

HUNDRED.

Under the late Act 7 & 8 Geo. 4, c. 31 (*b*), which repeals former statutes giving a remedy against the hundred in the case of robbery, &c. except as to offences before then committed, it is essential to prove:—

*That the conditions specified in the 3d sect. of the Act have been complied with, which prescribe that the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence (*c*), or the servant or servants who have the care (*d*) of the property damaged, shall within seven days (*e*) after the commission of the offence, go before some justice of the peace residing near (*f*) and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath *531

(*a*) *Doe* v. *Roe*, 8 Sc. 146. Upon the question as to slips of land between a highway and private inclosures belonging to the lord of the manor, the Court, upon a bill of exceptions, held, that grants of similar slips, at a distance from the spot claimed, were to be confined to such as were situated by the side of the highway which passed by the plaintiff's inclosures. *Doe* d. *Barrett* v. *Kemp*,[1] 2 Bing. N. C. (c. p.) 102. S. C. 7 Bing. 332; and 5 M. & P. 173.

(*b*) The remedy against the hundred under this st. extends to houses, &c., buildings used in carrying on trade, &c., machinery employed in any manufacture, &c., engines for working mines, &c., bridges, waggonways to mines, &c. feloniously demolished, pulled down or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together. The remedy is extended by the st. 2 & 3 W. 4, c. 72, to *threshing* machines or to any erection or fixture belonging to such machines.

(*c*) It is therefore unnecessary to examine *all* the owners or *all* the servants, and this seems to have been the rule under the st. 9 G. 1, c. 22; so that the alteration does not seem to have substantially altered the law in this respect. See the cases, note (*d*).

(*d*) Where the examination, taken before the justices according to the 9 Geo. 1, c. 22, s. 8, was only of the steward of the landlord having the superintendence of the farm on which the fire occurred, it appearing that there were several other servants of the landlord in possession of, and using parts of the premises; held, that the latter were also to be deemed "persons having the care," &c. within the words "servant or servants," of the Act, and ought to have been examined, or shown that they had no means of knowledge, and consequently that the Act had not been complied with to entitle the party to his remedy against the hundred. *Duke of Somerset* v. *Mere*,[2] 4 B. & C. 167. But that where the principal, having knowledge, &c., has been examined, it is not necessary that the servants should also be examined. Under the 9 Geo. 1, c. 22, it was held, that where no servant was in the care of the premises at the time, the examination of the party himself was sufficient; and although the justice may inquire as to his suspicions of the offender, there was nothing in the Act requiring suspicions to be stated. *Pellew* v. *Inhabitants of Wonford*,[3] 9 B. & C. 134. Where premises are under the care of several servants all ought to be examined. *Duke of Somerset* v. *Mere*,[1] 4 B. & C. 167. But where one servant has the general care of the property, he is the proper person to be examined, although other servants may have the special care of particular parts. *Lowe* v. *Broxtowe*,[4] 3 B. & Ad. 550. Where the owner of the premises maliciously set on fire, gave in his own examination, held that it was sufficient, without that of his servants; the statute requiring only the evidence of servants "having the care" of the premises, which is to be understood as referring to cases where the master is absent, and the primises are left in the charge of servants. *Rolf* v. *Inhab. of Elthorne*,[5] 1 M. & M. 185. And see *Nesham* v. *Armstrong*, 1 B. & A. 146; *infra*, note (*g*). In the case of a reversioner, his own oath is sufficient, without examining the tenant or his servants. *Pellew* v. *Inhabitants of Wonford*, *supra*.

(*e*) The days within which the notice is to be given from the act done, are to be reckoned exclusive of the day on which it is done. *Pellew* v. *Inhabitants of Wonford*, 9 B. & C. 134. See below, 534, note (*b*). And see *Lester* v. *Gurland*, 15 Ves. 247. Where a computation is to be made from an act done by the party, the day of doing the act shall be included, but not otherwise. Ib.

(*f*) Under the st. 27 Eliz. c. 11, s. 11, it was held that the justice need not be within the county at the time of administering the oath, for the act is merely ministerial. B. N. P. 186; 1 Jones, 239; Cro. Car. 211; 1 Leon. 323; 2 Will. Saund. 376, b. Where the robbery was committed twenty miles from the residence of the justice, and although many justices lived nearer, Abney, J., on a case reserved, held it to be sufficient, considering the statute to be directly on that point. *Lake* v. *Hundred of Croydon*, Lent, 1744, B. N. P. 186. And it has been held to be no objection that the examination was taken out of the jurisdiction, it being taken by a justice who usually resided with his family within the jurisdiction. *Helier* v. *Benhurst*, Cro. Car. 211.

[1]Eng. Com. Law Reps. xxix. 271. [2]*Id.* x. 303. [3]*Id.* xvii. 343. [4]*Id.* xxiii. 145. [5]*Id.* xxii. 286.

before such justice the names of the offenders, if known (*g*), and shall
*532 *submit to the examination (*h*) of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended; provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence.

The plaintiff under this section should be prepared to prove the examination by its production if taken in writing (*i*), and the due taking by some witness who was present at the time (*k*). If the plaintiff himself was not examined, it should be shown that those who were examined were his servants having the care of the property (*l*): the recognizances should also be produced and proved.

It is sufficient to show that the party presented himself to be examined in case the justice should think proper (*m*).

2dly. The plaintiff must prove a felonious (*n*) demolition and destruction of the property by persons riotously and tumultuously assembled, as alleged (*o*), within the hundred (*p*).

It seems to be necessary, under the present statute, as well as under the statute 1 Geo. 1, s. 2, c. 5, to prove either that the mob did demolish, pull

(*g*) In an action under the st. 52 Geo. 3, c. 130, the 4th sect. of which requires that the person or persons seeking to recover damages shall within four days after notice, &c. give in his or their examination on oath, or the examinations on oath of his or their servant or servants that had the care of his or their erections, buildings, &c. before a justice of peace, &c. whether he or they know the person or persons who committed the fact, it was held that the oath of one of several partners, negativing his own knowledge of the offender, but without stating that to the best of his belief the other partners had no knowledge, was insufficient. *Nesham and others* v. *Armstrong*, 1 B. & A. 146. Under the stat. of Eliz. it was, it seems, insufficient for the plaintiff to swear that he did not know the robbers, without adding "or any of them." Noy. 21; Com. Dig. Hundred, C. 4; *Trimmer* v. *Inhab. of Mutford*,[1] 6 D. & R. 10. In *King* v. *Inhab. of Bishops Sutton*, 2 Str. 1247, it was held to be insufficient for the plaintiff to state that he had good reason to suspect that the fact was done by *R. G.* and *W. L.*; for there is a great difference between knowing and suspecting.

(*h*) The examination ought, it seems, to be taken in writing: *qu.* and vide B. N. P. 186, which cites *Graham* v. *Hund. of Becontree*, cor. Wythers, J., to show that such an examination, under the former statutes, need not be in writing; the plaintiff, however, would comply with the condition of the statute in *submitting* himself to examination.

(*i*) It is unnecessary that the justice should take the examination in writing; it is sufficient if he appear upon the trial, and prove the substance of the matter sworn. *Graham* v. *Becontree Hundred*, B. N. P. 186, (under the stat. 27 Eliz). If the affidavit has been taken in writing, no other evidence but that is admissible; but that may be read, it is said, on proof that it was delivered to the person producing it, by the justice's clerk, without proving his hand-writing.

(*k*) See, however, *Graham* v. *Becontree*, B. N. P. 186, and note (*i*).

(*l*) *supra*, note (*d*).

(*m*) *Lowe* v. *Broxtowe*,[2] 3 B. & Ad. 550, per Ld. Tenterden.

(*n*) See the stat. 7 & 8 Geo. 4, c. 30, s. 8.

(*o*) By the sec. 2, if any church or chapel, or any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop oast, barn or granary, or any building or erection used in carrying on any trade or manufacture or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam engine or other engine for sinking, draining or working any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture or goods whatever, in any such church, chapel, house or other of the buildings or erections aforesaid. It is not necessary to aver a felonious demolition in *express terms* provided it appear that a felony has been committed. *Beatson* v. *Rudiforth*, 4 Marsh. 362; 7 Taunt. 45; 3 Price 48.

(*p*) See *Constable's Case*, Hob. 246. 2 Will. Saund. 375, N. Where a distinct hundred is called the half-hundred or upper hundred, and the action is brought against the hundred of *A.*, the plaintiff is liable to a nonsuit. *Constable's Case*, *supra*. But if the half hundred of *A.* be in fact part of the hundred of *A.*, the defendants, it is said (2 Will. Saund, 375 b., note (3),) ought to plead in abatement.

[1]Eng. Com. Law Reps. xvi. 251. [2]*Id.* xxiii. 145.

down and destroy the dwelling-house, &c., or that they began to do so; for here, as under the former Act, the right is given to recover against the *hundred, which otherwise would have merged in the felony (*q*). The breaking windows, window-frames and shutters, is a sufficient beginning to demolish, if the criminal agents *intended* to demolish; that intent may be confirmed, or rebutted, by circumstances. If, whilst they are occupied in the work of destruction, they are suddenly interrupted by a civil or military force, the presumption is that they would have proceeded to demolition if they had not been so interrupted (*r*); for what they intended to do must be inferred from what they were doing. But if the mob retire without actual interruption, and without demolishing, it is for the jury to say whether they intend to demolish, or merely to effect mischief short of demolition (*s*). Where they do not demolish, although they have it in their power to do so, it may be presumed that they did not intend to demolish (*t*). *533 Intention.

It was held under the stat. 9 G. 1, c. 22, that the term dwelling-house was used in that statute as descriptive of the species of property intended to be protected, and therefore that the owner of a dwelling-house might recover in respect of such an injury done to it, although no part of it was occupied by him or his family as a dwelling-house (*u*). The plaintiff is entitled to recover not only for the damage done to the subjects enumerated in the statute, but also for the damage at the same time done by any such offenders to any fixture, furniture or goods whatever in any such church, chapel, house, or other building (*x*). Dwelling-house.

It should appear that the plaintiff was the owner of the property; of this, possession is *primâ facie* evidence. The trustee even of a satisfied term, in whom the legal estate is vested, is entitled to recover (*y*).

(*q*) See Lord Ellenborough's observations in *Lord King* v. *Chambers & another*,[1] 1 Starkie's C. 195. [S. C. 4 Camp. 377.;] and in *Beckwith* v. *Wood*,[2] 2 Starkie's C. 263; 2 Will. Saund. 377. *Burrows* v. *Wright*, 1 East, 615. *Greasely* v. *Higginbotham*, Ibid. 636. Under the stat. 57 G. 3, c. 13, it was held to be necessary to prove to the reasonable satisfaction of the jury that the fire was wilfully and maliciously occasioned. *R.* v. *Gainsbury*,[3] 4 D. & R. 250. Holt's C. 603.

(*r*) See Lord Ellenborough's observations, *Lord King* v. *Chambers*,[1] 1 Starkie's C. 195. *Sompson* v. *Chambers*, 4 Camp. 221. The defendants having broken the windows, sashes, and destroyed furniture, departed, having manifestly completed their purpose; held, that it did not amount to a "beginning to demolish," within the 7 & 8 Geo. 4, c. 30, s. 8. *R.* v. *Thomas*,[4] 4 C. & P. 237.

(*s*) See Ld. Ellenborough's observations, *Lord King* v. *Chambers*,[1] 1 Starkie's C. 195; and *Reid* v. *Clarke*, 7 T. R. 496. In the case of *Lord King* v. *Chambers*, Ibid., the mob retired after breaking the windows, window-frames, &c. and in about five minutes afterwards the street was occupied by the military. The jury found for the defendant. In the case of *Beckwith* v. *Wood*,[2] (2 Starkie's C. 263), the mob attacked the house to effect the liberation of a person confined there, and they announced their intention to pull down the house if he was not delivered up. And see *R.* v. *Thomas*,[4] 4 C. & P. 237; *Price's Case*, 5 C. & P. 510; *R.* v. *Batt*,[5] 6 C. & P. 329.

(*t*) *Reid* v. *Clarke*, 7 T. R. 496; 2 Starkie's C. 265.

(*u*) *Rea* v. *Wood*, 2 Starkie's C. 269. But a building intended for a dwelling-house, but not completed, is not a house, outhouse or barn, within the 9 Geo. 1, c. 23, s. 7, so as to enable the owner to recover against the hundred. *Elmore* v. *Hundred of St. Briavells*,[6] 8 B. & C. 461. By the late stat. 2 & 3 W. 4, c. 72, the provisions of the 7 & 8 Geo. 4, c. 31, are extended to threshing machines. The words house, shop, or other buildings, under the stat. 57 G. 3, c. 19, were held not to include hustings erected to take elections. *Allen* v. *Ayre*,[7] 3 D. & R. 96.

(*x*) 7 & 8 G. 4, c. 30, s. 2; before this statute, where the demolition and injury was part of the same riotous transaction, the plaintiff was entitled to recover in respect of such contemporaneous damage. *Greaseley* v. *Higginbotham*, 1 East, 636. *Hyde* v. *Cogan*, Doug. 699. *Wilmot* v. *Horton*, ib. 701, n. *Secus*, in the case of a distinct substantive offence. *Beckwith* v. *Wood*, 1 B. & A. 487, where arms were stolen from a gunmaker's shop; and see *Smith* v. *Bolton*,[8] Holt's C. 201; and in this respect the law seems to remain as it was.

(*y*) *Pritchett* v. *Waldron & another*, 5 T. R. 14. Parties jointly interested may join. *Winterstoke Hundred's Case*, Dyer, 370. One of two lessees may recover, according to his share. *Lowe* v. *Broxtowe*,[9] 3 B. & Ad. 558. As to the case of a church, chapel or corporation property, see sec. 11. A reversioner may sue. *Pellew* v. *Inh. of Wonford*,[10] 9 B. & C. 134.

[1]Eng. Com. Law Reps. ii. 353. [2]*Id.* iii. 342. [3]*Id.* xvi. 202. [4]*Id.* xix. 363. [5]*Id.* xxv. 423. [6]*Id.* xv. 266. [7]*Id.* xvi. 240. [8]*Id.* iii. 72. [9]*Id.* xxiii. 145. [10]*Id.* xvii. 343.

*3dly. The sum requisite to restore the premises to the state in which they were before is the proper quantum of damages (*z*).

4thly. The plaintiff must prove by the production of the writ, or otherwise (*a*), that the action was commenced within three months after the offence committed (*b*).

By sec. 5, no inhabitant shall by reason of any interest arising from such inhabitancy be exempted or precluded from giving evidence.

HUSBAND AND WIFE.

I. *Evidence in actions by the husband and wife, or one of them,* p. 534.
II. *In actions against the husband and wife, &c.* p. 538.
III. *Indictments against them,* p. 548.
IV. *Competency,* p. 549.

Action by husband and wife.

I. *Joint action by the husband and wife.*—In general, when the husband and wife join, the interest of the wife must be alleged in the declaration (*c*); and consequently, if she has been improperly joined, the defect appears upon the record, and is not matter of proof in defence upon the trial (A).

(*z*) *Duke of Newcastle* v. *Hundred of Broxtowe*,[1] 4 B. & Ad. 273.

(*a*) See TIME. The commencement of the action would now appear on the record.

(*b*) See the st. sec. 3. According to the decisions under the stat. 27 Eliz. c. 13, s. 9, the day of committing the offence is to be included. It was held under that statute, that if a robbery be committed on the 9th of October, the action must at the latest be commenced on the 8th of October next. *Norris* v. *Hundred of Gawtrey*, Hob. 139; 2 Roll. Ab. 520; 1 Brownl. 156; Doug. 465. And see *Price* v. *Hundred of Chewton*, 1 P. Wms. 437. But now see *Pellew* v. *Wonford*,[2] 9 B. & C. 134, and tit. TIME.

(*c*) 2 Bl. Rep. 1236. Com. Dig. *Pleader*, 2 A. 1. [*Staley* v. *Barhite*, 2 Caines R. 221.] [And where a bond and warrant of attorney were given to a feme *dum sola*, who afterwards married, the Court, upon affidavit of facts, allowed judgment to be entered in favour of *baron and feme*. *Sheble* v. *Cummin*, 4 Browne's Rep. 253.] She *must* join in respect of all causes of action which are complete before the marriage (3 Lev. 493; Co. Lit. 351; 7 T. R. 340; Com. Dig. *Baron and Feme*, V.;) {*Donaldson* v. *Maginnes*, 4 Yeates, 127}; so in real actions, and actions of waste (1 Bulst. 21; 7 Hen. 4, 15 a.; 3 Hen. 6, 53); or personal injury to the wife, by slander or battery, during coverture (Yelv. 89; 1 Brownl. 205; 2 Cro. 501, 538; Com. Dig. *Baron and Feme*, V.) She *may* join wherever there was an inception of the cause of action in her before coverture, although it become complete afterwards (2 Saund. 47, g.; Salk. 114; 2 Lev. 107; Cro. Eliz. 459; Com. Dig. *Baron and Feme*, X.) (1); yet in *detinue*, except for the charters of the wife's inheritance, it is said that the husband must sue alone (B. N. P. 50; 1 Salk. 114; Bac. Ab. tit. *Detinue*, A. But see R. tem. Hardw. 120); or where she is the meritorious cause of action; as, where a bond or promissory note is made payable to her (*Phillis-kirk* v. *Pluckwell*, 2 M. & S. 393. *Day* v. *Pasgrave*, cited Ibid. from Mr. Ford's note, 3 Lev. 403; 2 Mod. 217; Salk. 114; 4 Mod. 156; *Peat* v. *Taylor*, Cro. Eliz. 61). [*Banks* v. *Marksberry*, 3 Littell's R. 281.] In an action for use and occupation, the wife may join with her joint-tenant and her husband. P. C. B. R. *Smith* v. ——, Mich. 2 G. 4. Or where an express promise is made to pay money to her for her service, as by the cure of a wound (*Brashford* v. *Buckingham*, Cro. Jac. 77, 205. *Rose* v. *Bowler*, 1 H. B. 106. *Waller* v. *Baker*, 2 Wils. 414); or the husband alone may sue (2). So the husband may sue alone on a covenant to husband and wife in respect of the wife's land. *Arnold* v. *Revoult*,[3] 1 B. & B. 443. See *Beaver* v. *Lane*, 2 Mod. 217. So where she was joint plaintiff in a former action, and a cognovit was given. *Wills* v. *Nurse*,[4] 1 Ad. & Ell. 65. Where the action would not survive to the wife, she *must not* be joined (Com. Dig. *Baron and Feme*, W.); as, where words not actionable are spoken of the wife, and occasion special damage to the husband. 1 Salk. 206; 1 Lev. 140; 1 Sid. 246. The husband and wife cannot sue as partners in this country, although they are foreigners, and may be partners by the law of their own country, where they resided when the cause of action, a balance of account, was contracted. *Cosio & others* v. *De Bernales*,[5] 1 Ry. & M. 102. A note given to the wife *dum sola*, for money lent and not reduced into possession by the husband, does not survive to him. *Galers* v. *Maderley*, 6 M. & W. 423.

(A) (The husband *may* join the wife where there is a promise to her or to him and her in writing, as by bond or note; or where there is an express verbal promise to her or to him or her, in consideration of her services, or her property, and in actions to recover the rents of her lands. In these cases she is considered as the meritorious cause of the action. *Lewis* v. *Martin*, 1 Day, 263; 2 Conn. R. 565.)

[Husband and wife cannot join in detinue for a chattel of the wife, if the husband had actual or constructive possession after the marriage. *Spiers* v. *Alexander*, 1 Ruffin's Rep. 67. But they must join in detinue to recover the wife's chattels, of which she had lost possession *dum sola*. *Crozier* v. *Gano*, 1 Bibb, 257.]

(1) [As in an action of account for the rents and profits of the wife's land during coverture. *Lewis* v. *Martin*, 1 Day, 263; though the husband *may* sue alone. *Chauncey* v. *Strong*, 2 Root. 369.]

(2) [Where a bond is given to a feme executrix or administratrix during coverture, styling her executrix, &c., the husband may sue on it alone. *Stewart* v. *Chance*, 2 Penn. Rep. 827.]

[1]Eng. Com. Law Reps. xxiv. 55. [2]*Id.* v. 141. [3]*Id.* xxviii. 40. [4]*Id.* xi. 421. [5]*Id.* xi. 421.

It is unnecessary, unless the defendant deny the marriage by a plea in abatement, to give any evidence of the marriage (*d*); it is sufficient to *identify the parties; the defendant cannot impeach the marriage by evi- *535
dence under the general issue.

Where the action is brought in respect of an injury done to the wife, as by slander or imprisonment, and consequential damages to the husband are also laid, for which he ought to have sued alone, no evidence ought to be given of such special damage, and the defect will be aided by a special verdict, confining the damages to the detriment to the wife (*e*). As if the declaration allege a battery of both (*f*), or a battery of the wife, and the taking the goods of the husband (*g*), or the imprisonment of the wife, *per quod* the affairs of the husband remained undone (*h*) (1).

By the husband alone.—If the husband alone bring an action where his wife ought to have joined, as in debt on a bond, or for a chose in action, due to the wife before coverture (*i*), or for a personal wrong done to the wife, either before or during coverture, as by slander or battery of the wife, where the action is not founded on special and consequential damage to the husband (*k*) the declaration will be bad; but the objection usually appears on the record, and does not arise upon the evidence (*l*). By the husband alone.

Where the husband sues in respect of special damage to himself, in con-

(*d*) *Dickenson & Ux.* v. *Davis*, 1 Str. 480; B. N. P. 20; Cro. Jac. 655. [*Coombs* v. *Williams*, 15 Mass. R. 243.]

(*e*) 2 Mod. 66; 2 Lev. 101; 1 Lev. 3; Com. Dig. *Pleader*, C. 87. In *Russell* v. *Corne* (1 Salk. 119), where in an action by the husband and wife for the imprisonment of the wife, the declaration alleged, *per quod*, the affairs of the husband remained undone, it was held, according to the report in Salkeld, that the *per quod* was well laid in aggravation; but in Str. 1094, Lee, C. J. said that he had seen a manuscript note of the case in Salkeld, and that Holt, C. J. said that he would not intend that the Judge suffered the husband to give the special damage in evidence. In *Todd* v. *Redford* (11 Mod. 264), which was an action by the husband and wife for an assault on the wife, *per quod* the husband expended money in her cure, and entire damages were given, it seems to have been held that the verdict might be supported. It seems, however, to be clear in principle, that where a special damage results to the husband from an injury to the wife, for which an appropriate action lies for the husband, he cannot recover jointly with the wife. See *Dix* v. *Brooks*, Str. 60. [See Yelv. 90, note 1.] In trespass on the lands of the wife, they may recover in respect of the grass cut and carried away. Cro. Eliz. 96. *Willy* v. *Hawksmore*, cited in *Weller* v. *Baker*, 2 Wils. 424. In case by husband and wife for slander of the latter, held that special damage for loss of the wife's service could not be recovered, which would accrue to the husband alone. *Dengate* v. *Gardiner*, 4 M. & W. 5.

(*f*) 2 Mod. 66. Com. Dig. *Pleader*, C. 87. Per Powell, J., *Todd* v. *Redford*, 11 Mod. 264. If husband and wife join for the battery of both, it is wrong; but it may be helped by a verdict separating the damages, and judgment may be given for the damages to the wife, and the writ will abate for the residue. B. N. P. 21; 9 Edw. 4, 51; Cro. Jac. 655. [See March, 47. Style, 429. 6 Mod. 149. *Ebersol* v. *Krug & ux.* 3 Binney, 555.]

(*g*) Com. Dig. *Pleader*, C. 87. *Dub.* 1 Lev. 3, if the defendant be found not guilty as to the goods.

(*h*) Str. 1094. *Russell* v. *Corne*, 1 Salk. 119. *Newman* v. *Smith*, Salk. 642. *Dix* v. *Brookes*, Str. 60. But see *Todd* v. *Redford*, 11 Mod. 264; *supra*, note (*e*).

(*i*) 1 Rol. 347. *Milnes* v. *Milnes*, 3 T. R. 627; 1 Sid. 24.

(*k*) Yel. 89; 1 Brownl. 205; 1 Roll. 360; Cro. Car. 90; Com. Dig. *Baron and Feme*, V.

(*l*) See the different cases, Com. Dig. *Baron and Feme*, T. W. X. It seems to be an invariable rule, that the wife must be joined in respect of all causes of action which are complete in the wife before coverture, and which of course will survive to her; but there are several instances in which a cause of action accrues during marriage, and which would survive to the wife, and where the husband may sue alone, as in the case of a bond or promissory note given the wife during coverture. *Supra*, 534. *Howell* v. *Main*, 3 Lev. 403. See also *Saville* v. *Sweeney*,[1] 4 B. & Ad. 514. Words are spoken of the wife in a separate business, *per quod*, &c. the wife must not be joined.

(1) [In an action by husband and wife against *A.* for driving his horse and chaise against the plaintiff's chaise, judgment was arrested, because the declaration charged injuries to the damage of the husband only, as the loss of the wife's labour, &c. *Barnes & ux.* v. *Hurd*, 11 Mass. Rep. 59. But in *Lewis* v. *Babcock*, 18 Johns. 443, the Sup. Court of New York held, that though such a declaration was bad on demurrer, it was good after verdict.

In ejectment by husband and wife, in right of the wife, advantage may be taken on the general issue of the wife's being the wife of another man and not of the plaintiff. *Les. of Lopez* v. *Mayer & al.* 1 Yeates, 551.]

[1]Eng. Com. Law Reps. xxiv. 108.

sequence of a personal injury to the wife, or lays the assault upon the wife, or other personal injury to her, in aggravation, he is entitled to recover in respect of the damage to himself only, and not for the injury to the wife; for the action for the latter damage would survive to the wife (*m*); but he
*536 *may allege and prove that in aggravation, in respect of which he cannot maintain another and more appropriate action. Thus, in trespass, for breaking and entering his house, he may allege the assaulting and menacing his wife, servants, and children, in aggravation (*n*), in order to show the enormity of the trespass (*o*). So it seems, although the contrary has been held (*p*), he may, in an action of trespass for breaking and entering his house, give in evidence loss of service, or other consequential damage which has accrued from a trespass on his wife or daughter (*q*).

In an action by the husband alone, in respect of consequential damage from a trespass against the wife, it is incumbent on the plaintiff to give *primâ facie* evidence of marriage, and that the defendant may negative the fact of marriage by a plea in bar or by evidence under the general issue.

The husband may maintain an action in his own name for the service or labour of his wife (*r*); and if he bring such an action in respect of earnings during cohabitation, it is no answer to show that she was previously married to another who is still living, for she may be considered as servant to the plaintiff (*s*). In such an action, it seems that an admission by the wife, such as a receipt given by her, is not evidence (*t*), unless, perhaps, there be some evidence to show that the husband had constituted her his agent for that purpose (*u*).

In an action by the husband for harbouring his wife, *per quod*, &c., the defendant may, under the general issue, show that he did not wrongfully detain her, by showing violent conduct on part of husband during derangement from habits of intoxication (*x*).

By the wife alone.

Action by the wife.—The wife cannot sue without the husband (*y*) (1),

(*m*) *Dix* v. *Brooks*, Str. 60, where the plaintiff declared for breaking and entering his house, and assaulting his wife, and the Court, on motion in arrest of judgment, said that the plaintiff might join that in his declaration to aggravate damages for which he could *not singly* recover, and for which the party injured might have a separate action; as in the common case of beating a servant, *per quod servitium amisit* (2). In *Newman* v. *Smith* (Salk. 642), it was held that the plaintiff might allege the beating of his daughter (in an action of trespass, *q. c. f.*) in aggravation of damages, although the loss of service could not be given in evidence, because for that he had an appropriate action; and that he might in such an action recover also for a personal injury to himself. But see *Bennett* v. *Alcott*, 2 T. R. 166.

(*n*) *Newman* v. *Smith*, Salk. 642. *Dix* v. *Brooks*, Str. 60.

(*o*) Ibid. (*p*) Ibid.

(*q*) *Bennett* v. *Alcott*, 2 T. R. 166.

(*r*) Salk. 114; B. N. P. 136; Cro. Jac. 77. For the promise in law is made to him; but on an express promise to the wife they may join. Ibid.

(*s*) Per Parker, C. J., Str. 80. (*t*) Per Lec, C. J., B. N. P. 136.

(*u*) *Supra*, tit. AGENT.

(*x*) Per Alderson, B., *Braithwaite* v. *Jackson*, Lanc. Lent Assizes, 1835. The pleas were, 1, not guilty; 2, that the husband conducted himself with cruelty and violent threats, which produced reasonable fear, in consequence of which she left the house. Per Alderson, J., if the defendant knew that the detention was against the plaintiff's will, then the question is, did the defendant act on the *bona fide* belief that the husband misconducted himself; if so, the jury should find for the defendant under the general issue.

(*y*) *Marshal* v. *Rutton*, 8 T. R. 545; although she lives separately from her husband, and has a separate maintenance secured by deed. Neither can she be sued alone. Ibid. A feme sole trader, by the custom of London, may be sued, but the husband must be joined for conformity, although execution may be joined against her alone. See *Beard* v. *Webb*, 2 B. & P. 98. *Langham* v. *Bewett*, Cro. Car. 68. A married woman being administratrix, received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband, and two other persons, payable to her with lawful interest; held, that although she could not have maintained any action on the note

(1) [The husband of a woman who is guardian in socage must join in actions by her. *Byrne* v. *Van Hoesen*, 5 Johns. 66.]

(2) [In North Carolina, a married woman may file a bill in her own name for a separate maintenance. *Knight* v. *Knight*, 2 Hayw. 101.]

but if *she alone bring an action, where she has a right of action, the defendant cannot take advantage of her coverture by evidence under the general issue; it is a personal disability, and must, according to the general rule (*z*), be pleaded in *abatement* (*a*) (1), although the husband may reverse the judgment by writ of error (*b*). But if the wife alone bring an action where she has no legal cause of action, it will be a ground of nonsuit at the trial (*c*). But mere declarations by her that she was married when the cause of action accrued, without without proof of either an actual marriage or cohabitation, are not sufficient (*d*). If, however, upon the trial, evidence be given of coverture, which would, being unanswered, show that the wife herself had no cause of action, she may rebut that evidence by proof of the husband's civil death, by exile and abjuration of the realm (*e*), or transportation for felony for a term of years (2).

Where a married woman brought an action for goods sold and delivered, and the defendant proved the plaintiff's coverture, and the plaintiff then gave in evidence the record of the husband's conviction for felony, and sentence of transportation for seven years, which term was then expired, it was held at *Nisi Prius* that this was evidence of the husband's abjuration of the realm; and that, if in fact he had returned, the *onus* of proving the contrary lying on the defendant, the right of action remained (*f*).

during the lifetime of her husband, yet he having died and it having been given for a good consideration, it was a chose in action, and survived to the wife, and she might maintain an action upon it against either of the other parties to it, at any time within six years of the death of her husband, and recover interest from the date of the note. *Richards* v. *Richards*,[1] 2 B. & Ad. 447.

(*z*) 3 T. R. 631.

(*a*) Coverture in a woman, whether plaintiff or defendant, must be pleaded in abatement (Com. Dig. tit. *Pleader*, 2 A. 1. *Milnes* v. *Milnes*, 3 T. R. 827.) See *Westbrooke* v. *Strutville* (Str. 79), where in an action for an assault, the defendant proved his marriage with the plaintiff, and she proved in answer her previous marriage to one Westbrooke, who was living at the time of the second marriage: it was insisted that she ought not to give felony in evidence to support her action; but Ld. King admitted it. See B. N. P. 20.

(*b*) 2 Bl. R. 1236. If she marry during the suit, the coverture must be pleaded by plea *puis darrein* continuance. Bac. Ab. *Abatement*, C. *Morgan* v. *Painter*, 6 T. R. 265.

(*c*) *Caddell* v. *Shaw*, 4 T. R. 361; where a widow, a feme sole trader in London, brought an action in the Court of K. B. for goods sold and delivered by her whilst she was covert. Mere evidence of an acknowledgement that she was covert has been said to be insufficient. *Wilson* v. *Mitchell*, 3 Camp. 393.

(*d*) *Wilson* v. *Mitchell*, 3 Camp. 393.

(*e*) *Belknap's Case*, 2 Hen. 4. 7, a. 1 Hen. 4. 1, a.; where the husband was banished to Gascony, there to remain till he attained the King's favour (Co. Litt. 132, b. 133, a.; Mod. 851; Com. Dig. *Abatement*, E. 6); and where the husband ought to join, and the coverture is pleaded in abatement, this is a good replication. In *Marsh* v. *Hutchinson*, (2 Bos. & Pul. 231), Ld. Eldon observed, "The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead; so she became entitled to the enjoyment and profits of her own land, though if he had not been civilly dead, he would have been seised of the lands in her right; and indeed she might have sued for an assault in her own name, and might have been made a defendant without her husband in all cases in which the husband must otherwise have joined."

(*f*) *Carroll* v. *Blencow*, 4 Esp. C. 27. But see Lord Eldon's observations in *Marsh* v. *Hutchinson*, 2 B. & P. 233. In *Sparrow* v. *Carruthers*, (cited in *Corbett* v. *Poelnitz*, 1 T. R. 7, and 2 Bl. R. 297), the action was on a note given by a woman who kept a public-house, for malt supplied to the public-house; plea the general

(1) [*Newton* v. *Robison*, 1 Taylor, 72, 2 Hayw. 121, *acc. Gatewood* v. *Turk*, 3 Bibb, 246, *contra*.]

(2) [Where a feme covert was deserted by her husband in a foreign country, and afterwards maintained herself as a feme sole, and came to this country and resided here five years—the husband being a foreigner and never having been in the United States—she was allowed to sue as a feme sole. *Gregory* v. *Paul*, 15 Mass. Rep. 31.

Where the husband is banished, the wife is to be considered as a feme sole to all purposes of acquiring property. *Troughton* v. *Hill*, 2 Hayw. 406. *Wright* v. *Wright*, 2 Desauss. 244.]

{The law seems to be settled, that when the wife is left by the husband, without maintenance and support, has traded as a *feme sole*, and obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crime, or has voluntarily abandoned his wife. *Rhea et al.* v. *Rhenner*, 1 Peters's Sup. Court Reports, 105}.]

[1] Eng. Com. Law Reps. xxii. 119.

*538 After a solemn admission by a woman that she is married to a man, and *that the goods in his possession are his goods by the marriage, she will be precluded afterwards, as against creditors, from denying the marriage (*g*) (1).

In an action by a trustee for the wife, it is usually necessary to prove his interest in the chattel or other property in respect of which he sues, by means of the settlement deed (*h*).

Where, in trespass for seizing under a distress against the husband, it appeared that on the marriage the wife's stock in trade and other articles belonging to her in and about her said business were assigned to trustees, and she being lame, the jury had found that a horse and gig, which before and after the marriage she had always used in going about to her customers, was kept for the purpose of the trade, and not for pleasure, and there being no other property to satisfy the words "and other articles," the Court discharged a rule for entering a nonsuit (*i*).

Actions against the husband and wife.

II.—*Actions against husband and wife.*—In an action against husband and wife it is sufficient to prove the marriage *de facto*, by evidence of cohabitation, acknowledgement, and reputation; for a man who has allowed a woman to pass in the world as his wife, shall not afterwards be permitted to say that she is not so (*k*). And they cannot prove in defence that they were not legally married (*l*) (A).

But in an action against the husband and wife, in respect of the contract of the wife *previous to the marriage* (*m*), the husband may prove under

issue; the defence was coverture; the replication in evidence was, that the husband had been transported, and the time not yet expired; and Yates, J., thought that the Court must consider the transportation as suspending her disability. See Lord Eldon's observations on this case, 2 B. & P. 233; where he says, "A difficulty of equal importance occurs where a wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country. As far as his (Mr. J. Yates's) opinion can be collected, he seems to have treated it as a material circumstance in evidence, that the time of the transportation was not out."

(*g*) *Mace* v. *Cadell*, Cowp. 323.

(*h*) *Horwood* v. *Hepper*, 3 Taunt. 421. *Liddlow* v. *Wilmot*,[1] 2 Starkie's C. 86. Upon the trial of an indictment against the husband for cruelty to the wife, an agreement of compromise was entered into between the husband and the brother and father of the wife (the prosecutors), for separation and maintenance, with covenants on the part of the latter to indemnify the husband, and a nominal fine was imposed in consequence: the Court, on demurrer to a bill for specific performance, held that such a stipulation could be enforced; a compromise of a misdemeanor being by the policy of the law permitted, though not of a felony, and overruled the demurrer. *Elworthy* v. *Bird*, 2 Sim. & St. 372. It is not, however, a general rule that the law allows of compromises in cases of misdemeanor. *Supra*, 248.

(*i*) *Dean* v. *Brown*,[2] 5 B. & C. 336. Trover for goods secured to the wife before marriage to enable her to carry on separate business, against the assignees of the bankrupt husband. The goods are not liable for the husband's debts, unless he intermeddle in the business, and that is a question of fact for the jury. *Jarman* v. *Woolloton*, 3 T. R. 618. If the wife treat the goods which she has as executrix as the goods of her husband, they are liable to be taken in execution for his debt. *Quick et Ux.* v. *Staines*, 1 B. & P. 293.

(*k*) *Norwood* v. *Stevenson*, Andr. 137. Peake's Ev. 351.

(*l*) Or even plead in bar *ne unques accouple:* for the legality of the marriage is not triable in personal actions, because a husband *de facto* is liable to his wife's debts. *Norwood* v. *Stevenson*, Andr. 237.

(*m*) [*Dorill* v. *Leadbeater*, 4 Pick. R. 220.] The ground of the husband's liability in respect of the contracts of the wife before marriage, and of her acts both before and after marriage, is this, that the law having conveyed to him all marital rights in respect of the wife's property, he ought also to be liable to the burthen of claims upon that property. And conversely, as he is liable to the burthen, he is also entitled to the consideration, and therefore a secret settlement by the wife before marriage is a fraud on his marital rights, and cannot be supported. See *Goddard* v. *Snow*, 1 Russ. 485, which questions the *dicta* in *Strathmore* v. *Bowes*, 2 Cox, 28; 1 Ves. J. 28.

(A) (*Hammick* v. *Brown*, 5 Day, 290. *M'Gahay* v. *Williams*, 12 John. R. 293.)

(1) [A feme covert, suing as sole, cannot, after judgment for the defendant, assign her coverture for error. *Dixon* v. *Dye*, 1 Coxe's Rep. 217.]

[1]Eng. Com. Law Reps. xvii. 258. [2]*Id.* xi. 248.

the general issue that she was, at the time of the supposed contract, the wife of another man (*n*) (1) (A).

Against the husband alone (*o*).—Although the wife cannot bind the husband *by any act or contract of her own, yet he may be affected by them after proof that he gave her authority to act as his agent (*p*) (B); or by evidence, from which a previous authority by him, or his subsequent assent, can be implied (C). Against the husband. *539

Where the wife, without any authority from the husband, contracted with a servant by deed, it was held, that the servant, after the services were performed, might maintain an action of *assumpsit* against the husband according to the terms of the deed (*q*). And if the husband, although not liable in point of law, promise to pay the debt of the wife, he will be bound by it, although it was made under a mistake of the law (*r*).

Where the husband covenanted in a deed of separation (reciting his agreement to allow her 100*l.* out of his salary, as &c.) to pay the same during her life, held, that the covenant was *controlled* by the recital, and that upon his dismissal from the office not by any act of his own, he was not liable to the covenant (*s*).

Where the action is brought in respect of goods supplied to the wife: 1st. They either cohabit, or 2dly, live apart; and if they live apart, they do so either by mutual consent, or by the default of one without the consent of the other, or by act of law. A presumption arises from *cohabitation*, that the wife has authority from the husband to purchase such articles as are necessary for herself and the family (*t*), unless the contrary appear, and that, having been supplied to her, they came to his use (*u*). Against the husband for goods supplied to the wife. During cohabitation.

(*n*) *Cowley* v. *Robertson and his Wife*, 3 Camp. 438. Action for goods sold to defendant's wife, at his request; a plea that she was not the wife of the defendant was held to be bad on demurrer, as being immaterial, and amounting to the general issue. *Sinclair* v. *Hervey*, 2 Ch. C. T. M. 642.

(*o*) The husband and wife must be sued jointly in respect of the debt or contract of the wife before marriage, although the husband state an account, and expressly promises to pay the debt (*Mitchinson* v. *Hewson*, 7 T. R. 348. Alleyn, 72). The husband may be sued alone for rent due during the coverture, on a lease which the wife has as executrix. Com. Dig. *Baron and Feme*, V.; Thom. En. 117.

(*p*) *Supra*, tit. AGENT. [See *Wallingham's Ex'r* v. *Simm's Ex'r*, 1 Desauss. 273.]

(*q*) *White* v. *Cuyler*, 6 T. R. 176.

(*r*) *Hornbuckle* v. *Hornbury*,[1] 2 Starkie's C. 177, cor. Lord Ellenborough, C. J. *Harrison* v. *Hall*, 1 Mo. & R. 185.

(*s*) *Hesse* v. *Albert*, 3 M. & Ry. 406.

(*t*) Bac. Ab. *Baron and Feme*, H.; 2 Str. 1122; and per Holt, *Etherington* v. *Parrott*, Salk. 118. *Longfoot* v. *Tiler*, 1 Salk. 113. Where the wife of the defendant took her niece to the plaintiff's school, and there was slight evidence of her agency in ordinary household expenses, which was objected to as inadmissible, the Court considering it some, although slight, evidence to go to the jury, refused to disturb the verdict. *M'George* v. *Egan*,[2] 5 Bing. N. C. 196.

(*u*) Where the wife took up goods, but pawned them before they had been made into clothes, it was held that the husband was not liable, for they never came to his use (Salk. 118, pl. 10); but it would have been otherwise if they had been first made up and worn, and then pawned. Ibid. So if the wife pawn her clothes, and afterwards borrow money to redeem them, the husband is not liable. 2 Show. 283. And where the wife living with the husband carries on trade, his authority is, it seems, to be presumed. Where the wife carries on business on her own account, during the imprisonment of her husband, and after his return to live with her, articles were furnished in the business with his knowledge; it was held that he was liable

(1) [The husband cannot be sued *alone* for a debt contracted by the wife *dum sola*. *Angel* v. *Felton*, 8 Johns. 149. Nor as administrator to his wife. *Moore* v. *Suttril*, 1 Hayw. 16.]

(A) (But he cannot plead infancy. *Roach* v. *Quick*, 9 Wend. 238.)

(B) (*Hopkins* v. *Mollinieux*, 4 Wend. 465. *Dacy* v. *The Chemical Bank*, 2 Hall, 550. *Church* v. *Landers*, 10 Wend. 79. *Torrence* v. *Graham*, 1 Dev. & Bat. 284. *Fermer* v. *Lewis*, 10 John. R. 33. *Rotch* v. *Miles*, 2 Conn. R. 638.)

(C) (*Webster* v. *M'Ginnis*, 5 Binney, 236. But where the wife of an innkeeper was entrusted by him with the *ordinary business* of the tavern in his absence, it was held, that she had no authority to bind the husband by a special contract, to board stage drivers, and find hay and oats for their horses, at less than the usual rates. *Ibid.*)

[1]Eng. Com. Law Reps. iii. 302. [2]*Id.* xxxv. 83.

A husband, however, is liable only for debts contracted by his wife, on the assumption that she acts as his agent; if he supplies her with necessaries, she is not to be deemed his agent beyond that, unless he sees her wear articles purchased by her without disapprobation. Where it was proved that he furnished her with necessary apparel, and was ignorant of her dealing with the plaintiff, it was held that he was not liable (*x*) (A).

The presumption which is one of fact for the jury, is liable to be rebutted by evidence negativing the husband's assent to the contract; as by proof of express notice to the plaintiff, or to his servant, that the husband would not
*540 *be responsible (*y*). Proof by the plaintiff that the articles were consumed in the defendant's family is but presumptive evidence of his assent, and a special verdict for the plaintiff, which does not find the assent of the defendant, is insufficient (*z*). It is a defence for the husband to show that the credit was given not to himself but to the wife, although they lived together, and although the husband saw the wife in possession of the clothes for the value of which the action is brought (*a*). As where the plaintiff, without the privity of the husband, supplied the wife of an apothecary in a small town with dress to the amount of 200*l.*, after the father of the wife had paid a similar bill, and had admonished the plaintiff not to supply her with other goods without the knowledge of the husband (*b.*) If the husband rely on notice to the plaintiff not to trust the wife during cohabitation, he must, it seems, prove express notice; it is insufficient to prove a general notice in the Gazette or other newspaper (*c*), without further showing that the plaintiff read the paper.

Where the husband has turned the wife out of doors.

Where the husband and wife do not cohabit, the liability of the husband is much varied by circumstances. If he go abroad, or simply live apart from his wife, his implied liability seems to remain as it was before (*d*).

If the husband turn away the wife, he sends credit with her for reasonable expenses (*e*), or, in other words, he lies under a *legal obligation* to

for them, though the invoices and receipts were in the name of the wife, and though she was rated, and paid the house and paving rates. The learned Judge left it to the jury to say, whether the wife was not the agent of the husband, and advised them to find for the plaintiff; and the Court afterwards held that the direction was right. *Petty* v. *Anderson*,[1] 3 Bing. 170.

(*x*) *Seaton* v. *Benedict*,[2] 5 Bing. 31; and the jury having found a verdict for the plaintiff, damages 10*s.*, the Judge certified to deprive him of costs. Ib. 187.

(*y*) B. N. P. 134, 135; Str. 113; Salk. 118. *Ozard* v. *Darnford*, cor. Lord Mansfield, Midd. Sitt. after Mich. T., Sel. N. P. 260, 7th ed.; and per Lord Eldon, in *Rawlins* v. *Vandyke*, 3 Esp. C. 250.

(*z*) B. N. P. 136. The case is there assimilated (B. N. P. 134) to that of credit given to a servant; but a servant has no authority till the master has recognized him as agent by his mode of dealing; a wife, on the other hand, derives her credit from the very nature of the relation, accompanied by cohabitation.

(*a*) *Metcalf* v. *Shaw*, 3 Camp. 22. *Bentley* v. *Griffin*,[3] 5 Taunt. 356. In the former case Lord Ellenborough nonsuited the plaintiff; in the latter it was left as a question of fact for the jury to say to whom the credit had been given. See *Leggatt* v. *Reid*,[4] 1 Car. & P. 16.

(*b*) *Metcalf* v. *Shaw*, 3 Camp. 22.

(*c*) Bac. Ab. *Baron and Feme*, H. *Harris* v. *Morris*, 4 Esp. C. 40.

(*d*) Where the husband and wife live apart, the person who gives credit to the wife stands in her place, inasmuch as the husband is bound to maintain her, and the Spiritual Court, or a Court of Equity, will compel him to allow her an adequate alimony; but if she elope from her husband, or live in adultery, or if upon separation the husband agree to make her a sufficient allowance, and pay it, he is not liable; in the former case she forfeits her title to alimony, and in the latter has no further demands on her husband. *Ozard* v. *Darnford*, cor. Lord Mansfield, Midd. Sitt. after Mich. 20 G. 3, Selw. N. P. 261.

(*e*) B. N. P. 135. Where a party, after cohabiting with the woman as his wife, went abroad and died, held, that in the absence of any contract, all that could be implied was, that he gave her an implied authority to bind him as a wife might have done; but that her contract could not bind his estate, if made after his death. *Blades* v. *Free*,[5] 9 B. & C. 167; 4 M. & Ry. 282. Where the plaintiff has supplied goods to a *feme*

(A) (And where a feme covert has a separate estate vested in a trustee, and services are rendered on account of the estate, and the credit for such services is given to her, the husband is not liable for them. *Stammers* v. *Macomb*, 2 Wend. 454.)

[1]Eng. Com. Law Reps. xi. 84. [2]*Id.* xv. 354. [3]*Id.* i. 131. [4]*Id.* xi. 301. [5]*Id.* xvii. 351.

pay the debts which she necessarily incurs (1), and therefore he cannot, in such a case, discharge himself either by a general or particular notice not to trust her.

The case of *Bolton* v. *Prentice* (2) affords a strong illustration of the distinction. The defendant there, had, during the cohabitation, given to the plaintiff (a milliner) express notice not to trust the wife; twelve months afterwards the defendant turned his wife out of doors, and she was furnished by the plaintiff with *apparel suitable to her degree;* and the Court, on a motion by the defendant for a new trial, denied it, saying, that when a man turned *away his wife, he gave her general credit, and the prohibition was gone and superseded (*f*). *541

If the husband by ill usage and harsh treatment compel the wife to leave him, the case is the same as if he had actually turned her out of doors (*g*) (3).

And it is not necessary that the wife should have suffered actual violence before she leave the house; it is enough that she had reasonable ground for apprehension (*h*), or that the husband, by the indecency of his conduct, precluded her from living with him.

Where they part by consent, and no *allowance* is made by the husband, the legal obligation on the husband to provide her with necessaries still remains (A). If in such case an allowance be made, it is to be presumed that she is trusted on her own credit, provided the fact be known that such allowance is made (*i*). And then it is not incumbent on the husband to prove personal notice to the plaintiff; it is sufficient if the fact has been

Where they part by mutual consent.

covert in the absence of the husband abroad, it lies upon him to show that the wife was in such a state as to render the supply necessary; and although a subsequent promise may render the husband liable, it is for the jury to say if such promise has been in fact made. *Bird* v. *Jones*, 3 M. & Ry. 121.

(*f*) B. N. P. 135. Where the husband having struck his wife and turned her out of doors, she had subsequently obtained a divorce *a mensa et thoro*, and alimony had been decreed, but which had not been duly paid, it was held that neither a deed of separation nor decree for alimony would discharge the husband from his liability. *Hunt* v. *De Blaquiere*,[1] 5 Bing. 590. And he is liable for necessaries supplied during a suit for alimony, although a decree is afterwards obtained for alimony previous to the time when such necessaries were supplied. *Keegan* v. *Smith*, 3 B. & C. 375.

(*g*) Per Lord Kenyon, *Hodges* v. *Hodges*, 1 Esp. C. 441.

(*h*) *Liddlow* v. *Wilmot*,[2] 2 Starkie's C. 86; *Houliston* v. *Smith*,[3] 3 Bing. 127. In *Horwood* v. *Hepper*, 3 Taunt. 421, (4) Sir J. Mansfield is reported to have said, that nothing short of actual terror and violence will support this action; and Lawrence, J. is stated to have said that the circumstance of a prostitute being placed at the husband's table was not sufficient to justify the wife's departure, so long as she could obtain support in the house. It is but justice to the memories of those learned Judges to doubt whether they ever sanctioned such a doctrine—a doctrine which was justly reprobated by the Court in the case of *Houliston* v. *Smith*, 3 Bing. 127. In that case Gaselee, J. said, "I have always considered the law on this subject to be as laid down by Lord Kenyon, that if a man renders his house unfit for a modest woman to continue in it, she is authorized in going away."

(*i*) If a husband, during temporary absences, supplies the wife with an allowance for necessaries, the tradesman who knows this, but credits the wife with goods, cannot recover. *Holt* v. *Brien*,[4] 4 B. & A. 252. It is not necessary that the allowance should be secured by deed. *Holt* v. *Brien*,[4] 4 B. & A. 252.

(1) [Where a husband deserted his wife and children, and left her keeping a boarding-house, without furnishing means for her support, and did not return nor make any provision for them; it was held that he was liable for her contracts made in the course of such business—including the rent for such house. *Rotch* v. *Miles*, 2 Conn. Rep. 638.]

(2) [2 Stra. 1214—and see Mr. Nolan's note to that case.] {*Barnes* v. *Winkler*, 2 Car. & Payne, 346.}

(3) {*Houliston* v. *Smith*, 2 Carr. & Payne, 23. *Emery* v. *Emery*, 1 Rus. & Jerv. Rep. 501.}

(4) {*Horwood* v. *Heffer*, was expressly overruled by Lord *Ellenborough* in *Aldis* v. *Chapman*, Selwyn's L. N. P. 281, and the Judges of the King's Bench in *Houliston* v. *Smith*, said they were surprised at the language and doctrine of the case (2 Carr. & Payne, 29, 30, 31). It was held in *Aldis* v. *Chapman*, that where a husband by bringing another woman under his roof, renders his home unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries.}

(A) (*Lockwood* v. *Thomas*, 12 John. R. 248. *Simpson* v. *Simpson*, 4 Dana, 140.)

[1]Eng. Com. Law Reps. xv. 535. [2]*Id.* iii. 258. [3]*Id.* xi. 64. [4]*Id.* vi. 418.

notified where the parties lived (*j*). This it seems furnishes a reasonable presumption that the plaintiff either did know the fact, or that he might have known it had he made proper inquiries (*k*).

*542 *And it seems to be now settled that where the husband allows his wife a sufficient maintenance, it is immaterial whether the tradespeople had notice of such allowance or not (*l*) (A).

Without consent. Where the wife leaves the house of her husband *without* his consent and against his will, no action is maintainable against the husband for necessaries supplied to her during such absence (*m*). In such case it seems to make no difference whether the husband makes an allowance under a settlement or otherwise, for the husband is guilty of no default in neglecting a duty the performance of which by another raises an implied promise to repay. He is not liable in such case, although he has executed a deed, which is invalid, because it stipulates prospectively for the separation of the parties (*n*). If he has made a legal provision on separation for the maintenance of the wife, the remedy is against the fund, and the trustees must obtain payment from the husband (*o*).

Against the husband for goods supplied to the wife.

From what has been said, it follows that the plaintiff, in an action against the husband for necessaries supplied to the wife, must prove the marriage, either by direct proof, or by evidence of cohabitation and repute, or admissions by the husband; and where they lived separate, the plaintiff

(*j*) *Todd* v. *Stokes*, 1 Lord Raym. 444. 8 Will. 3, by Lord Hale, B. N. P. 135. [*Baker* v. *Barney*, 8 Johns. 72; *Fenner* v. *Lewis*, 10 Johns. 38.] The husband lived at Winchester, and on separation by consent, articled to allow the wife 20*l.* per annum, and she, five years afterwards, contracted the debt with the plaintiff, an apothecary in London; the husband, it was held, was not liable.

(*k*) It has been said (B. N. P. 135; and by Holt, C. J. in *Todd* v. *Stokes*, 1 Ld. Ray. 444), that if the debt be contracted by the wife at a distance from the husband's residence, and so soon after the separation that it could not be known at the place where the debt was incurred, the husband will still be liable. The principle on which the necessity for such notice rests is not very evident. If the liability of the husband for goods supplied to the wife during separation, rested upon a mere *legal obligation*, independently of any assent or notice of dissent, on the part of the husband (*supra*, 69, *infra*, 544), even express notice would not obstruct the liability, which would depend wholly on the question whether the husband had or had not supplied the wife with necessaries; if, on the other hand, the liability depended on a presumed authority from the husband, and a contract by him, and it were necessary to prove a previous knowledge of the circumstance of an allowance on the part of the plaintiff, in order to rebut the presumption of such a contract, the reason would equally apply to cases of elopement and of adultery, where such a notice is unnecessary. See p. 445. *Quære*, therefore, whether, where the wife removes to a distance from the husband, who makes her a suitable allowance, it is not incumbent on one who trusts her to make inquiry as to her situation; it is not in the power of the husband to give immediate and effectual notice of the allowance in every place to which the wife may remove immediately after separation, but every one who trusts her may make previous inquiries. The affirmative has since been decided. See note (*l*).

(*l*) In the case of *Clifford* v. *Laton*, 1 M. & M. 101, it was held (by Lord Tenterden), that the plaintiff could not recover, she having a sufficient separate maintenance, although not from the husband. And per Lord Tenterden, C. J., where a wife lives with her husband he may generally be taken to be cognisant of her contracts; but where they are living separate, it is for the party seeking to charge the husband to make out by proof that he is liable. The plaintiff in that case did not know the party to be a married woman. And see *Mainwaring* v. *Leslie*,[1] 1 M. & M. 18. His lordship added, if a shop-keeper will sell goods to every one who comes into his shop, without inquiring into their circumstances, he takes his chance of getting paid, and it lies on him to make out by full proof his claim against any other person. And in *Mizen* v. *Pick*, 3 M. & W. 481, Alderson, B. intimated his doubts whether Lord Eldon expressed himself to the extent of what is stated in *Rawlins* v. *Vandyke;* and in giving judgment says, "I do not see how notice to the tradesmen can be material. The question in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself with everything proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable."

(*m*) *Hindley* v. *Marquis of Westmeath*,[2] 6 B. & C. 200.

(*n*) *Ibid.* (*o*) *Ibid.*

(A) (Where a husband professes to provide for his wife who lives apart from him, it is incumbent on a party who has been expressly forbidden to give credit to her, in order to render the husband liable for subsequent supplies, to show affirmatively and clearly, that the husband did not supply her with necessaries suitable to her condition. *Mott* v. *Comstock*, 8 Wend. 544.)

[1] Eng. Com. Law Reps. xxii. 236. [2] *Id.* xiii. 141.

must prove the circumstances under which they parted (*p*), either that they live so through the husband's default, or with his consent (*q*). Although they part by mutual consent, the husband lies under a legal obligation to support the wife, unless she has forfeited her right to maintenance by misconduct (*r*); and consequently he is liable for necessaries supplied to her, unless he can show that he himself maintains her, or that she has an adequate provision from some other source (*s*).

*Whether the wife live with or apart from her husband, evidence is *543
essential to show that the goods supplied were necessary and convenient, Necessa-
according to the husband's degree and estate in life (*t*); for it is not to be ries.
presumed that he made the wife his agent (*u*) beyond that extent where he cohabits with her, nor will the law impose a larger obligation upon him where they live apart. And regard is to be had to the *estate* of the husband, and not merely to his degree, for one of high degree may be a man of low estate (*v*). And in the ascertainment of what is suitable to his circumstances (which is usually a question of fact for the jury) (*x*), they are not to be guided by the fortune brought by the wife, but to regulate their verdict according to the real circumstances of the husband (*y*). Where the conduct of the husband renders it necessary that she should exhibit articles of the peace against him, his allowing a separate maintenance does not exempt him from liability to the costs of those articles (*z*).

(*p*) *Mainwaring* v. *Leslie*, 1 M. & M. 18.

(*q*) For if the plaintiff rely on an implied contract, he must show that circumstances exist which raise that implied contract; *supra* 58. And as where they live apart it may be without default on the part of the husband, this is a fact essential to his liability, and the *onus* of proof lies on the plaintiff. See *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200. *Contra*, *Coe* v. *King*, 12 Mod. 372; where it was held that mere proof of prior cohabitation was *prima facie* sufficient evidence to charge the husband. In *Longfoot* v. *Tiler*, Salk. 160, Holt, C. J. ruled that the husband was liable on the wife's contract for tea, in which she dealt, on mere evidence of cohabitation.

(*r*) *Nurse* v. *Craig*, 2 N. R. 152. *Harris* v. *Morris*, 4 Esp. C. 41.

(*s*) Vide *infra*, 545; and *Liddlow* v. *Wilmot*,[1] 2 Starkie's C. 86.

(*t*) B. N. P. 136. *Manby* v. *Scott*, 1 Lev. 4, 5; 1 Sid. 109. In an action against the husband for supplies to the wife, living separate, and only a payment of a sum into court pleaded, held, that the defendant thereby admitting the authority to contract, it was a question only of amount, but that she could not pledge his credit beyond what would be reasonable and necessary for her subsistence; the bill, 140*l.*, being for horses and carriages let on hire for ten months, and 73*l.* paid into court, the jury found for the defendant. *Emmett* v. *Norton*,[2] 8 C. & P. 506.

(*u*) Where there is no express promise on the part of the husband, and it cannot be inferred from his acts and conduct that he authorized the wife to act, the question is whether the law will under the circumstances raise an implied assumpsit; this the law will not do unless the articles supplied be necessaries. See *Montague* v. *Benedict*,[3] 3 B. & C. 631, and *infra*, note (*x*).

(*v*) Per Ld. Hale, in *Manby* v. *Scott*, Bac. Ab. *Baron and Feme*, H.

(*x*) Bac. Ab. *Baron and Feme*, H. It has been held that a husband, who has turned his wife out of doors, is liable for the costs of articles of the peace which are necessary for her safety. (*Shepherd* v. *Mackoul*, 3 Camp. 326.) A tradesman who sold lace and silver fringes for a petticoat and side-saddle, which amounted to 94*l.*, and all within four months, to the wife of a serjeant at law, afterwards a judge, recovered against him. Skinn. 349. But in the case of *Montague* v. *Benedict*,[3] 3 B. & C. 631, which was an action for jewels supplied to the wife of a special pleader, to the amount of upwards of 100*l.*, part of which the wife herself had paid, and it appeared that the wife brought a fortune under 4,000*l.*, that she received by virtue of her marriage settlement the sum of 60*l.* annually, and that before the supply of the jewels by the plaintiff, she had jewelry suitable to her condition; that they lived in a ready-furnished house, at the rent of 200*l.* a year, and there was no evidence to show his privity, and that no application was made to the husband for many months after, but that the plaintiff always called when he knew the husband was from home; it was held that there was no question for the jury; the articles not being necessary, the plaintiff was bound to prove either an express or implied contract on the part of the husband, and that here the circumstances did not raise an implied contract.

(*y*) Per Lord Eldon, C. J., *Ewers* v. *Hutton*, 3 Esp. C. 255.

(*z*) *Turner* v. *Rookes*, 2 P. & D. 294; 10 Ad. & Ell. 47. Where a husband is indicted for assaulting his wife, one who advances money to the attorney for carrying on the prosecution, and without which he could not have gone on, cannot recover from the husband such money as supplied for necessaries. *Grindell* v. *Godman*,[4] 5 Ad. & Ell. 755. Otherwise (*semble*) according to the above case where she exhibits articles of the peace against her husband.

[1]Eng. Com. Law Reps. iii. 258. [2]*Id.* xxxiv. 503. [3]*Id.* x. 205. [4]*Id.* xxxi. 431.

Where the husband was a common labourer, and after separation the wife worked for her livelihood, Lord Holt held that the money she earned should go to keep her (*a*). There seems to be no satisfactory reason why one who has lent money to the wife (who has been turned out of doors by her husband) in order to provide her with necessaries, should not be entitled to recover it from the husband, for it may happen that she may not be able to procure credit (*b*).

*544

Assent by the husband.

*Where, however, the husband allows a wife to assume the appearance which he is unable to support, he is answerable for the consequences of the deception, and is liable to pay for articles supplied to the wife corresponding with that appearance, however inconsistent it may be with his circumstances (*c*). And although where they do not cohabit, the husband is liable for necessaries only according to his estate, yet if he, after separation, be privy to and sanction her appearance in a pretended state of affluence inconsistent with his real circumstances, he would, it seems, be liable just as if the appearances had been real (*d*); and so he is, if knowing that his wife has ordered goods which are inconsistent with his fortune, and having the power of returning or countermanding them, he does neither, for then he adopts her act (*e*).

Separation by act of law.

But although in general a husband is not liable where the wife through her own default lives apart from him, yet it is otherwise, in some instances, where the separation is by operation of law; for in such case the wife has not the power to return (1). And therefore, if the wife be imprisoned for felony, the husband is liable for necessaries (*f*); but it is otherwise if she be kept in an improper place by the covin of the gaoler (*g*). So if the husband be imprisoned for any offence, it should seem that he would be liable as if he had deserted his wife, for the separation is a consequence of his own fault. Where they are separated *a mensâ et thoro* by sentence of the Ecclesiastical Court, she is allowed alimony at the discretion of the Judge, except in case of adultery (*h*) (2).

A declaration for provisions supplied to the husband will be supported by evidence of provisions supplied to the wife at his request during his absence (*i*).

The defendant may prove in answer that the wife eloped from him (*k*), or

(*a*) 1 Salk. 118.

(*b*) See *Harris* v. *Lee*, 1 P. Wms. 482. The husband gave his wife the foul distemper; she came up to town to be cured, and borrowed money from *A.* to pay the surgeon, and for necessaries; the husband having died, charging his land with debts, it was decreed that *A.* should stand in the place of those who had supplied the necessaries.

(*c*) *Waithman* v. *Wakefield*, 1 Camp. 120. *Atkins* v. *Curwood*,[1] 7 C. & P. 756.

(*d*) Ibid.

(*e*) Ibid.

(*f*) *Scott* v. *Manby*, 1 Sid. 118.

(*g*) *Fowles* v. *Dineley*, Str. 1122.

(*h*) 1 Bl. Comm. 429. See 5 T. R. 679.

(*i*) B. N. P. 136, as decided in *Ross* v. *Noel*, 31 Geo. 2, C. B., on a case reserved. It is added, that it was also said that it would be wrong in the case of a third person; but it seems that there is no difference between the two cases, if the delivery be on the request of the defendant. But see *Ramsden* v. *Ambrase*, Str. 127; B. N. P. 136; *Harris* v. *Collins*, Ibid.; 1 Sid. 145; Com. Dig. Action on the Case on Assumpsit.

(*k*) B. N. P. 135. *Morris* v. *Martin*, Str. 647. *Child* v. *Hardyman*, 2 Str. 875. *Todd* v. *Stokes*, 1 Ld. Raym. 444. 12 Mod. 244. 1 Salk. 116. *Car* v. *King*, 12 Mod. 372. In the case of *Manby* v. *Scott*, 1

(1) {And if a tradesman bring an action against a husband for goods furnished to his wife while she was living apart from her husband, it is for him, the tradesman, to show that her so living proceeded from some cause, which would justify it. *Mainwaring* v. *Leslie*, 2 Carr. & Payne, 507.}

(2) [In Massachusetts, since st. 1805, c. 57, a wife divorced *a mensa et thoro*, may maintain an action against the husband for alimony decreed to her. *Howard* v. *Howard*, 15 Mass. Rep. 196. And in South Carolina, she may, by *prochein ami*, maintain an action in her own name, against a sheriff, for an escape of her husband, committed by attachment for not performing a decree for alimony. *Prather* v. *Clarke*, 1 Const. Rep. 453.]

[1] Eng. Com. Law Reps. xxxii. 721.

that since the separation she has lived in a state of adultery, although she did not elope with the adulterer (*l*) (A). And in such cases, notice to the tradesman *of the fact of elopement, or of the adultery, is immaterial (*m*); for the legal obligation to maintain the wife, which alone in this case raises the implied promise, ceases. But although the wife elope, yet, if she afterwards solicit to be received, and the husband refuse, the legal obligation revives (*n*) (B). So the husband may show in defence that he allowed a separate and adequate (*o*) maintenance to the wife: but in this case, it has been held to be

Defence by the husband. *545

Lev. 4, the tradesman trusted the wife after she had gone away, *without her husband's consent*, and after an *express prohibition* on his part; and it was held that the husband was not liable (1 Lev. 4; 1 Sid. 109). The Judges of the Court of K. B. were divided upon the question; but in the Exchequer it was decided in favour of the husband, by eight Judges (one of whom was L. C. B. Hale) against three; but Atkyns, J. one of the eight, differed from the three on the ground of the special prohibition. Proof of prohibition by the husband will not alone be sufficient to discharge him.

(*l*) *Mainwaring* v. *Sands*, Str. 706. *Govier* v. *Hancock*, 6 T. R. 603. Although, when he turned her out of doors, there was no imputation upon her conduct, (Ibid.) But where, after the defendant's wife had committed adultery, he left her in the house with two children bearing his name, and without making any provision for her, and she continued to live in a state of adultery, the Court of C. P. held that he was liable for necessaries, in the absence of proof that the plaintiff knew or ought to have known the circumstances. *Norton* v. *Fazan*, 1 B. & P. 226. Where the husband is not civilly liable for necessaries to the wife, on account of her having quitted him and lived in adultery, he cannot be charged criminally under the Vagrant Act for neglecting and refusing to maintain her. *Rex* v. *Flinton*,[1] 1 B. & Ad. 226. *Ewers* v. *Hutton*, 3 Esp. C. 255. The proper construction of the statute 13 Ed. I, is, that if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited. *Hethrington* v. *Graham*,[2] 6 Bing. 135, and 3 M. & P. 300.

(*m*) Per Raymond, C. J. Str. 706; and Ld. Holt always ruled it so. Per Raymond, C. J. *Morris* v. *Martin*, Str. 647; and *Child* v. *Hardyman*, Str. 875. The previous adultery of the wife, or the fact that she was then living in adultery, is no defence for a trustee in an action on a bond for securing an annuity to the wife. *Field* v. *Serres*, 1 N. R. 121; and see Moore, 683.

(*n*) Where the wife had left the husband in consequence of some violence, and resided, with his knowledge, at the plaintiff's house, and he refused to receive her back unless she would give up certain property; held, that being bound to maintain her without any such condition, and having never offered to take her back, he was liable for necessaries. (Cor. Parke, J.) *Reed* v. *Moore*,[3] 5 C. & P. 200. But he will not be liable to any extent if she be living apart in adultery; the verdict, however, in an action for *crim. con.* being *inter alios partes*, is not evidence in the action for such supplies; and if the husband inform the tradesman that she is living in adultery, he will not be liable beyond necessaries, although he does not prove the adultery. *Hardie* v. *Grant*,[4] 8 C. & P. 512.

(*o*) *Ewers* v. *Hutton*, 3 Esp. C. 255; *Hodgkinson* v. *Fletcher*, 4 Camp. 70. In an action for coals supplied to the wife, living separate, held that he was liable, unless the wife be shown to have a competent provison, and it lies on him to show that, and a mere notice that he will not pay is not sufficient to relieve him from the liability: where the tradesman served both, and agreed with the husband not to charge him with the goods supplied to the wife, he cannot recover from the husband. *Dixon* v. *Hurrell*,[5] 8 C. & P. 717. A bond by the husband reciting an instrument for separation, and covenanting for payment of an annuity, is valid. *Jee* v. *Thurlow*,[6] 2 B. & C. 547. And a plea of adultery committed by the wife is no bar. Ibid. And see *St. John* v. *St. John*, 11 Ves. 537. *Seagrove* v. *Seagrove*, 13 Ves. 439. *Worral* v. *Jacob*, 3 Mer. 456. In *Durant* v. *Titley*, 7 Price, 577, the deed of a husband covenanting with a trustee for the payment of an annuity to the wife *in case they should live separate*, was held to be void, as being contrary to the policy of marriage. *Secus*, where the deed is not prospective, but where the husband covenants, on an agreement to separate, to pay an annuity. *Jee* v. *Thurlow*,[6] 2 B. & C. 547. Where it was found that during their cohabitation a deed was executed not intended to be accompanied with immediate separation, held that it was void. *Hindley* v. *Lord Westmeath*,[7] 6 B. & C. 200. Courts of equity will enforce deeds of separation, and the performance of covenants for payments to a trustee, except as against creditors of the husband; and the want of an indemnity by the trustee to the husband held not to affect the right. *Ross* v. *Willoughby*, 10

(A) (*Hunter* v. *Boucher*, 3 Pick. R. 289.)

(B) (In an action against a husband for necessaries furnished to his wife, after evidence of the marriage, of their living apart without suspicion that they were man and wife, and of a libel by the wife for a divorce, evidence is admissible on behalf of the plaintiff to show that the wife had solicited the husband to receive her again as his wife, and had offered to return and live with him as such, and he refused to receive her. *Cunningham* v. *Irwin*, 7 Serg. & R. 247. [*M'Cutcher* v. *M'Gahay*, 11 Johns. 281. And where a third person went to the husband repeatedly, and requested him to let his wife return, which he refused, without questioning the authority by which the request was made, it was held to be tantamount to a personal application by the wife, and that the husband thereafter became liable for necessaries furnished to her. *M'Gahay* v. *Williams*, 12 Johns. 293].)

[1] Eng. Com. Law Reps. xx. 380. [2] *Id.* xix. 31. [3] *Id.* xxiv. 277. [4] *Id.* xxxiv. 506. [5] *Id.* xxxiv. 599. [6] *Id.* ix. 174. [7] *Id.* xiii. 141.

necessary to show that the tradesman had notice of the separate maintenance (*p*). But it was held by Lord Holt to be sufficient to show that the fact was notorious in the place where the husband resided (*q*). And it
*546 has *since been held that such notice is unnecessary (*r*). It is not necessary for the husband to prove that he executed a deed, or even a written instrument, to secure the maintenance to the wife (*s*). But the formal execution of such a deed by the husband and trustee of the wife will be no defence, unless the husband prove that he actually *paid* the allowance (*t*). He is liable for necessaries supplied to her previous to a decree for alimony in the Ecclesiastical Court, although alimony is decreed from a time previous to the supply (*u*).

The husband may also show that his wife has separate funds of her own, adequate to her maintenance according to his situation in life; for although she does not derive that provision from him, he is not liable unless her funds be inadequate (*v*). The adequacy of the allowance, and of the separate funds of the wife, is a question of fact for the jury (*x*). The receipts of the wife are not evidence to prove that the maintenance has been paid (*y*). It is no defence to show that the defendant was not really married to the woman with whom he cohabits as his wife, even although he can prove that the plaintiff knew the fact; for the implied promise results from the presumption of authority given by the defendant to the wife; and if the defendant treat a woman as his wife in the face of society, the presumption of authority arises independently of the fact of marriage (*z*). But although the parties have long cohabited as husband and wife, it is, it seems, a good defence, where goods are supplied to the supposed wife after separation, to show that she is not in fact the wife of the defendant (*a*). For in case of separation, the implied promise rests, it seems, upon the legal

Price, 1. The adequacy of the maintenance is a question of fact for the jury. *Hodgkinson* v. *Fletcher*, 4 Camp. 70. If, in consideration of the wife proceeding no further in the prosecution of an indictment for an assault, the husband agree to secure her an annuity, it is an illegal contract, and, in a creditor's suit, she is not entitled to come in as a creditor. *Garth* v. *Earnshaw*, 3 Y. & C. 584.

(*p*) *Rawlins* v. *Vandyke*, 3 Esp. C. 250, cor. Ld. Eldon. In the case of *Turner* v. *Winter*, cited Sel. N. P. 262, Ld. Mansfield, C. J. is said to have nonsuited the plaintiff, because, on separation, the defendant had agreed to make the wife an allowance, and had regularly paid it.

(*q*) *Supra*, 541. If the liability of the husband in such case depended on a presumption of authority delegated by him to the wife, such notice would obviously be material for the purpose of negativing the presumed authority. But *qu.* whether the liability of the husband, where the wife lives apart, depends upon that principle; if it did, the husband might discharge himself by giving express notice not to trust her, which he cannot do; and it would be no defence to show that the wife had eloped, or lived in adultery, without notice of the fact to the plaintiff. As the liability of the husband in case of separation seems to rest on the legal obligation to maintain the wife, must not (in principle) the *implied assumpsit* cease when the obligation is at an end?

(*r*) *Supra*, 542 (*l*).

(*s*) *Hodgkinson* v. *Fletcher*, 4 Camp. 70. But see *Ewers* v. *Hutton*, 3 Esp. 255; where Lord Eldon held that a deed of separate maintenance, executed by the husband and wife only, was a nullity; but in that case, it is to be observed, there was no evidence of any actual payment of the maintenance.

(*t*) *Nurse* v. *Craig*, 2 N. R. 148, by three of the Judges of C. B., Sir J. Mansfield, C. J. *dissent.* This was a strong case: the wife's trustee under the deed, with whom the husband had covenanted to allow her maintenance, brought *assumpsit* for necessaries supplied to the wife; and it was held that the action lay, the husband not having paid the stipulated maintenance. [See *Lockwood* v. *Thomas*, 12 Johns. 248.]

(*u*) *Houliston* v. *Smith*,[1] 3 Bing. 127.

(*v*) *Liddlow* v. *Wilmot*,[2] 2 Starkie's C. 86, *cor.* Ld. Ellenborough; and by Lord Tenterden in *Clifford* v. *Laton*,[3] 1 M. & M. C. 101. The plaintiff knew that she had resources of her own independent of her husband. So in the Ecclesiastical Court the wife is at all times entitled to have her costs taxed, since the marriage gives all the property to the husband; but where she has separate property the privilege does not apply. *Beevor* v. *Beevor*,[4] 3 Phill. 461. *Thomson* v. *Harvey*, 4 Burr. 2177.

(*x*) 4 Camp. 70; [2] 2 Starkie's C. 86. (*y*) 4 Camp. 70.

(*z*) *Norwood* v. *Stevenson*, Andr. 237. *Watson* v. *Threlkeld*, 2 Esp. C. 637. *Munro* v. *De Chemant*, 4 Camp. 215; but see *Robinson* v. *Nahon*, 1 Camp. 245.

(*a*) *Munro* v. *De Chemant*, 4 Camp. 215, *cor.* Ld. Ellenborough.

[1] Eng. Com. Law Reps. xi. 64. [2] *Id.* iii. 258. [3] *Id.* xiv. 188. [4] *Id.* i. 403.

obligation to maintain the wife, and that obligation must be founded on a legal marriage. The husband is not liable, as upon an implied *assumpsit*, to maintain his wife's children by a former husband (*b*). But an implied promise may arise from his conduct, as where he adopts the children, receives them into his family, and treats them as part of it, and stands in *loco parentis* (*c*); even although the contract for necessaries be made by the wife during his absence from home (*d*).

*The husband may, it seems, in answer to an action of *assumpsit*, on an agreement to allow the plaintiff 12*s*. a week for the use of the wife, prove her adultery under the general issue, without a special plea (*e*). But the declarations of the wife are not, it seems, admissible to prove the fact of adultery (*f*). *547

Against the wife alone.

Where there is a cause of action *against the wife*, as upon her contract before marriage or a tort committed by her during marriage (*g*), and she is sued alone, the coverture is no defence on the evidence, unless it be pleaded in abatement (*h*).

Where there is no cause of action against the wife by reason of the coverture, she cannot now give the coverture in evidence under the plea of *non est factum*, or of the general issue (*i*) (1). And she is not estopped from setting up such a defence by proof that she had declared herself to be a widow, and that she had executed deeds and carried on lawsuits under that description (*k*). If she make a demise of her land jointly with her husband, her agreement to the deed after his death will affirm it (*l*), although there be no re-execution (*m*), and although the demise be not warranted by the stat. 32 H. 8, c. 28 (*n*). And such agreement may be proved by circumstances, as by a re-delivery of the deed (*o*).

Upon the principle of common law, the wife of one who has abjured the

(*b*) *Tubb* v. *Harrison*, 4 T. R. 118. *Cooper* v. *Martin*, 4 East, 76. And the husband may maintain an action for the amount of necessaries on an express *assumpsit* by such child, made after he has attained his age.

(*c*) *Stone* v. *Carr*, 3 Esp. C. 1.

(*d*) Ibid. and per Lord Ellenborough, *Cooper* v. *Martin*, 4 East, 76.

(*e*) *Scholey* v. *Goodman*,[1] 1 Bing. 349. (*f*) Ibid.

(*g*) Com. Dig. *Baron and Feme*, Y.; *& supra*, 534.

(*h*) Com. Dig. *Pleader*, 2 A. 1. Ibid. *Abatement*, F. 2, 3 T. R. 631. And in that case the civil death of the husband by abjuration, transportation, &c. may be replied (vide *infra*, 547, note (*q*),) or that he is an alien enemy and out of the realm (1 Salk. 118). It is now perfectly settled, that in other cases the husband must be joined, although she is separated from her husband, and has a separate maintenance by deed (*Marshall* v. *Rutton*, 8 T. R. 545), or live in adultery, and separate from her husband (*Gilchrist* v. *Brown*, 4 T. R. 766), or be divorced *a mensa et thoro* for adultery. *Lewis* v. *Lea*,[2] 3 B. & C. 291; and see *Hatchett* v. *Baddeley*, 2 Bl. 1082. *Hyde* v. *Price*, 3 Ves. 443. A warrant of attorney executed by a feme covert, held invalid, although at the time divorced *a mensa et thoro*. *Faithorne* v. *Blaquire*, 6 M. & S. 73.

(*i*) Under the new rules, Hil. T. 4 W. 4. It was formerly otherwise. B. N. P. 172; *supra*, tit. Deed; Com. Dig. *Baron and Feme*, Q.; 12 Mod. 101; 1 Salk. 7; 3 Keb. 228; 2 Str. 1104.

(*k*) *Davenport* v. *Nelson*, 4 Camp. 26.

(*l*) 1 Roll. 149, l. 10, 11; Com. Dig. *Baron and Feme*, s. 1.

(*m*) Cowp. 201.

(*n*) Which authorizes leases by one of full age seised in right of his wife, or jointly with his wife, of any estate of inheritance made before coverture, or after, by writing indented under seal.

(*o*) *Goodright* v. *Straphan*, Cowp. 201.

(1) [A wife cannot in any case be sued upon a mere personal contract made during the coverture, whether joined with her husband or not, unless he be *civiliter mortuus*, or banished, or transported. *Edwards* v. *Davis*, 16 Johns. 281. Thus where husband and wife execute a conveyance in which they both covenanted with the grantee, the wife cannot be joined with the husband in an action for breach of the covenant. *Whitbeck* v. *Cook*, 15 Johns. 483. *Colcord et al.* v. *Swan & ux.* 7 Mass. Rep. 291. *Parsons* v. *Plaisted & al.* 13 Mass. Rep. 189. *Pell & ux.* v. *Pell & ux.* 20 Johns. 126. See *Ela* v. *Card & al.* 2 N. Hamp. Rep. 176.

It seems that judgment cannot be entered against the husband and wife on a warrant given by the wife *dum sola*. *Anon.* 2 Penn. Rep. 973. See also *Ivins* v. *French*, 2 Halstead's Rep. 27.]

[1] Eng. Com. Law Reps. viii. 432. [2] *Id.* x. 84.

realm (*p*) is liable in respect of a cause of action subsequent to such abjuration. There seems to be no instance in which it has been held that the wife of an Englishman who resides abroad is liable (*q*).

*548 *The defendant may prove her coverture by the usual presumptive evidence of marriage, as well as by direct proof (*r*). Proof that the husband was alive within seven years of the time when the debt was contracted will be sufficient (*s*). Mere acknowledgements of the marriage by the defendant and her alleged husband are insufficient (*t*).

Indictment against husband and wife.

III.—In general, it seems that a wife may be indicted, even for felony, jointly with the husband (*u*); but if it appear on the evidence upon an indictment for any felony, except murder or homicide (*x*), that the husband was *present* when the offence was committed, and acted in the commission of it, the wife, it seems, ought to be acquitted, on the presumption that she acted under the coercion of her husband (*y*) (1). This practice, however, of acquitting the wife in cases of all felonies except murder, seems to have been encouraged out of tenderness to her sex, and in order to obviate the unjustifiable rigour of the law, which would, for the same felony, have saved the husband by admitting him to the benefit of the clergy, whilst the

(*p*) *Lean* v. *Schutz*, 2 Bl. 1199; 4 B. & C. 297. So of one transported for a term. *Carrol* v. *Blencowe*, 4 Esp. C. 27. *Walford* v. *Duchesse de la Pienne*, 2 Esp. C. 554. Lord Kenyon in that case held, that if an emigrant left his wife in this country and resided abroad, it was tantamount to an abjuration by a native, and that the wife might be sued as a feme sole. And see *Franks* v. *Duchesse de la Pienne*. But in a later and similar case Lord Ellenborough held that the wife was not so liable, and his ruling was confirmed by the Court in the case of *Kay* v. *The Duchesse de la Pienne*, 3 Camp. 123. A temporary absence from this country is not sufficient to render the wife liable, even although the husband be a foreigner. *Walford* v. *The Duchesse de la Pienne*, 2 Esp. C. 554. *Franks* v. *Same*, Ib. 587. [See *Commonwealth* v. *Cullins*, 1 Mass. R. 116.]

(*q*) Per Heath, J. in *Marsh* v. *Hutchinson*, 2 B. & P. 226. An Englishman may be compelled to return at any time by the King's privy seal (Ibid.) See *Marsh* v. *Hutchinson*, 2 B. & P. 226. In that case the husband, an Englishman, had resided in Holland for ten years, and had become possessed of Madder-grounds there, from the cultivation of which he derived considerable profit; three or four years before the action was brought, he sent the defendant and his family to England, where his wife resided as a married woman; the husband remained in Holland to look after his madder-grounds, and also in order to recover a situation which he had held as agent for the English packets at the Brill, in case the intercourse between the two countries should be re-established. It was held that the wife was not liable in an action for coals supplied to her under those circumstances. In the case of *De Gaillon* v. *Victoire Harel L'Aigle* (1 B. & P. 357), where the replication stated that the husband resided abroad, and that the defendant lived separate from him, and traded in this country as a feme sole, and that the plaintiff traded with and gave credit to her as a feme sole, the defendant was held to be liable; but Heath, J. afterwards (1 N. R. 80) said that the decision proceeded much upon the ground that the husband was a foreigner. [See *Gregory* v. *Paul*, 15 Mass. R. 31.] In the case of *Farrer* v. *The Countess of Granard* (1 N. R. 80), a replication, alleging that the husband resided in Ireland, and that the defendant lived in this country separate from him as a single woman, and as such promised, &c., was held to be bad on demurrer. And see *Stretton* v. *Bushach*,[1] 1 Bing. N. C. 139; *Bogget* v. *Frier*, 12 East, 301; *Marshall* v. *Rutton*, 8 T. R. 545. A divorce *a mensa et thoro* does not render the wife liable as a feme sole. *Lewis* v. *Lee*,[2] 3 B. & C. 291. But a divorce *ab initio* renders her a single woman by operation of law, as if she had always been single. *Ansley* v. *Manners*,[3] Gow. 11.

(*r*) *Kay* v. *Duchesse de la Pienne*, 3 Camp. 123. *Leader* v. *Barry*, 1 Esp. C. 353. *Bick* v. *Barlow*, 1 Doug. 171.

(*s*) *Hopewall* v. *De Pinne*, 2 Camp. 113. (*t*) *Wilson* v. *Mitchell*, 3 Camp. 394.

(*u*) 1 Hale, 46, 516; Dalt. 104; 22 Edw. 4, 7. But not, it seems, as an accessory in receiving felons.

(*x*) The same rule applies in the case of an indictment for a misdemeanor, except in such cases as are afterwards mentioned. As in the case of an indictment for uttering counterfeit coin. *Infra*, 549.

(*y*) 1 Hale, 44, 5, 6, 7; 1 Bl. Comm. 28. It seems that the allegation in the indictment, that she is the wife, sufficiently shows the fact. *R.* v. *Knight*,[4] 1 Carr. & P. 116. Central Court, March, 1837; the husband and wife were indicted for a *misdemeanor* in uttering counterfeit coin, and held that the wife was entitled to be acquitted on the presumption of coercion. *Cor.* Mirehouse, C. S., after consultation with Bosanquet and Coltman, Js. Where a prisoner was described in the indictment as a single woman, but had been described by all the witnesses as the wife of the other prisoner, and passed and appeared as such, it was held that if the jury were satisfied that she was so in fact, they ought to acquit, notwithstanding she had pleaded to the indictment. *R.* v. *Woodward and another*,[5] 8 C. & P. 561.

(1) [*Commonwealth* v. *Trimmer & al.* 1 Mass. Rep. 476, in case of larceny. *Martin* v. *Commonwealth & al.* Ibid. 391.]

[1]Eng. Com. Law Reps. xxvii. 335. [2]*Id.* x. 84. [3]*Id.* v. 441. [4]*Id.* xi. 335. [5]*Id.* xxxiv. 524.

wife must have suffered death (*z*). But, on account of the heinousness of the offence, this doctrine does not extend to cases of murder (*a*), or manslaughter, nor to that of treason (*b*); neither does it extend to assaults and batteries (1), or, as it seems, *to any other forcible and violent misdemeanors committed jointly by the husband and wife. So she may be convicted jointly with him upon an indictment for keeping a bawdy-house, such offences being, it is said, usually carried on by the intrigues of her sex (*c*). And it seems that the presumption does not arise in any case unless the husband be actually present when the felony is committed (*d*); for then only is she supposed to act under such coercion as will absolve her from the consequence of her act (*e*). And formerly, it seems, that even in cases of larceny and burglary both might be convicted of the joint offence (*f*). But in the time of Ld. Hale, it had become the settled practice in such cases to acquit the wife peremptorily (*g*). But Ld. Hale, although he admitted that the practice had prevailed, and approved of it, because it operated in *favorem vitæ*, was yet very strongly of opinion that it was a mere *primâ facie* presumption (*h*). A wife cannot be convicted of setting fire to her husband's house, with intent to injure him; to constitute the offence the intent must be to injure or defraud some third person, not one identified with herself (*i*). Where a wife commits a felony or other crime in the absence of her husband, although by his command, she is liable to be convicted (*k*). And she may be convicted as a principal in the felony, and the husband as an accessory before the fact (*l*). *549

Presumption as to coercion.

If the husband commit felony or treason, the wife is not guilty of either in receiving him, for she is *sub potestate viri*, and bound to receive him (*m*); but it is otherwise if the husband in such cases knowingly receive the wife (*n*). And it has been held that an indictment charging her jointly with the husband as an accessory after the fact, in receiving felons, is vitious (*o*); for the act is adjudged in law to be entirely the act of the husband (*p*).

Competency.

IV. The husband and wife cannot be witnesses *for* each other, for their interests are identical; nor *against* each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and

(*z*) Hale, 46.

(*a*) Where the husband and wife were indicted for the murder of an apprentice to the husband, and it was proved that the deceased died from want of proper necessaries, and not from wounds, Lawrence, J. directed the wife to be acquitted, because it was the duty of the husband to provide food; although if he had provided food, and she had withheld it, she would have been guilty. *R.* v. *Squires*, Stafford Lent Assizes, 1792; Russel, 25. The Earl and Countess of Somerset were jointly convicted as accessories before the fact to the murder of Sir Thomas Overbury. 1 St. Tr. 351; 1 Hale's P. C. 45.

(*b*) *Arden & Somerville's Cases*, 1 And. 104.

(*c*) Haw. B. 1, c. 1, s. 12; 3 Salk. 384. (*d*) Hale's P. C. 45; Kel. 31.

(*e*) *Hughes's Case*, *cor.* Thompson, B., Lanc. Lent Ass. 1813; *supra*, tit. Forgery; 1 Hale, 46; Kel. 37; 2 East's P. C. 559. But see 27 Ass. 40.

(*f*) Bract. l. 3, c. 32, s. 10; Dalt. c. 104.

(*g*) 1 Hale, 45; and see 2 Edw. 3, Corone, 160, *accord.*

(*h*) 1 Hale, 45 & 516. (*i*) *March's Case*, 1 Ry. & M. C. C. 183.

(*k*) 1 Hale, 45.

(*l*) *R.* v. *Morris*, 2 Leach, 696; *supra*, tit. Accessory.

(*m*) 1 Hale, 47. (*n*) Co. P. C. 108; 1 Hale, 47.

(*o*) *R.* v. *Dey & ux.*, M. 37, E. 3; 1 Hale, 47.

(*p*) 1 Hale, 48. Where the charge of receiving stolen goods was joint against husband and wife, and it had not been left to the jury to say whether she received them in the absence of the husband, it was held, that she could not be properly convicted, although she had taken a more active part than he had done. *Archer's Case*, 1 Ry. & M. C. C. 146.

(1) [In *Commonwealth* v. *Neal et ux.* 10 Mass. Rep. 152, it was held that a feme covert is not indictable for an assault and battery committed in the company and by the command of her husband.]

occasioning perjury (*q*). So important is this rule, that the law will not allow it to be violated, even by agreement; the wife cannot be examined against her husband, although he consent (*r*); and the principle is further preserved by adhering to the rule even after the marriage tie has been dissolved by the death of one of the parties, or by a divorce for adultery (*s*). The application of these principles will be considered as they relate to the following classes of cases:

*550 *1. Where the husband or wife is a party.
2. Where one of them, not being a party, is interested in the result of a proceeding between others.
3. Where neither of them is a party to the suit, or interested in the event.

Where one of them is a party.

1. Where either of them is a party the rule seems to be universal, that the other is altogether incompetent in either civil or criminal proceedings (A) (1). In an action by the plaintiff, as a feme sole, for goods sold and delivered, the husband is not competent to defeat the action by proof of the marriage (*t*).

Upon an indictment for bigamy, the real wife is incompetent; and the second wife is also incompetent until the first marriage has been established (*u*); so in a criminal case the wife is not a competent witness against any co-defendant tried with her husband, if the testimony concern the husband, although it be not given *directly* against the husband (*x*); nor for a co-defendant if the evidence tend to the husband's acquittal, as in the case of conspiracy, where the acquittal of the co-defendant would enure to the acquittal of the husband (*y*); or of an assault, where the cases of the co-defendants cannot be separated (*z*) (2); and where the wife would be incompetent as a witness, on such grounds, her examination (*a*) or admission cannot be read (*b*), or given in evidence, except in cases where she is proved to have been constituted the agent of her husband, and then her acknowledgement or admission stands upon the same ground with that of

(*q*) 2 Haw. c. 46; 2 Hale, 279; 2 Str. 1095; Co. Litt. 6, 112, 187. *Supra*, Vol. I.
(*r*) *Barker* v. *Dixie*, R. tem. Hardw. by Ld. Hardwicke, 264.
(*s*) See *Aveson* v. *Lord Kinnaird*, 6 East, 192.
(*t*) *Bentley* v. *Cooke*, Brownl. 47. The defendant's wife cannot be examined for the plaintiff without the defendant's consent, although the marriage has taken place since she was subpœnaed. *Pedley* v. *Wellesley*,[1] 3 C. & P. 558.
(*u*) *R.* v. *Griggs*, 1 Raym. 1; 1 Inst. 6. b.; Gilb. Ev. 252. R. v. *Cliviger*, 2 T. R. 265.
(*x*) 1 Hale, 301; 2 Hale, 201; Dalt. c. 111; 2 T. R. 268; 4 T. R. 678. [*Comm.* v. *Easland*, 1 Mass. R. 15.]
(*y*) Per Ld. Ellenborough, *R.* v. *Locker & others*, 5 Esp. C. 107. *R.* v. *Frederick*, Str. 1095.
(*z*) *R.* v. *Frederick*, Str. 1095.
(*a*) Hutt. 16; B. N. P. 287; 1 T. R. 69; 1 Burr. 635; Brownl. 47.
(*b*) 2 Ch. C. 39; B. N. P. 286.

(A) (*Snyder* v. *Synder*, 6 Binn. 488; *Griffin* v. *Brown*, 2 Pick. R. 304; *Fitch* v. *Hill*, 11 Mass. R. 286. *Comm.* v. *Easland*, 1 Mass. R. 15; *Daniel* v. *Proctor*, 1 Dev. 428. But in some cases, the wife may be a witness, under peculiar circumstances, where the husband may be interested in the question, and, to some extent, in the event of the cause. *Stein* v. *Bowman et al.* 13 Peters, 209.)

(1) [In the case of *Stanton* v. *Wilson & al.* 3 Day, 37, a widow, administratrix of her last husband, sued the executors of her first husband (from whom she was divorced,) in an action of *book debt*, and was held to be a competent witness in support of the charges on book—they having accrued after her divorce, and the last husband being himself, while alive, a competent witness in that form of action—by a statute of Connecticut.]

(2) [Where two are jointly indicted, but are separately tried, the wife of the defendant not on trial may be a witness on the trial of the other. *The State* v. *Anthony*, stated ante, p. 412, *note* (2).]

[a] In ejectment, tenant's wife not competent for him. *Pipher* v. *Lodge*, 16 Serg. & Rawle, 214.

[1] Eng. Com. Law Reps. xiv. 448.

any other agent (*c*). An admission by the wife, even of a trespass committed by herself, is not evidence to affect the husband (*d*) (1).

2. Where one of them, not being a party, is interested in the result.— Here there is a distinction between the giving evidence *for*, and giving it *against*, the other. It is an invariable rule that neither of them is a witness for the other who is interested in the result, and that where the husband is disqualified by his interest, the wife is also incompetent (*e*). Thus the wife of a bankrupt cannot be examined as to the bankruptcy of her husband (*f*). The husband is an incompetent witness for the wife, where her separate estate is concerned (*g*). In an action by a trustee for the wife against the sheriff, for taking goods the separate property of the wife, under an execution against the husband, the latter was held to be an incompetent witness for the plaintiff, on the ground of the wife's interest, although he had an interest on the other side, in having the debt satisfied by the execution (*h*). Where a carrier brought an action to recover the value of a box belonging to the husband which had been delivered by a mistake to a wrong person, the wife of the owner of the box was held to be incompetent (*i*). The interest of the *husband must, in order to disqualify the wife, be vested and certain; the mere expectation and hope on her part of benefiting her husband, when she gives evidence against an accomplice of the husband (the latter having been convicted), will not destroy her competency (*j*).

Where one not being a party is interested in the result.

Nature of the interest.

*551

On the other hand, where the interest of the husband, consisting in a civil liability, would not have protected him from examination, it seems that the wife must also answer, although the effect may be to subject the husband to an action (A). This case differs very materially from those where the husband himself could not have been examined, either because he was a party, or because he would criminate himself. The party to whom the testimony of the wife is essential has a legal interest in her evidence; and as he might insist on examining the husband, it would, it seems, be straining the rule of policy too far to deprive him of the benefit of the wife's testimony. In an action for goods sold and delivered, it has been held that the wife of a third person is competent to prove that credit was given to her husband (*k*) (2).

(*c*) See tit. AGENT.

(*d*) *Denn* v. *White*, 7 T. R. 112. [*Hawkins* v. *Hatton*, 2 Nott & M'Cord, 374.]

(*e*) Ld. Raym. 744; Str. 1095.

(*f*) 1 P. Wms. 610, 611; 12 Vin. Ab. pl. 28; 1 Brownl. 47.

(*g*) 1 Burr. 424.

(*h*) *Davis* v. *Dinwoody*, 4 T. R. 678. The wife was, in fact, the real plaintiff in the action. See *Bland* v. *Ansley*, 2 N. R. 331.

(*i*) This may be used as an illustration of the rule, although there may be a doubt whether the husband himself would have been incompetent; for in an action against the carrier the record would not have been evidence further than to show that such a trial was had, and such a sum recovered, and the husband must have proved his case *aliunde*. Ld. Raym. 344.

(*j*) *R.* v. *Rudd*, Leach, C. C. L. 133.

(*k*) B. N. P. 287. *Williams* v. *Johnson*, cor. King, C. J.; 1 Str. 504.

(A) (See *Fitch* v. *Hill*, 11 Mass. R. 286.)

(1) [An acknowledgement by the wife is not sufficient to establish an account against her husband, though it be for articles furnished her before the marriage. *Sheppard's Ex'ors* v. *Starke & ux.*, 3 Munf. 29. Declarations of a wife, made in the absence of the husband, and affecting his interests, are not evidence, though the wife is party to the suit which is brought to recover land, in which she is jointly interested in her own right. *Lessee of Moody* v. *Fulmer*, Sup. Ct. of Pennsylvania, June, 1814. Wharton's Digest. 249.] {*Turner et ux.* v. *Coe et al.* 5 Conn. Rep. 93.}

(2) {See the reasons stated for the doctrine, 2 Pick. Rep. 308.} [In suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a competent witness. *Baring* v.

In an action by a trustee under a separation agreement, against a husband, for the arrear of a weekly sum he had agreed to allow his wife; the declarations of the wife are not evidence to show that during the time in respect of which the demand was made she was living in adultery (*l*).

Where neither is a party, or interested in the result.

3. Where neither of them is either a party to the suit, or interested in the general result, the husband or wife is, it seems, competent to prove any fact, provided the evidence does not directly criminate the other, or, as it seems, involve the disclosure of some communication made by the other. It has, indeed, been said, that the rule applies to all evidence which tends collaterally, and by its connection with some other circumstances, to criminate the husband or wife of the witness, although the fact itself, abstractedly considered, involves no criminality, because it may lead to a criminal charge, and to the apprehension of the other (*m*): and therefore, that if the evidence *tend* to criminate the other, it is not admissible (1). Accordingly, it was held, in a settlement case, that a witness was not competent to prove her previous marriage with a man who had been removed as the husband of another woman, along with the latter. Here the rule seems to have been carried further than the principle will warrant: such evidence induces no breach of that confidence between married persons which ought to be held sacred; and neither that evidence, nor any decision founded upon it, can be afterwards used against the other party as proof of the fact.

The position laid down in the case of *The King* v. *Cliviger*, and which certainly seems to be too extensive and too indefinite, has been materially contradicted in the later case of *The King* v. *The Inhabitants of All Saints, Worcester* (*n*). The respondents removed a pauper to the place of her maiden settlement, and produced Ann Willis to prove her own marriage with G. Willis. The appellants objected, on the ground that they intended to prove the subsequent marriage of G. Willis with the pauper. The sessions received the evidence of Ann Willis, who proved the mar-
*552 riage. The *respondents then proved the maiden settlement of the pauper in the appellant parish, and her marriage with G. Willis subsequently to the first marriage (*o*); the appellants then objected, that the testimony of

(*l*) *Schooley* v. *Goodman*,[1] 1 Bing. 349.
(*m*) By Ashurst and Buller, Justices, in *R.* v. *Cliviger*, 2 T. R. 263.
(*n*) K. B. Easter Term, 1817; Phil. on Ev. 82.
(*o*) This proof, it seems, ought properly to have come from the appellants.

Reader, 1 Hen. & Mun. 154. Thus in trover by *A.* against *B.* for goods which had been lent by *B.* to the wife of *C.*, and conveyed by *C.* to *A.*, the wife of *C.* is a competent witness. Ibid. So in an action on a note given to the wife *dum sola*, and indorsed by her husband, she may be a witness to prove payment of the note before the indorsement. *Fitch* v. *Hull & ux.* 11 Mass. Rep. 286.

A second husband, surviving his wife who was administratrix of her first husband, is a competent witness for her surety, in an action on the administration bond. *Wallis* v. *Britton*, 1 Har. & J. 478. So the husband of the widow of the ancestor of the plaintiff's lessor is a competent witness for the plaintiff in ejectment. *Beatty* v. ——, 1 Taylor, 9. In ejectment, the wife of *A.*, the plaintiff's father, was held to be a competent witness to prove the destruction by *A.* of the will of the plaintiff's grandfather, although she had released her dower in the premises to the defendant who was her husband's grantee. *Wilmot* v. *Talbot*, 3 Har. & M'Hen. 2. But in ejectment by the children of *A.* to recover land which had been sold under the order of Orphans' Court, alleged to be void; one who had married the widow of *A.* was held not to be a competent witness for the plaintiffs, though he had executed a release of all interest of dower or otherwise. *Lessee of Snyder & al.* v. *Snyder*, 6 Binn. 488. See *Boltz & al.* v. *Ballman*, 1 Yeates, 534. *Lessee of Gallaher* v. *Rogers*, 1 Yeates, 390.]

(1) [In an indictment for a forcible entry, the wife of the prosecutor was allowed by M'Kean, C. J. as a witness to prove the *force*: but only the force. *Respublica* v. *Shryber & al.* 1 Dallas, 68. On an indictment for adultery, the husband of the woman, with whom the crime is alleged to have been committed, cannot be a witness for the prosecution. *The State* v. *Gardiner*, 1 Root, 485. S. P. *Commonwealth* v. *Shriver*, Quarter Sessions, Philadelphia, 1820. Wharton's Digest, 265.]

[1] Eng. Com. Law Reps. viii. 432.

Ann Willis ought to be struck out. The Court of King's Bench held that the evidence was unobjectionable when received, and could not subsequently be expunged. That the evidence was admissible, since it did not directly criminate the husband, and could not afterwards be used against him, or made the ground-work of any future prosecution. The Court further intimated, contrary to the case of *The King* v. *Cliviger*, that the former wife would have been competent to prove the marriage, even although the subsequent marriage had been previously proved (*p*).

It follows from the above decision, that the rule laid down by the Court in the case of *The King* v. *Cliviger*, where it was said that the husband or wife could not be admitted to give any evidence which *tended* to the crimination of the other in collateral cases, was too general.

Even after a divorce *a vinculo matrimonii*, the woman cannot prove any contract or other matter which arose during the coverture (*q*) (1).

Wife de facto.

The general rule does not extend to a wife *de facto* but not *de jure;* and this is not an exception, but a case which does not fall within the general rule.

Upon an indictment for forcible abduction and marriage, the woman is a competent witness for the Crown. For the marriage being obtained by force, has no obligation in law (*r*), and the prisoner cannot take advantage of his own wrong (*s*) (2). So in such case it is said that she is a competent witness for the prisoner (*t*). It has, however, been said, that if the marriage *has been ratified by subsequent voluntary cohabitation, she is not *553

(*p*) In the case of *R.* v. *The Inhabitants of Bathwick*,[1] 2 B. & Ad. 639, it was held, upon a question of settlement, that the wife was a competent witness to prove her first marriage with her husband, although he had been first examined and had proved a second marriage.

(*q*) *Munroe* v. *Twisleton*, Peake's Ev. App. lxxxvii.

(*r*) Gilb. Ev. 251; *R.* v. *Fulwood*, Cro. Car. 482, 488, 489. *R.* v. *Brown*, 1 Hale, 301; 1 Vent. 243; 3 Keb. 193; 5 St. Tr. 6; Ann. 83.

(*s*) 1 Comm. 444. In *Fulwood's Case*, 1 Hale's P. C. 302, upon an indictment for a forcible abduction and marriage, it was held, that the evidence of the woman was admissible if the force be continuing upon her till the marriage; and in *Brown's Case*, Ib. and 1 East, 243, 3 Keb. 193, the evidence of the child was admitted: 1. because otherwise the stat. would be vain and useless, for possibly all that were present were of the offender's confederacy; 2. that the marriage was but *de facto*, and not *de jure;* but 3dly, principally because it was *flagrante crimine*, the child having been taken on the Thursday, married on the Friday, and seized the next day, before they had lain together, and whilst the force was continuing. There were other witnesses who proved the forcible taking, but none to prove the marriage against her will but herself. In the case of *The King* v. *Wakefield & others*, Lancaster Spring Assizes, 1827, for a conspiracy unlawfully to take Ellen Turner and procure her to be married to E. G. Wakefield, one of the defendants, proof was given that Ellen Turner, a young lady about the age of fifteen, had, under an artful contrivance and pretence, been removed by the defendants from a school in Lancashire, and taken to Scotland, where she was induced, by the pretext that it would rescue her father from ruin, to marry E. G. Wakefield. And her testimony was held by Hullock, Baron, to be admissible, even supposing the marriage to have been valid, on the principle of necessity, and also on the ground that the defendant could not by his own criminal act exclude such evidence against him; and the learned Judge referred to the cases of *R.* v. *Jagger*, cor. Lawrence, J. at York, which was the case of an attempt by the husband to poison his wife; also the case of *R.* v. *Bowes & others*, for a conspiracy to carry away Lady Strathmore, and of Lord Audley, and several instances in which a wife had been allowed to exhibit articles of the peace against her husband. The defendants were convicted, and two of them sentenced to three years imprisonment.

(*t*) *R.* v. *Perry*, Bristol, 1794, 1 Haw. P. C. c. 46, s. 79. There the testimony of the wife was admitted to show that the marriage was not forced.

(1) [In Vermont a woman divorced *a vinculo* was held (in the case of *The State* v. *J. N. B.*, 1 Tyler, 36,) to be a competent witness against her former husband, on an indictment against him for an offence committed during the coverture. But in a subsequent case she was held to be incompetent. *The State* v. *Phelps*, 2 Tyler, 374. See *Supra*, 707, *note* (1).]

(2) [On an indictment for a conspiracy in inveigling a girl, in a state of intoxication, from her mother's house, and procuring the marriage ceremony to be recited between her and one of the defendants, the girl is a competent witness to prove the facts. *Respublica* v. *Hevice & al.* 2 Yeates, 114.]

[1] Eng. Com. Law Reps. xxii. 152.

competent either for or against the prisoner (*u*); neither would she be competent, unless the force was continuing at the time of the marriage (*x*).

Competency of wife de facto.

Where a woman was called as a witness for a man with whom she had cohabited for several years as his wife, it is said to have been doubted whether she was a competent witness for him, and the Court came to no decision upon the point (*y*). In such a case, the fact of marriage seems to be the most simple and convenient, and, indeed, the legal test of competency. It appears to be clear, that the woman would be a competent witness *against* the man, notwithstanding the cohabitation; and the parties living in a state of illicit intercourse could not avail themselves of the benefits and protection which result from a lawful marriage (*z*); but if she would be a competent witness against him, it would certainly be going a great length to hold that she was not also competent for him, and to say, that because he had cohabited with her as his wife, he was to be estopped from disputing the fact where his life was at stake, and debarred from making use of her testimony when it was essential to his defence. Besides, there would be great uncertainty and difficulty in deciding upon the length of cohabitation, the nature and number of the representations made by the party, which should thus estop him. And in conformity with these principles, the case of *Batthews* v. *Galindo* was decided (*a*). It seems, however, that in one instance (*b*), Lord Kenyon refused to admit a woman to be examined as a witness for a prisoner charged with forgery, who had himself in court represented her to be his wife, but denied the marriage on hearing the objection taken to her competency.

Declarations in nature of facts.

Neither does the rule extend to declarations of the parties, which are in the nature of facts; for in such cases the presumptions which are made are not founded on the *credit* of the party but of the fact (*c*), and the objection on the score of policy is out of the question (A). Thus, the declaration of the wife at the time of effecting a policy on her life, of the bad state of her health, is evidence against her husband (*d*). So a declaration by the wife at the time of leaving her husband's house, that she fled through fear of violence, is evidence against the husband (*e*) (B).

Declarations of the wife.

Declarations made by the wife as the agent of the husband, are, as has been seen, admissible, after proof of her authority to act for her husband, just as those of any other agent are (*f*).

(*u*) *R.* v. *Brown*, Hale, 301; 1 Vent. 243; 3 Keb. 193.

(*x*) Cro. Car. 488; Vent. 243; 4 Mod. 3; Str. 633; 2 Haw. c. 46.

(*y*) *Campbell* v. *Twemlow*, 1 Price, 81. The case arose upon an arbitration, and the arbitrator had rejected the witness; but as all matters of law, as well as of fact, had been submitted to the arbitrator, his decision was considered to be final.

(*z*) See *Adey's Case*, Leach, C. C. L. 245.

(*a*)[1] 4 Bing. 610. It was there held that the mere circumstance of a woman cohabiting with a party, though it goes to her credit, is no ground for rejecting her testimony in an action to which he is party, and that it is immaterial as to the character in which she stands when the declarations are made; the true principle is, that she shall not be excluded unless *de jure* the wife of the party.

(*b*) Chester Circuit, 1782, cited by Richards, C. B. in *Campbell* v. *Twemlow*, 1 Price, 81. But in the case of *Batthews* v. *Galindo*, the doctrine laid down by Lord Kenyon was repudiated.

(*c*) *Supra*, Vol. I. tit. Hearsay. (*d*) *Aveson* v. *Lord Kinnaird*, 6 East, 188.

(*e*) Per Lord Ellenborough, in *Aveson* v. *Lord Kinnaird*, 6 East, 188.

(*f*) *Supra*, tit. Agent.—Bills of Exchange. Gilb. L. E. 183. [*Hughes* v. *Stokes*, 1 Hayw. 372.] {*Webster* v. *M Ginnis*, 5 Binn. 235; 5 Conn. R. 95.} Also *White* v. *Cuyler*, 6 T. R. 176; where, in an action of *assump-*

(A) (See *Tucket* v. *May*, 3 Dana, 79. In a suit brought by husband and wife jointly *jure uxoris*, declarations made by her not in his presence, are not evidence. *Turner* v. *Coe*, 5 Conn. R. 93.)

(B) (In an action on the case for enticing away the plaintiff's wife, the declarations of the wife, made immediately before, and at the time she left her husband, of his cruel treatment of her, are competent evidence for the defendant. *Gilchrist* v. *Bale*, 8 Watts, 355.)

[1] Eng. Com. Law Reps. xv. 58.

*The wife of a paper-maker having done an illegal act in delivering out paper before it could legally be removed according to law, stating at the time that her object was to raise money to pay duties with, former acts done by her in illegally removing paper, and depositing it for the alleged purpose of raising money to pay duties, which were in fact afterwards paid by her, are admissible in evidence to prove the authority of the husband to do the illegal act charged (*g*).

Some exceptions to the general rule are founded on evident necessity (*h*), where the fact is presumed to be exclusively within the knowledge of the wife (*i*). The wife is a witness *ex necessitate*, on a charge against her husband of violence committed on her person (*k*) (A); so the dying declarations of the wife against her husband are admissible in the case of murder (*l*) (B). Necessity. Husband and wife—Competency.

On the same ground, the wife, on an appeal of bastardy, is competent to prove the adulterous intercourse, although the effect may be to relieve the husband from the charge of maintaining the child; but she is not competent to prove non-access (*m*), or any fact which may be proved by other testimony. It has been said that, on grounds of state policy, the wife is a competent witness against her husband in case of treason (*n*). The husband and wife are competent, as has been seen (*o*), to prove the legitimacy or illegitimacy of their children, and to prove the fact of adultery, but not to prove non-access (*p*) (C); so they are competent to prove the marriage, or the contrary (*q*).

Where a husband and wife perished at sea, the husband at the time the

sit by a servant for wages, the plaintiff was allowed to give in evidence a deed executed by the wife at the time of hiring, in order to show the terms of hiring. In an action by husband and wife, the declarations of the wife (executrix) are inadmissible for the defendant. *Alban* v. *Pritchet*, 6 T. R. 680. But in an action against the husband, as administrator of his wife, for a debt due from her *dum sola*, held that her admissions during the coverture were admissible, the defendant's character of husband having nothing to do with the action against the representative of the wife whom she might bind, (Tenterden, L. C. J.) *Humphries* v. *Boyce*, 2 M. & M. 140. Where a *feme covert* has for many years been separated from her husband, and during that time has received to her separate use the rents of her own property, which accrued to her by devise, after the separation, she is presumed to receive the rents and acknowledge the tenure by the husband's authority. *Doe* v. *Biggs*, 1 Taunt. 367. Where a testator gave a power to his daughter, describing her as a *feme covert*, to appoint by deed; held that she might well execute it by deed. *Downes* v. *Timperon*, 4 Russ. 334.

(*g*) *Attorney-general* v. *Riddell*, 2 Tyr. 523. See also *Attorney general* v. *Siddon*, 1 Tyr. 41; *R.* v. *Gutch*,[1] 1 M. & M. 437.

(*h*) 1 Sid. 431. By the express provision of the stat. 21 Jac. 1, c. 19, s. 5 & 6, commissioners of a bankrupt may examine the wife of the bankrupt for the finding out of the estate, goods and chattels of the bankrupt, concealed, &c. by the wife or other person.

(*i*) 1 Ford's MS. 416; An. 82; Andr. 161; Say. 62.

(*k*) As in case of rape (*R.* v. *Ld. Audley*, 1 St. Tr. 387; Ann. 83; Hale, 301; Hutt. 46); and although the contrary has been laid down (T. Raym. 1 Gilb. Ev. 253; 2 Keb. 403), yet the affirmative seems to be now settled (*R.* v. *Aryre*, 1 Str. 633. *Lady Lawley's Case*, B. N. P. 287. *R.* v. *Mead*, Burr. 542. *R.* v. *Bowes*, 1 T. R. 698. *Jagger's Case*, East's P. C. 454). So the affidavit of the wife has been allowed to be read in court to ground a criminal information against the husband (*Lady Lawley's Case*, B. N. P. 287. *Mary Mead's Case*, 1 Burr. 542). So she may exhibit articles of the peace against her husband. *R.* v. *Doherty*, 13 East, 171; B. N. P. 287. Vide *R.* v. *Wakefield*, *supra*, 552.

(*l*) *R.* v. *Woodcock*, Leach, C. C. L. 463, 2d ed.

(*m*) *Supra*, BASTARDY. *R.* v. *Rooke*, 1 Wils. 340. *R.* v. *Kea*, 11 East, 132.

(*n*) B. N. P. 289; T. Ray. 1 *tam. qu. & vid.* Brownl. 47; Bac. Ab. Ev. A. 1. For the wife is not bound to discover the treason of the husband. T. Ray. 1 Brownl. 47.

(*o*) *Supra*, 313.

(*p*) *Supra*, tit. BASTARDY. 2 Str. 925; 2 P. Wms. 276; B. N. P. 283. *R.* v. *Cliviger*, 2 T. R. 263.

(*q*) *R.* v. *Bramley*, 6 T. R. 330; where a pauper, removed as a widow, was held to be competent to disprove the marriage.

(A) (*Stein* v. *Bowman*, 13 Peters, 209.)
(B) (*Pennsylvania* v. *Stoops*, Addis. 332.)
(C) (*Cross* v. *Cross*, 3 Paige, 139.)

[1]Eng. Com. Law Reps. xxii. 352.

vessel struck being on deck, and the wife and child below, there being no *555 *evidence of the latter having survived, administration with the will annexed granted to the next of kin of the husband as a widower (*r*).

INFANT.

Trial of non-age.

The trial of the non-age of a party is either by *inspection*, or in the ordinary way by a jury (*s*). In a suit to reverse a fine for the non-age of the cognizor, or to set aside a statute or recognizance, and similar cases, a writ issues to the sheriff, commanding him that he constrain the party to appear, that it may be ascertained by the view of his body by the King's Justices, whether he be of full age or not, *ut per aspectum corporis sui constare poterit Justiciariis nostris si prædictus A. B. sit plenæ ætatis necne* (*t*). Where the Court entertains doubts of the fact upon inspection, it may proceed to take proofs of the fact by the examination of the infant himself, and other witnesses, if necessary (*u*).

General presumption.

The general presumption of law is, that an infant does not know his own rights (*x*).

Although the promise of an infant will not bind him, except for necessaries, yet he may take advantage of any promise made to him, although the consideration were merely the infant's promise, as in an action on mutual promises to marry (*y*) (A).

Where evidence in bar.

In an action on bond, or other specialty, infancy is not a defence under the plea of *non est factum*, for the deed of an infant is not void, but merely voidable (*z*); and now, in general, under the new rules of H. T. 4 W. 4,

(*r*) *In the Goods of Murray*, 1 Curt. Prer. 696.

(*s*) As to the proof of non-age, see tit. PEDIGREE.

(*t*) 9 Rep. 31 According to Glanvil, l. 13, c. 15, non-age was formerly tried by a jury of eight men. 3 Bl. Comm. 332. [See *Sliver* v. *Shelback*, 1 Dallas, 166, that the fact of infancy must in this country be tried *per pais* and not by inspection.]

(*u*) 2 Roll. Ab. 373; 3 Bl. Comm. 332. (*x*) 1 Inst. 246; Show. 83.

(*y*) *Holt* v. *Ward*, B. N. P. 155; Str. 937. [*Cannon* v. *Alsbury*, 1 Marsh. 76. *Willard* v. *Stone*, 7 Com. 224] So he may sue on a contract for a purchase of potatoes (*Warwick* v. *Bruce*, 2 M. & S. 205), or submit to a reference (*Knight* v. *Stone*, Sir W. Jones, 164; S. C. Noy, 93). So the infant may recover on a contract by the defendant for cutting and taking away the grass of the infant. Gilb. L. E. 187, 2d edit.; Vent. 51; Mad. 25; 2 Sid. 41, 446; 2 Str. 939; 2 Keb. 581. In an action on an agreement for a Scotch tack made with the tutors of a minor, but the action was brought in his own name; held, that it being made for his benefit, it was competent for him to sue in his own name upon the contract, and that it lay upon the defendant to show that the plaintiff was a minor at the time of action brought. *Fitzmaurice* v. *Waugh*,[1] 3 D. & R. 273. An infant may make a valid contract of hiring and service with a father. *R.* v. *Chillesford*,[2] 4 B. & C. 94; *R.* v. *Stevenson*,[3] 2 B. & C. 34. In an action for wages, whilst the servant was an infant, the master cannot set off sums which he had advanced for silk dresses, &c. not being necessaries, nor does the statement of an account bind her, but payments to an infant on account of wages for necessaries are valid payments. *Hedgley* v. *Holt*,[4] 4 C. & P. 104. By the stat. 9 Geo. 4, c. 14, s. 4, no action shall be maintained whereby to charge any person upon any promise after full age to pay any debt contracted during infancy, or upon any ratification after full age to pay any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

(*z*) B. N. P. 172. *Tam. qu.* if the deed be obviously to the prejudice of the infant; and see the observations of L. C. J. Eyre, in the case of *Keane* v. *Boycott*, 2 H. B. 515. [*Conroe* v. *Birdsall*, 1 Johns. Cas. 127. *White* v. *Flora*, 2 Overton, 431. *Roberts* v. *Wiggin*, 1 N. Hamp. R. 73.] {It has been decided by the King's Bench in *Ireland*, that a bond with a penalty entered into by an infant is *void*, not *voidable* merely. *Hunter* v. *Smith*, 1 Fox & Smith's Rep. 15.} A single bond, *i. e.* a bond without a penalty, given by an infant for necessaries, is good. Hargr. Co. Litt. 172, and the cases there cited; and therefore it extinguishes an antecedent debt for necessaries. The general rule as to deeds by infants is, that if the agreement be for the benefit of the infant at the time, it shall bind him. Per Ld. Mansfield, C. J. in *Drury* v. *Drury*, Dom. Pro. 26th May, 1762, 5 Bro. Ap. 570; and by Buller, J. *Maddon* v. *White*, 2 T. R. 161, where he says that notwithstanding the doctrine, Co. Litt. 380, b, also laid down in Brownlow, all the modern cases have expressly

(A) (An infant is not liable for a breach of promise of marriage. *Hunt* v. *Peake*, 5 Cow. 475. See also *Eubanks* v. *Peak*, 2 Bailey, 497.)

[1]Eng. Com. Law Reps. xvi. 169. [2]*Id.* x. 279. [3]*Id.* ix. 16. [4]*Id.* xix. 297.

*infancy, to be available as a defence, must be specially pleaded; but in an action of simple contract, the infancy of the defendant at the time of the contract is *primâ facie* a defence, even although he has paid money into court (*a*), unless the action be for necessaries; he is not liable on an account stated (*b*).

In an action against an infant, to recover money advanced for him in Scotland, to prevent his arrest, it was held that proof was necessary to show that by the law of Scotland such a defence was available (*c*).

But an infant is liable in respect of all torts committed by him, as for slander or battery (*d*) (1); and in *detinue* for goods delivered to him for a particular purpose, and which he has failed to return (*e*); and in assumpsit for money embezzled (*f*) (A). But if an action against an infant be founded in a contract, the plaintiff cannot, by changing the form of his action in respect of a breach, convert it into a tort (2), as by charging him in *tort* for the negligent or immoderate use of a horse which he has hired (*g*).

If the defendant prove his infancy, the plaintiff may reply by evidence that he ratified the promise upon attaining his age (*h*) (B). His continu- Proof in reply to infancy.

held that an infant cannot avoid a lease which is made for his own benefit; and he cited Mr. Dunning's argument in *Zouch* v. *Parsons* (3 Burr. 1806), who says, "as to the infant's lease, the benefit of the infant is to considered; his leases are good if rent is reserved for them; this exception arises from necessity, therefore it is necessary to validate his leases reserving rent." If an infant bargain and sell lands by deed indented and inrolled, he may avoid it at any time. 2 Ins. 673. A feoffment by an infant with livery is not void but voidable only. Covenant does not lie against an infant apprentice. *Gilbert* v. *Fletcher*, Cro. Car. 179. *Lilley's Case*, 7 Mod. 16. He may avoid his apprenticeship on coming of age, but his father, &c. will still be liable on the covenant. 1 Saund. 312, note (*b*). But an apprentice cannot avoid his indentures by a tortious act, as by absconding. *Gray* v. *Cookson*, 16 East, 13. On an indictment for conspiring to procure a marriage with a minor, the latter cannot be a witness against the wife. There is no distinction in principle between admitting a wife or husband for or against each other. *R.* v. *Sergeant*,[1] 1 Ry. & M. C. 352.

(*a*) Per Buller, J., *Hitchcock* v. *Tyson*, 2 Esp. C. 481. For the money may have been paid in on account of necessaries.

(*b*) Although it be on account of necessaries supplied to him. *Ingledew* v. *Douglas*,[2] 2 Starkie's C. 36. Such an account is not evidence even to show the fact that the necessaries were supplied. Ibid.

(*c*) *Male* v. *Roberts*, 3 Esp. C. 163. And see *Mure* v. *Kaye*, 4 Taunt. 54. It seems that money advanced to release an infant taken on mesne process for necessaries, may be recovered here. *Clarke* v. *Leslie*, 5 Esp. C. 28; so to release an infant when in execution. Ibid. And see *Finly* v. *Jowle*, 13 East, 6.

(*d*) 8 T. R. 336, 7. Bac. Ab. *Infancy*, H. [*Sikes* v. *Johnson*, 16 Mass. R. 389.]

(*e*) 1 N. R. 140. (*f*) *Bristow* v. *Eastman*, 1 Esp. C. 172.

(*g*) *Jennings* v. *Rundall*, 8 T. R. 335. The objection was there taken by plea of infancy, to which the plaintiff demurred. [S. P. *Schenck* v. *Strong*, 1 Southard's R. 87. *Green* v. *Greenbank*, 2 Marsh. 485. 11 Serg. & R. 210.]

(*h*) If to a plea of infancy the plaintiff reply a promise after he attained his age, it is sufficient for the plaintiff to prove the promise, and it lies on the defendant to prove that he was not of age at the time. *Borthwick* v. *Caruthers*, 1 T. R. 648. And per Holroyd, J. in *Bates* v. *Wells*, Lanc. Sp. Ass. 1822.

(1) [An infant is liable to an action of deceit on the warranty of a horse. *Word* v. *Vance*, 1 Nott & M'Cord, 197. And to an action for malicious prosecution. *Semb. Sterling* v. *Adams & ux.* 3 Day, 411. So infants, who prosecute an unjust claim at law, and thus compel the defendant to resort to equity for an injunction and relief, and who there sets up an equitable defence, must pay costs. *Price* v. *Sykes*, 1 Ruffin's Rep. 87.]

(2) [In *Vasse* v. *Smith*, 6 Cranch, 226, it was held that an infant may be liable in trover, although the goods were delivered to him under a contract, and that infancy may be given in evidence under the general issue; and it may have some influence in determining whether the act complained of be really a conversion or not.]

(A) (*Bullock* v. *Babcock*, 3 Wend. 391. *Sikes* v. *Johnson*, 16 Mass. R. 389. And even though he acts by the command of his father. *Humphrey* v. *Douglass*, 10 Ves. R. 71. See *Campbell* v. *Stokes*, 2 Wend. 137. *Homer* v. *Thwing*, 3 Pick. R. 492. Where an infant hired a horse and gig to go to *G.*, but instead of going there went to another place in an opposite direction and by severe usage the horse was killed, his infancy was held a bar to the action. *Penrose* v. *Curren*, 3 Rawle, 351; but if the hiring came within the exception of necessaries, as it might be where a horse was hired to visit a sick parent, then the infant would be liable for the consequences, per Rogers, J. Ibid.)

(B) (A confirmation by an infant, who was merely a security for another, must be made with the intent of confirming, and with the knowledge that the act would be void unless he confirmed it, and there should be

[1]Eng. Com. Law Reps. xxi. 453. [2]*Id.* iii. 233.

ance in possession after his full age of lands demised to him during his minority, is an affirmance of the lease (*i*), and he will be liable to previous arrears of rent (*k*) (1). The plaintiff must prove a ratification of the agreement, a *promise* to pay the debt; a mere acknowledgement of the debt is insufficient (*l*), for the law will imply no promise in the case of an infant, but for necessaries (*m*); and therefore part payment, or an express promise
*557 to pay part, *will bind him to that extent, but no further (*n*) (2). And

(*i*) 1 Rol. 831, l. 37; Com. Dig. *Infant*, C. 6. But if the estate to the infant was *void*, it cannot be affirmed by his agreement at full age; as, if an infant lessee take a new lease, to commence on a future day, it will not be a surrender, although it commenced at full age, and he then entered and claimed by the new lease. 1 Rol. 728, l. 40.

(*k*) Ibid. and 2 Cro. 320; 2 Bul. 69; Godb. 365. So during his infancy, if he *occupy* by virtue of the lease. 2 Buls. 69.

(*l*) *Lara* v. *Bird*, H. T. 31 Geo. 3; Peake's L. E. 297. The promise must be voluntary. *Harmer* v. *Killing*, 5 Esp. C. 102.

(*m*) *Thrupp* v. *Fielder*, 1 Esp. C. 628. Peake's L. E. 297.

(*n*) *Green* v. *Parker*, cor. Forster, J., Peake's L. E. 297. And per Holt, C. J. in *Hyling* v. *Hastings*, 1 Ld. Raym. 389.

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evidence of a distinct act of confirmation. *Curtin* v. *Patton*, 11 Serg. & R. 305; and in an action against a minor as security for another in articles of agreement on the plea of infancy, the plaintiff cannot give evidence to show that the defendant, while a minor, entered into a number of contracts, received conveyances of land, and transacted business as an adult. Ibid. See also *Smith* v. *Mayo*, 9 Mass. R. 62. *Alexander* v. *Hutcheson*, 2 Hawks, 535; *Houser* v. *Reynolds*, 1 Hayw. 143; *Tucker* v. *Moreland*, 10 Peters, 58; *Wilcox* v. *Roath*, 12 Conn. R. 550; *Deason* v. *Boyd*, 1 Dana. 45; *Benham* v. *Bishop*, 9 Conn. R. 330; *Phillips* v. *Green*, 5 Munr. 350; *Caplinger* v. *Stokes*, Meigs' R. 175; *Alexander* v. *Hutchinson*, 1 Dev. Law R. 13; *Richardson* v. *Boright*, 9 Ver. 368; *Thring* v. *Libbey*, 16 Shepley, 55; *Martin* v. *Byrom*, Dudley's R. 203; *Ordinary* v. *Wherry*, 1 Bailey, 25. But where an infant, who had made a note, on payment being demanded after he became of age, said, "I will pay it as soon as I can make it, but I cannot do it this year; I understand that the holder is about to sue it, but she had better not," it was held that it was an affirmation of the contract. *Bobo* v. *Hansell*, 2 Bailey, 114.)

(1) [If an infant grantee of land continue in possession after he is of full age, it is an affirmance of the contract. *Hubbard & al.* v. *Cummings*, 1 Greenleaf, 11. And if an infant mortgagor, after coming of age, convey the same land to another, subject to the mortgage, which he recognizes in the deed, he therefore confirms the mortgage. *Boston Bank* v. *Chamberlain*, 15 Mass. Rep. 220. So where an award, made under a submission by an infant's guardian, directed that the infant should pay to his mother an annuity in lieu of dower, and that she should release to him her right of dower—his acceptance of the estate free of dower, and entering upon and enjoying it, after he came of age, according to the award, were held to be a sufficient ratification. *Barnaby* v. *Barnaby*, 1 Pick. 223. So, although a lease of an infant's lands by his guardian is voidable, yet it is confirmed by any act of the ward expressive of his assent after he arrives at full age. *Van Dorens* v. *Everett*, 2 Southard's Rep. 460.]

(2) [A bare acknowledgement of the debt or an admission of the consideration upon which the promise was made during infancy, is not sufficient to make the party liable as upon a promise made when of full age. *Martin* v. *Mayo & al.* 10 Mass. Rep. 137. *Whitney & al.* v. *Dutch & al.* 14 Mass. Rep. 457. But the terms of ratification need not be such as import a direct promise to pay—all that is necessary is that there be an express agreement to ratify the contract, by words, oral or in writing, which import a recognition and confirmation of the promise, 14 Mass. Rep. *ubi sup.* Thus where one who made a note during his minority, acknowledged after he came of age that the money was due, and promised that on his return home he would endeavour to procure it and send it to the creditor—it was held to be a sufficient ratification. *Ibid.* So where the party said, after he came of age, "when I return from this voyage I will pay you"—and "I have not the money now, but when I return from this voyage I will settle with" the holder of the note. 10 Mass. Rep. *ubi sup.* See also *Jackson* v. *Mayo & al.* 11 Mass. Rep. 147. So in the case of the award, mentioned in the preceding note, the defendant, after he was of age, enclosed money in a letter to his mother, saying—"you will find enclosed the sum of ——— in part towards your right of dower: the remainder I shall forward in a few days," &c. *Barnaby* v. *Barnaby*, 1 Pick. 223. See also *Thompson* v. *Linscott*, 2 Greenleaf, 186.

But where a defendant in conversation concerning a note made by him during his infancy, said he owed the plaintiff, but was unable to pay, and that he would endeavour to procure his brother to be bound with him—it was held not to be a renewal of the promise. *Ford* v. *Phillips*, 1 Pick. 203. {*Thompson* v. *Lay & ux.* 4 Pick. Rep. 48.} And where an infant had given a promissory note for a valuable consideration, though not for necessaries, and after coming of age made his will, in which he directed all his "just debts" to be paid—it was held that his executors were not liable. *Smith* v. *Mayo & al.* 9 Mass. Rep. 62. *Sed vide Wright* v. *Steele*, 2 N. Hamp. 51. A promise, made after the arrival at full age, must, in order to ratify one made during minority, and to be binding, be made deliberately, and with a knowledge that the party is not liable by law. Ibid. *Hussey & al.* v. *Jewett*, 9 Mass. Rep. 100. *Ford* v. *Phillips*, *ubi sup.* And the same evidence ought to be required of the confirmation of a voidable contract, after full age, as of the execution of a new one. *Rogers & ux.* v. *Hurd*, 4 Day, 57.] {Where however the contract is absolutely *void*, as being against the interest of the infant, it is incapable of confirmation, and a promissory note executed by an infant as the *surety* of another has been held to be such a contract. *Maples* v. *Wightman*, 4 Conn. Rep. 376.}

the promise must, in order to support the action, be made before action brought (*o*).

If the plaintiff reply that the articles supplied were necessaries, he must prove the defendant's rank and condition in life, and show that the things furnished were suitable to and consistent with that situation. The question of necessaries is a relative fact, to be governed by the fortune and circumstances of the infant, the proof of which lies on the plaintiff (*p*). Whether they were necessaries or not is usually a question of fact for the jury (*q*) (A). An infant is liable for necessary victuals (*r*), apparel (*s*), physic, and surgical attendance (*t*), schooling, and instruction (*u*), for a fine assessed on him on his admission to a copyhold estate (*x*). So he is liable for necessaries supplied to his wife (*y*), or child (*z*). But he is not liable as for necessaries in respect of goods bought to sell again, although he keeps an *open public shop, for he has not discretion to carry on business (*a*); or *558

Necessaries.

(*o*) *Thornton* v. *Illingworth*,[1] 2 B. & B. 824 (1). *Secus*, it has been held, under the stat. of limitations *Yea* v. *Fouraker*, 2 Burr. 1099.

(*p*) Per Lord Kenyon, *Ford* v. *Fothergill*, 1 Esp. C. 211; and see *Maddox* v. *Miller*, 1 M. & S. 738. Where the debt was for grocery goods to stock his shop, but out of which his family were supplied; held, that *pro tanto* as necessaries, he was liable to be sued. *Turberville* v. *Whitehouse*, 12 Price, 692. Where a father sufficiently supplied the defendant, his son, a minor, with clothes, the question is, whether the articles of clothing supplied by the plaintiff were necessaries; if a tradesman trusts an infant, he does it at his peril, if it turns out that he has been properly supplied. *Story* v. *Pery*,[2] 4 C. & P. 526.

(*q*) The question generally depends upon the collateral circumstances of the case, such as the rank and situation of the party, and the suitableness of the articles. The finding of the jury is of course subject to the control of the Court in point of law. See Cro. Eliz. 587. Com. Dig. *Enfant*, B. 5. An infant is not liable on a bill of exchange, though given for necessaries. *Williamson* v. *Watts*, 1 Camp. 552. But he is liable on a bill of exchange accepted after twenty-one, though drawn before. *Stevens* v. *Jackson*, 1 Camp. 164. He is not liable on contracts made by a firm in which he is partner during minority, but he will be liable to such as are made after twenty-one, unless he disaffirm the partnership. *Goode* v. *Harrison*, 1 B. & A. 147. He is not liable in respect of goods which do not reach him till he has attained his age, if the property vested in him previously, by delivery to the carrier. *Griffin* v. *Langfield*, 3 Camp. 254. A tailor cannot recover for more clothes than are necessary, according to the actual state of his wardrobe, taking into consideration clothes ordered from other tailors. *Burghart* v. *Angerstein*, Mo. & R. 458. An infant, being a lieutenant in the navy, is not liable for the price of a chronometer supplied to him when out of employment. *Berolles* v. *Ramsay*,[3] Holt's C. 77. He is not liable on the warranty of a horse. *Howlett* v. *Haswell*, 4 Camp. 118. In *Chartress* v. *Bayntun*,[4] 7 C. & P. 62), it was held that a stanhope was not necessary for a minor, being the son of a beneficed clergyman, and holding a commission in the army.

(*r*) Co. Litt. 172, a.; Jon. 182. And if he be a housekeeper, for victuals supplied to his family. 1 Sid. 112.

(*s*) Co. Litt. 172, a.; 1 Rol. 179, l. 5. Or for making clothes; and if he brings the cloth to the tailor, the latter need not show that it was suitable to his quality (Latch. 157). An infant captain in the army has been held to be liable for a livery provided by his orders for his servant, being necessary for the credit of his station (*Hands* v. *Slaney*, 8 T. R. 578); but it was held that he was not liable for cockades supplied to the soldiers by his orders, for these were not necessaries incident to his station. So regimentals supplied to an infant member of a volunteer corps were held to be necessaries. *Coates* v. *Wilson*, 5 Esp. C. 152.

(*t*) Palm. 528.

(*u*) Co. Litt. 172, a.; 1 Sid. 112; Mar. 40.

(*x*) *Evelyn* v. *Chichester*, Burr. 1717; B. N. P. 154. Per Yates, J. Note, he enjoyed the estate when he came of age; but debt, it seems, would not lie in such a case, because an infant cannot wage his law; but if an infant take a lease for years and hold when of age, he may be charged in debt for the rent. *Supra*, 556.

(*y*) *Turner* v. *Trisby*, Str. 168; B. N. P. 155. So for money advanced to liberate him when taken in execution for necessaries. *Clarke* v. *Leslie*, 5 Esp. 28.

(*z*) B. N. P. 155. For *persona conjuncta æquiparatur interesse proprio*. Barnes, 184.

(*a*) Cro. Jac. 494; B. N. P. 154; Peake's L. E. 281, and *Green* v. *Parker*, there cited. *Whittingham* v. *Hill*, Cro. Jac. 494. *Wywall* v. *Champion*, 2 Str. 1083. *Aliter*, by Clarke, Baron, B. N. P. 154. [*Van Winkle* v. *Ketcham*, 3 Caines R. 323.]

(A) (*Bent* v. *Manning*, 10 Ver. 225.)

(1) [*Ford* v. *Phillips*, 1 Pick. 202, and *Tappan* v. *Abbot & al.*, there cited, *acc. Wright* v. *Steele*, 2 N. Hamp. Rep. 51, *contra*.]

(2) [Whether articles furnished for an infant are of the classes for which he is liable, is matter of law; whether they were actually necessary and of reasonable prices, is matter of fact for the jury. *Beeler* v. *Young*, 1 Bibb, 519. *Stanton* v. *Wilson & al.* 3 Day, 37.

A horse is not within the denomination of necessaries for which an infant is liable. *Rainwater* v. *Durham*, 2 Nott & M'Cord, 524.]

[1] Eng. Com. Law Reps. ix. 256. [2] *Id.* xix. 508. [3] *Id.* iii. 32. [4] *Id.* xxxii. 433.

for money supplied to buy necessaries with, unless it be actually expended (*b*).

The plaintiff cannot show, in reply to the defence of infancy, that the infant stated an account with him even for necessaries (*c*). Where it appears that the things themselves were necessary, abstractedly considered, it is still a good defence to prove that the defendant was supplied with necessaries by his parents or friends, although no proof be given that this was known to the plaintiff (*d*).

Action by infant.

An infant who has paid money with his own hand, though without a valuable consideration, cannot, it seems, recover it back. Where an infant paid money as a premium for a lease, and enjoyed it for a short time during infancy, but avoided it on attaining his age, it was held that he could not recover the money (*e*). An infant heir-at-law cannot eject his ancestor's tenant from year to year, without giving the ordinary notice to quit (*f*). After the death of the master of an apprentice, his assets are liable to the maintenance of the apprentice (*g*).

Criminal liability.

An infant under the age of twenty-one is privileged as to some misdemeanors, particularly in cases of omission, unless he be bound in respect of tenure, &c., as not repairing a bridge or highway (*h*); for not having the command of his fortune till twenty-one, he wants the capacity to do that which the law requires. Yet, with regard to other offences, even those of a capital nature, an infant is equally liable to suffer with a person of full age

Capacity, or matter of proof.

(*i*) (1). By the law, as it now stands, and has stood at least ever since the time of Edward 3, the capacity of doing ill and contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen, and in these cases the maxim of the law is, that *malitia supplet ætatem.* Under seven years of age, indeed, an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old, he may be guilty

*559 of felony (*k*) (A). *Also under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax,* yet, if it appear to the Court and jury that he was *doli capax,* and could discern between good and evil, he may

(*b*) *Semble*, B. N. P. 154; Ca. K. B. 157. *Darby* v. *Boucher*, 1 Salk. 279. *Probart* v. *Knouth*, 2 Esp. C. 472 (n).

(*c*) *Truman* v. *Hirst*, 1 T. R. 40. *Bartlet* v. *Emery*, ibid. 42 (*n*). Peake's L. E. 280. *Ingledew* v. *Douglas*,[1] 2 Starkie's C. 36. *Hedgley* v. *Holt*,[2] 4 C. & P. 104.

(*d*) *Ford* v. *Fothergill*, Peake's C. 229; 1 Esp. C. 211. [*Wailing* v. *Toll*, 9 Johns. 141. *Angel* v. *M'Lellan*, 16 Mass. Rep. 31.] It is the duty of a tradesman to make inquiries from the parents; if the infant be supplied with necessaries by them, the tradesman cannot recover for those which he has supplied. *Cooke* v. *Deaton*,[3] 3 C. & P. 114. The infant, if not left destitute of necessaries, but provided with such as his friends think it proper to supply, cannot bind himself to a stranger, even for such things as might otherwise be deemed to be necessaries. *Bainbridge* v. *Pickering*, 2 Bl. 1325.

(*e*) *Holmes* v. *Blogg*,[4] 1 Moore, 466; 2 Moore, 552; 8 Taunt. 508; Wilmot's Notes, 226, n.; and per Ld. Mansfield, in the *Earl of Buckinghamshire* v. *Drury*, ibid. and 3 Brown's P. C. 492: 2 Eden's C. 1.

(*f*) *Madden* v. *White*, 2 T. R. 159.

(*g*) *Wadsworth* v. *Gye*, 1 Sid. 216; Cro. Eliz. 553; Str. 1267; 1 Salk. 66.

(*h*) 1 Hale's P. C. 20. *Secus* where the guardian in socage is in possession. *R.* v. *Sutton*, 5 N. & M. 353.

(*i*) In the Comm. vol. iv. p. 22, it is stated, that for a breach of the peace, riot, battery, or the like, an infant *of the age of fourteen* is answerable; but as an infant *under the age of fourteen* is liable to suffer death in respect of a capital offence, can there be any doubt as to his liability to suffer imprisonment for a less offence?

(*k*) Dalt, J., c. 147. A child under ten years was charged with stealing a small quantity of coals: the Judge directed the jury that they must be satisfied that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong; the jury acquitted the prisoner. *R.* v. *Owen*,[5] 4 C. & P. 236.

(A) (See *State* v. *Mary Doherty*, 2 Tenn. R. 88.)

(1) [An infant may commit treason, and thus subject his estate to forfeiture. *Denn* v. *Banta*, 1 Coxe's Rep. 226.)

[1]Eng. Com. Law Reps. iii. 233. [2]*Id.* xix. 297. [3]*Id.* xiv. 232. [4]*Id.* iv. 189. [5]*Id.* xix. 362.

be convicted and suffer death (*l*) (A). But in all cases the evidence of malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction (*m*).

The competency of an infant has already been considered (*n*). It is observed by Sir W. Blackstone (*o*), that where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances. Such evidence is always desirable in criminal cases, to confirm the testimony of an adult witness, as well as that of an infant. It is, in many instances, even more desirable in the former than in the latter case, where the inexperience and simplicity of the witness render subornation very difficult. By the stat. 9 G. 4, c. 14, s. 5, no action shall be maintained on a promise or ratification after full age, unless it be in writing, signed by the party to be charged. Competency. St. 9 G. 4, c. 14.

INFERIOR COURT.

A RESTRICTION that no action shall be brought (otherwise than in the inferior jurisdiction), in respect of any *debt* under 40*s.*, does not apply where the plaintiff declares on a special contract for the selling of a chattel of the plaintiff by the defendant, the claim not being colourably inserted (*p*).

INNKEEPER.

THE general rule of law is, that an innkeeper is bound to keep the goods of his guest, who resorts to his house *animo hospitandi*, so that no loss happen *pro defectu hospitatoris* (*q*) (B). And, therefore, in such cases two questions *usually arise: 1. Whether the guest came to the inn *animo hospitandi*; 2dly. As to the fact that the goods were lost. *560

(*l*) Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged, because it appeared, upon their trials, that one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil (1 Hale's P. C. 26, 27; 4 Comm. 24). And there was an instance in the last century but one, where a boy of eight years old was tried at Abingdon for firing two barns; and it appearing that he had malice, revenge and cunning, he was found guilty, condemned, and hanged accordingly (Emlyn on Hale's P. C. 25; 4 Comm. 24). Thus also, in modern times, a boy of ten years old was convicted, on his own confession, of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a mischievous discretion; and as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the Judges that he was a proper subject of capital punishment. Fost. 72.

(*m*) 4 Comm. 23, 24.

(*n*) See Index, tit. WITNESS.—COMPETENCY.

(*o*) 4 Comm. 214.

(*p*) *Mansfield* v. *Brearey*,[1] 1 Ad. & Ell. 347. As to the mode of procuring return of the actual proceedings, see *Salter* v. *Slade*,[2] 1 Ad. & Ell. 608. And see as to a plea of Court of Requests Act, *France* v. *Parry*,[3] 1 Ad. & Ell. 615.

(*q*) Per Ld. Ellenborough in *Farnworth* v. *Packwood*,[4] 1 Starkie's C. 251. An innkeeper shall be charged if there be a default in him or his servants in the well and safe keeping of his guest's goods and chattels within his common inn, for the innkeeper is bound in law to keep them safe without any stealing, and it is not any excuse for him to say that he delivered to the guest the key of the chamber in which he is lodged, and that he left the chamber-door open. And although the guest doth not deliver his goods to the innkeeper to keep, nor acquaints him with them, yet if they be carried away or stolen, the innkeeper shall be charged; and so, although they who stole the goods shall be unknown. But if the guest's servants, or he who comes, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged, for here the fault is in the guest to have such companions or servants. *Calye's Case*, 8 Rep. 33, a.; and see Moore, 78, pl. 207; 22 H. 6, 21, b.; 11 H. 4, 45, a. b.; 42 Ed. 3, 11, a.; 5 Mod. 543; 1 Roll. Ab. 4; 10 H. 7, 26. *Spencer* v. *Spencer*, Dyer, 266. *East India Company* v. *Pullen*, 2 Str. 690. Com. Dig. Action against a common Carrier, C. 1; Cro. Eliz. 285; Salk. 18.

(A) (An infant under the age of fourteen may be convicted and punished for an assault with an intent to commit a rape, although the law presumes him incapable of executing such intent. *Commonwealth* v. *Green*, 2 Pick. 380.)

(B) (But an innkeeper is not bound to entertain the agent of a rival inn who seeks to decoy away his customers. *Jencks* v. *Colman*, 2 Sumner, C. C. R. 321.)

[1]Eng. Com. Law Reps. xxviii. 105. [2]*Id.* xxviii. 162. [3]*Id.* xxiii. 165. [4]*Id.* ii. 377.

The plaintiff must prove, in the first place, that he was received as a guest at the inn (*r*). Although the innkeeper refuse to take charge of the plaintiff's goods till a future day, on request to do so, still if the plaintiff remain as a guest, and the goods are stolen, the innkeeper is liable (*s*).

A house of entertainment in London, where beds and provisions are furnished, though not frequented by coaches, and destitute of stables, is an inn, the keeper of which is subject to the common-law liability (*t*).

The plaintiff may sue if his goods were lost, although his servant (*u*) or his friend having the custody of his goods was the guest (*x*).

In the next place, he must prove the loss and value of the goods (A).

Defence. The defendant may show in defence that he never received the plaintiff as a guest, but refused (*y*).

In the next place, although the plaintiff prove a *primâ facie* case, yet the defendant may show that the plaintiff himself conduced to the loss.

If a guest contract for the exclusive use of a room, to be used as a shop, and take the key, he discharges the landlord (*z*). If, indeed, the landlord himself afterwards take the key, the onus of safe custody again devolves

(*r*) *Bennett* v. *Meller*, 5 T. R. 273; *Bird* v. *Bird*, 1 And. 29.

(*s*) *Bennett* v. *Meller*, 5 T. R. 273. So if on a fair day he place the gig of plaintiff with others as usual in a public street. *Jones* v. *Tyler*,[1] 1 Ad. & Ell. 522.

(*t*) *Thompson* v. *Lacy*,[2] 3 B. & A. 283.

(*u*) *Beedle* v. *Morris*, innkeeper of Dunchurch, Cro. J. 224, Coke's Ent. 347. So under the St. of Winton, where the servant was robbed, either the master or servant might have maintained the action against the hundred.

(*x*) Yel. 162. He is responsible for money belonging to his guest. *Kent* v. *Shuckhard*,[3] 2 B. & Ad. 803. *Dorman* v. *Jenkins*, 4 N. & M. 170. A traveller desired part of his luggage to be taken into the commercial room of the inn, which but for such order would, by the usage of the house, have been carried with the rest into his bed-room; the innkeeper is nevertheless answerable for the loss of it. *Richmond* v. *Smith*,[4] 8 B. & C. 9; and 2 M. & Ry. 235. A tavern-keeper had a room for a public entertainment of music, to which persons were admitted at 2*d.* a head, without a license under 25 Geo. 2, c. 36; he is liable to the penalty, whether he received it for his own benefit or for others, and however respectable the persons frequenting it might be; the 13th sect. applies to common informers. *Green* v. *Botheroyde*,[5] 3 C. & P. 471.

(*y*) *White* v. ———, Dyer, 158. The Court held that if one come to an inn, and the host say that his house is full of guests, and does not admit him, and the traveller says that he will make shift among the other guests, the landlord shall not be charged, because he refused cover, although the cause of refusal was false, for the plaintiff may have his action for so refusing; and it was held that these facts were good evidence, on issue joined on a plea by the landlord that the goods were taken without his default.

(*z*) *Farnworth* v. *Packwood*,[6] 1 Starkie's C. 249. *Burgess* v. *Clements*, 1b. 251, in the note. The plaintiff, in the case of *Burgess* v. *Clements*,[7] 1 Starkie's C. 251, requested to have a private room to exhibit his goods, and receive his customers. The landlady showed him into a private room, gave him the key, and advised him to lock the door. The loss happened at night; the plaintiff had a candle in the room, but the curtains of the widows were down. When the defendant's son left him he was packing up the goods, and had been out two hours before the loss was discovered. When he went out he was not sure that he had even shut the door after him; the key was found in it. The defendant went into the room after the plaintiff went out, and found the candle burning. The learned Judge left it to the jury to say, whether the plaintiff had not, by his careless and negligent conduct, discharged the defendant from his common-law responsibility. The jury found for the defendant, and the Court of K. B. affirmed the verdict; 4 M. & S. 306.

(A) (An innkeeper is liable for whatever is deposited in his house, but if the trust of the depositor is reposed in another person living in the house, the case is taken out of the general rule. *Sneider* v. *Geiss*, 1 Yeates, 34. *Quinton* v. *Courtney*, 1 Hayw. 40. But he is not liable in trover for property intrusted to him, unless an actual conversion be shown; a demand and refusal is not sufficient evidence of a conversion, unless at the time of the demand the goods were in his possession or under his control. *Hallenbake* v. *Fish*, 8 Wend. 547. *Pool* v. *Adkisson*, 1 Dana, 120. So he may show that the guest was admitted upon terms, the inn being full. *Quinton* v. *Courtney*, *supra*.) An innkeeper is responsible for the safe keeping of a load of goods belonging to a traveller who stops at his inn for the night, if the carriage containing the goods be deposited in a place designated by the servant of the innkeper, although such place be an open unenclosed space near the public highway. *Piper* v. *Manny*, 21 Wend. 282. Where a sleigh loaded with wheat, &c. was put by the guest into an outhouse appurtenant to the inn, where loads of that description were usually received, and the grain, was stolen during the night the innkeeper was held responsible for the loss. *Chute* v. *Wiggins*, 14 John. R. 175. See also *Platt* v. *Hibbard*, 7 Cow. 497.)

[1] Eng. Com. Law Reps. xxviii. 138. [2] *Id.* v. 285. [3] *Id.* xxii. 186. [4] *Id.* xv. 144. [5] *Id.* xiv. 395. [6] *Id.* ii. 377. [7] *Id.* ii. 378.

*upon the landlord (*a*). Such a case differs materially from *Caley's Case* (*b*,)where the landlord gave the guest the key of the room; but it was to be occupied merely as a lodging-room, and not for any aliene purpose (*c*).

Where it appeared that the plaintiff, being a guest at an inn, had deposited his pocket-book, containing bills of exchange and bank-notes, on the chimney-piece of his bed-room, and had left the book there so exposed, the learned Judge directed the plaintiff to be nonsuited, on the ground that he had been guilty of gross negligence in leaving valuable property so exposed (*d*).

In an action of trover for goods, the defendant may justify in evidence, as an innkeeper having a lien on them for the payment of the bill of the guest (*e*.) But it is otherwise if the innkeeper receive a horse under a special agreement at so much per week, so long as he continues at pasture (*f*).

A landlord cannot insist on a lien on the horse of *A.* which has been left at the inn by *B.* who has wrongfully seized it, if the landlord knew, at the time of receiving the horse, that *A.* was a wrong-doer, for by so doing he made himself a party to the wrongful act of *A.* (*g*) (A).

INSOLVENT.

Title of assignee.

By the stat. 7 G. 4, c. 57, s. 16, the provisional assignee appointed under the Act may sue in his own name, if the Court shall so order (*h*), for the recovering, obtaining and enforcing of any estates, debts, effects or rights of any such prisoner; and in the case of the resignation or removal from office of such assignee, or of his death, all the real and personal estate, &c. vested in or possessed by such provisional assignee, shall vest in his successor in office to be appointed by the Court. And by sec. 38, upon the appointment of a new assignee by the Court, all the estates, effects, rights and powers of such prisoner, vested in any such former assignee,

(*a*) Ibid. (*b*) 8 Co. 65.

(*c*) See the observations of Le Blanc, J., in *Farnworth* v. *Packwood*,[1] 1 Starkie's C. 253.

(*d*) Cor. Hullock, B., Lancaster Lent Assizes, 1827.

(*e*) *Thompson* v. *Lacy*,[2] 3 B. & A 283; *Supra*, 560; 2 Show. 161. It has even been said that an innkeeper may sell a horse brought to the inn, and left there without any special agreement, when his keep amounts to his value, upon a reasonable appraisement. Per Popham, C. J., Yelv. 67. But in *Jones* v. *Pearle*, Str. 556, it was held that an innkeeper could not in such case sell the horse except in the city of London.

(*f*) *Chapman* v. *Allen*, Cro. Car. 271.

(*g*) *Johnson* v. *Hill*,[3] 3 Starkie's C. 172.

(*h*) The Court refused after verdict to stay proceedings in an action by the provisional assignee, on the ground that the plaintiff had not proved that he was authorized by the major part of the creditors to bring the action, and that he brought it with the approbation of the Insolvent Court, pursuant to 1 G. 4. c. 119, and 3 G. 4, c. 123. The proper course, if the action were improper, was by application to that Court, which might restrain the plaintiff from proceeding any further. *Doe d. Spencer* v. *Clark*,[4] 3 Bing. 370. But in the case of *Allison* v. *Rayner*,[5] 7 B. & C. 441, in an action brought by an attorney against the assignee of an insolvent's estate, for the costs of an action prosecuted by the attorney on the retainer of the assignee, it was held to be incumbent on the plaintiff to prove that the consent of the creditors, and the approbation of one of the commissioners of the Insolvent Court had been obtained, or at least that he had informed his client that such consent was necessary.

(A) (The law makes it the duty of innkeepers to receive and feed the horses of travellers, and gives them liens, by virtue of which a landlord may refuse to redeliver a guest's horse, till his reasonable charge for keeping him is paid; and though a guest departs and leaves his horse, the lien and right of detainer, for past and accruing expenses, continues and this lien will prevail (unless there was some ground for suspicion, that would justify a refusal to receive the horse) against all claimants—even against the true owner, when the horse had been stolen and brought to the inn by the thief. *Black* v. *Brennan*, 5 Dana, 311. But this privilege of detainer is confined to regular innkeepers, who are bound to receive guests. *Carlisle* v. *Quattlebaum*, 2 Bailey, 452.

[1]Eng. Com. Law Reps. ii. 377. [2]*Id.* v. 285. [3]*Id.* xiv. 176. [4]*Id.* xiii. 12. [5]*Id.* xiv. 76. [6]*Id.* xxvii. 559.

shall be vested in such new assignee; and proof of such removal and appointment, entered of record, shall be received by such certified copy thereof as is thereinbefore directed to be received as proof of assignments under the Act (*i*).

By the same statute, s. 19, it is enacted, that every conveyance and *562 *assigument (by the petitioning insolvent) to the provisional assignee, and a counterpart of every such conveyance and assignment, by such provisional assignee to such other assignee or assignees, shall be filed of record in the said Court; and a copy of any such record made upon parchment, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy appointed for that purpose, endorsed thereon, and to be sealed with the seal of the said Court, shall be recognized and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all courts, and before commissioners of bankrupt and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceedings in the said Court in the matter of the said prisoner's petition (*j*).

Proof of proceedings.

By the stat. 7 G. 4, c. 57, s. 76, a copy of the petition, schedule, order and other orders (*k*) and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c. and sealed with the seal of the said Court, shall be at all times admitted in all Courts whatever, and before commissioners of bankrupt and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the Court as aforesaid (*l*).

Under sec. 19 of the 7 Geo. 4, an assignee, in order to prove his title, is not bound to show the petition, but the order of discharge and certified copies of the assignment to the provisional assignee and to himself, are sufficient (*m*).

The assignees of an insolvent cannot recover by action property which

(*i*) Under sec. 11, the copyhold vests without any entry on the roll. *Doe* v. *Glenfield*, 1 Bing. N. C. 729.

(*j*) See *Doe* v. *Land*,[1] 4 D. & R. 509.

(*k*) It has been said that a parol admission of the fact of discharge of an insolvent, made by the opposite party, is not evidence of the fact without proof of the order. *Scott* v. *Clare*, 3 Camp. 236.

(*l*) Certified copies, although made evidence for the insolvent or his creditors, (*semble*) are, it has been held, not so for other persons, nor against him; but if the original schedule and his handwriting thereto be proved, it would be evidence against him. *Nicholls* v. *Downes*,[2] 4 C. & P. 330. The stat. 7 Geo. 4, c. 57, s. 76, does not preclude a party from giving the original document in evidence. *Northam* v. *Latouche*,[3] 4 C. & P. 145. The Insolvent Act requiring that the petition shall be subscribed by the prisoner and filed, and a certified copy admitted as legal evidence, it must be presumed to have been regularly done, and such copy is therefore a sufficient proof of an allegation, in a declaration for a libel, that a petition subscribed by the plaintiff as such prisoner has been duly filed, &c. *Gould* v. *Hulme*,[4] 3 C. & P. 625. Where the copy of the provisional assignment, under 1 Geo. 4, c. 119, s. 7, was produced from the Insolvent Court, and offered in evidence under 7 Geo. 4, c. 57, s. 76; held admissible, and that it was not necessary to go on to show that the proceedings under the former Act were complete, and the prisoner discharged, *Doe* v. *Hardy*,[5] 6 Ad. & Ell. 335; *Doe* v. *Evans*, 1 C. & M. 450.

(*m*) *Delafield* v. *Freeman*,[6] 6 Bing. 294. The assignment to the provisional assignee gives him a right to sue, and the 7 Geo. 4, c. 57, s. 16, is only affirmative, and it is not essential that he should previously obtain the order of the Court for that purpose. *Dance* v. *Wyatt*,[7] 6 Bing. 486. And see *Doe* d. *Clark* v. *Spencer*,[8] 3 Bing. 203. The assignment by the provisional assignee of an insolvent, does not vest a lease absolutely, until the assignee has done some unequivocal act to signify his assent; where the jury negatived any such act, and also found that he had not retained the lease an unreasonable time in order to ascertain whether it would prove beneficial to the creditors to accept it, held that he was not liable to the covenants. In this respect, he stands in the same situation as the assignees of a bankrupt. *Lindsay* v. *Limbert*,[9] 12 Moore, 209. And see *Turner* v. *Richardson*, 7 East, 335. The 57th clause does not apply to the copy of an assignment where the insolvent and his effects have been assigned under the stat. 53 G. 2, c. 102. *Doe* v. *Sellon*,[10] 6 Ad. & Ell. 328.

[1]Eng. Com. Law Reps. xvi. 177. [2]*Id.* xix. 407. [3]*Id.* xix. 314. [4]*Id.* xiv. 491. [5]*Id.* xxxiii. 86. [6]*Id.* xix. 83. [7]*Id.* xix. 145. [8]*Id.* xiii. 12. [9]*Id.* xxxii. 448. [10]*Id.* xxxiii. 86.

accrues to the insolvent after his discharge, but must, under the statute, apply to the Insolvent Debtors Court to issue execution on the judgment *entered up in their names against the insolvent (*n*). But where money *563
was due to the insolvent previous to his discharge in respect of the sale by him of an equitable estate, and the money was, after the discharge, received by the insolvent's agent, it was held that the assignee was entitled to recover (*o*); subject, however, to a lien on the part of the defendant, created by the insolvent's contract with him when the insolvent was *sui juris* (*p*).

To constitute a voluntary payment under the 7 Geo. 4, c. 57, s. 32, it must be a payment with knowledge of the insolvency, and also made voluntarily: where the plaintiff, an attorney, defending actions for the insolvent, had refused to go on unless money were furnished to him, and 20*l.* had been paid him for the purpose, a sum exceeding the costs in the action, the Judge directed the jury that it was not a voluntary payment (*q*). Voluntary payment.

By sec. 46, the Court is authorized, on the prisoner's swearing to the truth of his petition and schedule, and executing a warrant of attorney as directed by the Act, to adjudge that the prisoner (*r*) shall be discharged (*s*) as to the several debts or sums of money due or claimed to be due at the time of filing such prisoner's petition, from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition and which were not then payable, and as to the claims of all other persons not known to such prisoners at the time of adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule (*t*). Proof of discharge.

The schedule (*u*) is the test of discharge from a particular debt; but a

(*n*) *Hepper* v. *Marshal*,[1] 2 Bingh. 372; and per Best, C. J. in *Twiss* v. *White*,[2] 3 Bingh. 486, under the stat. 1 G. 4, c. 119. The assignment under the st. 7 G. 4, c. 57, s. 11, extends to all the estate, debts, &c. to which he shall be entitled previous to his final discharge. It was held under the stat. 41 G. 3, c. 70, that the title of the assignee had no relation to the time when the estate vested in the clerk of the peace. *Doe* v. *Telling*, 2 East, 257.

(*o*) *Twiss* v. *White*,[2] 3 Bing. 486. (*p*) Ibid.

(*q*) *Troup* v. *Brooks*,[3] 4 C. & P. 320. Under the stat. 7 Geo. 4, c. 57, s. 32, the payment of a debt to a creditor by an insolvent within three months before his imprisonment is included, and therefore void. *Herbert* v. *Wilcox*,[4] 6 Bing. 203.

(*r*) A party in custody under an attachment for contempt for non-payment of costs, and under the criminal jurisdiction, held, not "a person in execution under a judgment" within the provisions of 48 G. 3, c. 123. *R.* v. *Clifford*,[5] 8 D. & Ry. 58.

(*s*) Under the 7 G. 4, c. 57, s. 54, the Court is to issue a warrant to the gaoler for the insolvent's discharge. Under the stat. 53 G. 3, c. 102, s. 10, the order of Court delivered to the gaoler, was evidence of the discharge. *Neall* v. *Isaacs*,[6] 4 B. & C. 335.

(*t*) By sec. 53, such discharge extends to process for contempts in non-payment of costs and expenses, and also to costs of actions by creditors, incurred by the prisoner previous to the filing of his schedule. By sec. 52, such discharge extends to sums payable by way of annuity.

(*u*) An insolvent who inserts in the schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description as the statute requires, is discharged as to all parties to the bill though not named in the schedule, and also as to the original debt. *Boydell* v. *Champneys*, 2 M. & W. 433. Where the defendant was sued as joint maker of a promissory note for 14*l.*, after being discharged under the Insolvent Act, having given no notice to the plaintiff, but in his schedule having stated that he had accepted several bills for *M.* the other joint maker, on which the plaintiff had a claim against him to the amount of 18*l.*; held that if the defendant knew that the note was payable to the plaintiff, notice should have been given to him, but if the jury thought he did not know it, the body of the note being in the hand-writing of *M.*, it was not necessary. *Sharpe* v. *Gye*,[7] 4 C. & P. 311. Where the acceptor of a bill, an insolvent, described the bill in his schedule correctly as to parties, date and amount, but misdescribed the parties in whose hands it then was, there being some evidence to show that he knew the true holder, held that it was properly a question for the jury to say whether he did so or not. *Levy* v. *Dolbell*,[8] 1 M. & M. 202. Under the stat. 7 Geo. 4, c. 57, the defendant is discharged as to claims on bills if it appear that at the time of making out his schedule he did not know the holder; *secus* if he had been once informed, although he

[1]Eng. Com. Law Reps. ix. 437. [2]*Id.* xiii. 61. [3]*Id.* xix. 404. [4]*Id.* xix. 56. [5]*Id.* xi. 457. [6]*Id.* x. 350. [7]*Id.* xix. 402. [8]*Id.* xxii. 292.

*misdescription of the debt in the schedule will not be material when it was not intended to mislead, and could not have misled the creditor (*x*); such discharge will not extend to the whole debt, if the whole be not specified in the schedule (*y*). In an action by an insolvent after his discharge, the creditor is entitled to set off the difference between the amount really due and that specified in the schedule (*z*).

By sec. 61, no writ of *fieri facias* or *elegit* shall issue on any judgment obtained against such prisoner (after an adjudication of discharge) for any debt or sum of money with respect to which such person shall have so become entitled (*a*) to his discharge; nor in any action upon any new contract, or security for payment thereof, except upon the judgment entered up according to the Act; and that if any such suit or action, &c. be brought, he may plead generally that he was duly discharged according to the Act by an order of adjudication, and that such order remains in force; to which the plaintiff may apply either generally, and deny the matters so pleaded, or specially, as he might have replied had the discharge been pleaded specially (*b*).

Where in an action against an insolvent the question is, whether the debt in respect of which he claims to have been discharged has been stated in the schedule, the identity of the debt, where a doubt exists, is a question of fact for the jury (*c*).

*565 *An insolvent is liable to repay to a surety the arrears of an annuity which he had been called upon to pay after the discharge of the principal (*d*).

might have forgotten it. *Lewis* v. *Mason*,[1] 4 C. & P. 322. The insolvent after his discharge signs a bill for the old debt, which is indorsed to the plaintiff for full value; in order to entitle the plaintiff to recover, the jury must be satisfied he took it *bona fide*, and without being conscious of the latent defect and for his own purposes. *Northam* v. *Latouche*,[2] 4 C. & P. 140. On a general plea of discharge, under the Insolvent Act, and replication, denying the discharge, the filing of the petition not being in issue, need not be proved. *Andrews* v. *Pledger*,[3] 4 C. & P. 174.

(*x*) *Wood* v. *Jowett*,[4] 4 B. & C. 20.

(*y*) *Taylor* v. *Buchanan*,[5] 4 B. & C. 419. If, being indebted to a party in two sums, he insert one only in his schedule, he is not discharged as to the other. *Tyers* v. *Stunt*, 7 Sc. 349.

(*z*) Ibid.

(*a*) Where the surety to an annuity bond, become insolvent, inserted the bond in his schedule, held, that under 1 G. 4, c. 114, s. 10, he could not be arrested for subsequent arrears. *Collins* v. *Lightfoot*,[6] 5 B. & Cr. K. B. 581; and 8 D. & R. 339. Sec. 61 is confined to debts due from the insolvent at the time of his imprisonment; where, therefore, at that time, a liability only existed to a claim for unascertained damages, as upon a judgment by default in an action, although commenced prior to his imprisonment; held, that he might be taken in execution for the damages when assessed upon the writ of inquiry. *Wilmer* v. *White*,[7] 6 Bing. 291.

(*b*) As to proof of discharge under former Insolvent Acts, see *Neale* v. *Isaacs*, 4 B. & C. 335; 6 D. & R. 464.

(*c*) Where on a plea of discharge under an Insolvent Act, in an action on a bill of exchange, it appeared that there were no other outstanding bills of like date or amount, but the names of the drawer and acceptor in the schedule were transposed; the Judge left it to the jury to say if they thought the bill declared on, and that intended to be described in the schedule, were the same, and if so, whether the mis-description was intended to deceive or mislead the holder, and likely to produce that effect. *Nias* v. *Nicholson*,[8] 1 Ry. & M. C. 323. Where the insolvent stated in his schedule a debt to *A.* for goods sold, and for which he had accepted a bill drawn by *A.* for the amount; held a sufficient description within 1 G. 4, c. 119, s. 6, although the bill at the time had been indorsed to another, the insolvent being ignorant of that fact; the Act only requiring the statement of his debts to be made according to the party's "knowledge or belief." *Reeves* v. *Lambert*,[9] 4 B. & C. 214. Where the insolvent had ordered coals of *A. B.* residing at *N.*, but the invoice made out in the name of the *A. Coal Co.*, and in his schedule he had stated the debt as due to *A. B.* of *N.* for coals, and that the latter held notes in respect thereof, which were the subject of the subsequent action; held, that it was a sufficient description of the debt under the 1 G. 4, c. 119, s. 6, there being no evidence of any intention to mislead, and the mode of describing the debt being calculated to notify to the plaintiffs the particular debt in question. *Forman* v. *Drew*,[10] 4 B. & C. 15. A surety in an annuity bond was held to be protected by his discharge, under the stat. 1 G. 4, c. 119, from arrest for future arrears. *Collins* v. *Lightfoot*,[11] 4 B. & C. 581.

(*d*) *Abbott* v. *Bruere*, 5 Bing. 8.

[1]Eng. Com. Law Reps. xix. 404. [2]*Id.* xix. 314. [3]*Id.* xix. 381. [4]*Id.* x. 268. [5]*Id.* x. 376. [6]*Id.* xii. 326. [7]*Id.* xix. 84. [8]*Id.* xii. 53. [9]*Id.* x. 311. [10]*Id.* x. 265. [11]*Id.* xii. 326.

A party, after his discharge under an Insolvent Act, will be liable on a new agreement to pay the same debt (*e*). Liability on new promise.

An Insolvent Court has no jurisdiction to inquire whether an acceptance, on which the party was charged in execution, was a forgery (*f*). His not putting a debt due to him in his schedule is, it is said, conclusive against him in an action to recover it (*g*). An insolvent cannot, after taking the benefit of the Act, carry on a suit commenced before he took the benefit of the Act for the benefit of his creditors (*h*). Action by.

An assignment by an insolvent is void if made with the intention of petitioning the Court for his discharge, although made three months before the imprisonment (*i*).

INSPECTION.

With respect to the granting an inspection or copy of an instrument, preparatory to the trial, the application is made either, 1st, against a party, or, 2dly, against a third person.

The general rule as to parties is, that a party shall not be compelled to produce evidence against himself (*j*). And, therefore, where a plaintiff *moved to be allowed to inspect and take a copy of a writ in the possession of the defendant, late sheriff of Chester, to enable him to frame his declaration, the Court refused the application (*k*). But if the plaintiff be either an actual party, or a party in interest to an instrument in the defendant's possession, the Court will, if it be necessary, compel the production of it in order to be stamped, or that a copy may be taken, although the interest of the party does not appear, except by his own declaration, by which he claims an interest. In order, however, to obtain this rule the applicant Rule as to parties. *566 Inspection, when allowed.

(*e*) *Sweenie* v. *Sharpe*,[1] 4 Bing. 37.

(*f*) *Rice* v. *Lee*,[2] 9 Moore, 593.

(*g*) *Nicholls* v. *Downes*,[3] 4 C. & P. 330.

(*h*) *Swann* v. *Sutton*, 2 P. & D. 535, and see *Minchin* v. *Hart*,[4] 1 Chitty's R. 215.

(*i*) *Beckie* v. *Smith*, 2 M. & W. 191, and see *Atkinson* v. *Brindall*,[5] 2 Bing. N. C. 225; *Morgan* v. *Brundrett*,[6] 5 B. & Ad. 297; *Doe* v. *Gillett*, 2 C. M. & R. 579. Where several executions being in at the same time on the insolvent's goods, which, with the landlord's claim, and for taxes, &c., would more than have absorbed the whole property, the insolvent consented to a proposal to assign over the whole of his property to the defendants, one the landlady, and the other one of the execution creditors, for the benefit of all his creditors, the defendants to pay off the execution creditors, and carry on the business to a certain time, whereby a surplus would be realized; held, that the assignment was not to be deemed voluntary and fraudulent within the Insolvent Acts, and that there was a sufficient consideration from the defendants. *Knight* v. *Ferguson*, 5 M. & W. 389.

(*j*) See the observations of Abbott, L. C. J., in *The King* v. *Sheriff of Chester*,[7] 1 Chitty's R. 476. In trover for goods detained (beyond the period allowed) for a distress for rent due from a third party, the Court refused to compel the defendant to produce an agreement in his possession entered into by such third party, authorizing the defendant to remain in possession of the distress, for the purpose of being inspected, and if necessary, stamped. *Lawrence* v. *Hooker*,[8] 5 Bing. 6. Action by a corporation against their clerk for making false entries, the Court refused to order the defendant to have inspection of the books, he not having sworn that it was essential to his defence, and the plaintiff having furnished him with the item of charge to be considered as a particular, and offered him inspection of a particular item. *Imperial Gas Company* v. *Clarke*,[9] 7 Bing. 95. In a suit by the vicar, and motion for the production of papers, admitted by the answer of one defendant to be in his possession, but which he contended related to the impropriate rectory and tithes, the Court, distinguishing between such deeds as related to the defendant's title, and those which were only collateral, refused the motion. *Collins* v. *Gresley*, 2 Y. & J. 491. Inspection was refused to a plaintiff in replevin of a deed to which he was no party, assigning the reversion of the demised premises to the avowant. *Brown* v. *Rose*,[10] 6 Taunt. 305. In general an adverse claimant having no interest in title-deeds, has no right to inspect them. *Talbot* v. *Villebois*, 3 T. R. 142. The defendant, after settling a draft of articles of partnership, engrossed and executed a deed differing from the draft. The plaintiff refused to execute the deed, but commenced an action for breach of agreement to take him into partnership. The Court refused a motion for leave to inspect and copy the deed. *Ratcliff* v. *Bleasby*,[11] 3 Bing. 48.

(*k*) *The King* v. *Sheriff of Chester*[7], Chitty's R. 476. Note, that the plaintiff had neglected to call the defendant to return the writ into the Court of General Session at Chester.

[1]Eng. Com. Law Reps. xiii. 331. [2]*Id.* xvii. 129. [3]*Id.* xix. 407. [4]*Id.* xviii. 68. [5]*Id.* xxix. 316. [6]*Id.* xxvii. 79. [7]*Id.* xviii. 139. [8]*Id.* xv. 345. [9]*Id.* xx. 59. [10]*Id.* i. 334, 382. [11]*Id.* xi. 74.

must either be an *actual party* to the instrument, or a *party in interest* (*l*). Where one part only of an indenture was executed, the Court compelled the defendant, who had possession of it, to produce it for the inspection of the other party (*m*); for one part only having been executed, there was an implied agreement by the party who had the possession of it to produce it: and in such a case the Court will direct an inspection, although the plaintiff requires it for the purpose of discovering some defect in the deed (*n*).

So where an action is brought by a sailor for his wages, the Court will compel the master to produce the ship's articles, and give a copy (*o*).

And in general it seems that whenever the defendant holds a document as a trustee for the other, the Court will compel him to produce it for inspection, upon an action brought by the other party. Where the defendant was a stakeholder, the Court ordered him to produce a copy of a racing contract for the plaintiff (*p*).

Where a plaintiff declares on a specialty, the defendant is entitled, as of course, to oyer of the deed; and although the instrument be not declared upon, but is wanted for the purposes of evidence only, the Court will compel the production, for the purpose of inspection, stamping, or taking a copy, upon the application of the party who has an interest in the instrument (*q*), although the practice was formerly to the contrary (*r*). According to the present practice, a Judge will, upon summons, order a copy of the instrument on which the action is founded, to be delivered to the defendant or his attorney, whenever the action is founded on a written
*567 instrument, whether *it be a policy of insurance (*s*), bill of exchange, or special agreement or undertaking (*t*) in writing to pay the debt of another, if special ground be laid, as that the demand is of long standing, and the

(*l*) *Taylor* v. *Osborne*, 4 Taunt. 159, n. As between two persons admitting themselves to be tenants in common, a court of equity will order the production of title-deeds, in the hands of either, for the inspection of the other; but where one had sold his share, and was in possession as mortgagee of the vendee only, the Court held that they could not compel it, the rule being, that a mortgagee has no right to show his mortgagor's title. (*Lambert* v. *Rogers*, 4 Merivale, 489.) An heir cannot support a bill for title-deeds, without showing that they are in some way necessary to enable him to recover at law; he must rely on his title as heir; and if he cannot set aside the will he has nothing to do with the deeds. *Jones* v. *Jones*, 3 Merivale, 172.

(*m*) *Blakey* v. *Porter*, 1 Taunt. 386.

(*n*) *King* v. *King*, 4 Taunt. 666. The Court refused to compel the defendant who was in possession of a lease, on which the plaintiff brought an action, to permit a copy to be taken, although it appeared that the plaintiff had no copy or counterpart, and although the attorney who drew the lease and counterpart had absconded. *Lord Portmore* v. *Goring*,[1] 4 Bing. 152. But note, it was not shown that no counterpart was in existence, and on that ground the Court decided. So where bought and sold notes are delivered by the broker, it seems that the vendor is entitled to an inspection of the note delivered to the vendee. Per Hullock, B., in *Grant* v. *Fletcher*, Lancaster Lent Assizes, 1826.

(*o*) 1 Taunt. 386; Abbott, O. S. 389.

(*p*) Barnes, 439.

(*q*) Tidd, 523.

(*r*) Ib. & Salk. 215, where the Court refused a copy of a note, in an action on a parol contract, of which the note was merely evidence.

(*s*) Tidd, 524, 3d ed. and see the st. 19 G. 2, c. 37, s. 6.

(*t*) *Barry* v. *Alexander*, 25 G. 2, Str. 1130. Where in an action on an agreement to take the plaintiff into the defendant's employment, the defendant pleaded, first, the general issue; second, that there was no memorandum in writing, &c.; to which the plaintiff replied that there was such a writing; held, that the defendant was entitled to an inspection of it, as in any other case where there is only one copy of the contract, and where the party holding is to be considered a trustee for the production of it for the other. *Blogg* v. *Kent*,[2] 6 Bing. 614. Where the plaintiff made affidavit that he sued the defendant to recover damages for a breach of agreement in not entering into partnership, pursuant to a partnership deed drawn up and signed by the plaintiff, but remaining in the custody of the defendant or his attorney, and that the plaintiff possessed neither copy nor counterpart of the deed; the Court granted a rule enabling the plaintiff to inspect the deed and take a copy, though the defendant swore he had not executed the deed. On a motion for leave to inspect a partnership deed, the affidavit should state that the party moving has neither copy nor counterpart. *Morrow* v. *Saunders*,[3] 1 B. & B. 318; *Bateman* v. *Phillips*, 4 Taunt. 157. Upon a plea of letters patent not enrolled, the Court will direct a copy to be given. *R.* v. *Amery*, 1 T. R. 149.

[1] Eng. Com. Law Reps. xiii. 384. [2] *Id.* xix. 179. [3] *Id.* v. 94.

defendant has no copy of the instrument, or that there is reason to suspect its being forged (*u*); and it is not material whether the instrument be or be not stated in the declaration to be in writing. The rule laid down by Lord Mansfield on such occasions was, that wherever the defendant would be entitled to a discovery in equity, he should have it in a court of law (*v*). It has been stated that in an action between a Smithfield factor and a grazier, the Court ruled the plaintiff to show cause why he should not produce upon the trial his books of account of beasts sold, and of monies received on the defendant's account, and that no cause being shown, the rule was made absolute (*x*). On a new trial granted, the Court has allowed the inspection of a deed read on the former trial (*y*).

When a party is ordered to produce the documents which bear upon the issue, he is not bound to produce such parts of documents as do not relate to the issue; but if the applicant insist that anything material has been withheld, the other party must, in analogy to the practice in the Court of Chancery, deny by affidavit that what he withholds is relevant (*z*). Of what documents.

It seems to be a general rule, that a Court will not compel a party to discover his evidence before trial, by the production of his books or other private documents (*a*). And the Court refused the application where the *object was to enable the defendant to plead in abatement the non-joinder of parties (*b*). In another case the Court refused a motion for the inspection of the bill of exchange on which the action was brought, and for impounding it in the hands of the prothonotary, on the suggestion of its being a forgery; for this is matter of defence on the trial (*c*). *568

In actions on policies of insurance, the Court or a Judge at Chambers, at the instance of the underwriters, will order the assured to produce all papers relevant to the issue (*d*).

Where the applicant is neither an actual party to the instrument, nor a party in interest, the Court will not compel the production of an instrument to be stamped (*e*). Where an action was brought on a bond, and the defendant, on a suggestion of forgery, moved that it might be examined in the hands of the plaintiff, by an officer from the Stamp-office, the Court refused the application, since it might be the means of convicting the party of a capital felony (*f*). And where each party has his own part of the instrument, the Court will not compel the defendant to produce his part or copy. If the plaintiff lose the bond on which the action is brought, the Court will not compel the defendant to produce his copy (*g*). When refused.

(*u*) See Tidd's Prac. 610, 7th ed. *Barry* v. *Alexander*, 25 G. 3, K. B.

(*v*) Tidd, 524, cites *Barry* v. *Alexander*, Mich. 25, G. 3. On a bill filed for a discovery, it is not competent to the plaintiff to call for all the defendant's deeds indiscriminately; some specific deed or deeds should be pointed out, and the object of the party calling for them fully and clearly stated. *Shaw* v. *Shaw*, 12 Pri. 163. See *Worthington* v. *Staffurd Canal Company*, Ib. 166.

(*x*) 2 Str. 1130.

(*y*) Where on the trial the defendant produced two deeds, one only of which was read, but the execution of the other was admitted; held, that upon a new trial being granted, the opposite party was entitled to have inspection of that instrument only which had been read. *Hewitt* v. *Piggott*,[1] 7 Bing. 400. Where a party produces his title-deeds to defeat his adversary's claim, the Court will give the latter an opportunity of inspecting them. *Willis* v. *Farrar*, 2 Y. & J. 242.

(*z*) *Clifford* v. *Taylor*, 1 Taunt. 167; 1 Camp. 562.

(*a*) *Infra*, (*h*). In *Price* v. *Tuvare*, Bayley, J., refused an application made by the plaintiff to inspect and take a copy of an entry of a sale of peach-wood by the defendant to the plaintiff, supposed to have been made in the defendant's books; the plaintiff's affidavit did not state that such entry had been signed either by the parties, or by any agent; and he observed upon the hardness of the defendant's situation if he were compellable to produce an entry which might be used as evidence against him, but which would not be evidence for him.

(*b*) *Beale* v. *Bird*,[2] 2 D. & R. 419.

(*c*) *Hildyard* v. *Smith*,[3] 1 Bing. 451.

(*d*) 1 Camp. 562; 1 Taunt. 47, 167

(*e*) *Taylor* v. *Osborne*, 4 Taunt. 159, n.

(*f*) *Chetwynd* v. *Marnell*, 1 B. & P. 271.

(*g*) *Street* v. *Browne*,[4] 6 Taunt. 302.

[1] Eng. Com. Law Reps. xx. 179. [2] *Id.* xvi. 99. [3] *Id.* viii. 376. [4] *Id.* i. 391.

In general, the Court will not compel a party to discover the evidence before the trial, by the production of his books or other private instruments (*h*); nor will they grant a rule for the inspection of books or documents of a private nature in the hands of third persons (*i*).

Inspection of court-rolls and corporation books.

But though the law will not compel one who is not a party to the suit to permit the inspection of private books and documents, it is otherwise where the document can be considered to be of a public nature, in which the applicant has an interest in common with others, as in the case of court-rolls and corporation books (*j*). With respect to a tenant or member, the books are public books; they are common evidence, which must of necessity be kept in some one hand, and then each individual possessing a legal interest in them has a right to inspect, and to use them as evidence of his rights; but with respect to a mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. This was decided, after much consideration, in the case of *The Mayor of Southampton* v. *Greaves* (*k*), notwithsanding several modern cases, in which the granting such applications in the case of corporations seemed to have been considered as a matter of course (*l*). In that case the corporation brought an action against the defendant for tolls, and the Court denied the application to inspect. A similar application had been refused in an action of trespass, where the defendant justified
*569 *under the corporation of Ipswich, for distraining for a toll for repairing the quay (*m*), and in many other instances.

The Court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of a corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion (*n*).

But in an action of debt for a penalty under a bye-law, the defendant was allowed an inspection of the bye-law and of the corporation books: for as the law was made for the public good of the residents, the defendant could not be regarded as a stranger (*o*).

In an action between the impropriator and the parishioners, as to the right to a house, the Court refused to the former the inspection of the parish books, and copies of so much as regarded his title, saying that the case differed from that of copyholders, because all the tenants of the manor have an interest in the court-rolls, but the impropriator had a distinct interest for the parishioners; it was not a parochial right, but a title, which was in question, and therefore it was not reasonable that the parish-books should be produced, which would be to show the defendant's evidence (*p*)[a].

(*h*) Tidd, 525; 6 Mod. 364; but see 2 Burr. 2489.

(*i*) Tidd, 524; Ld. Raym. 705, 927; 1 Barnard, 466; Barnes, 236; C. T. Hardw. 130; 2 Bl. R. 850. But it seems that a stakeholder was compelled by the Court to produce an entry of a racing contract, that a copy might be taken. Barnes, 439. In *White* v. *Earl of Montgomery*, 2 Str. 1198, a third person, having possession of the bond sued on, was compelled to produce it. A bankrupt is not entitled, previous to the trial of an action by which he disputes the bankruptcy, to inspect the proceedings. Lofft, 80.

(*j*) Per Buller, J., *R. v. Holland*, 2 Stra. 260.

(*k*) 8 T. R. 590. See the opinions of Ld. Hardwicke, and of C. J. De Grey, there cited.

(*l*) *Mayor of Lynn* v. *Denton*, 1 T. R. 689; 3 T. R. 303. *Mayor of London* v. *Mayor of Lynn*, 1 H. B. 211.

(*m*) Per Lawrence, J., 8 T. R. 595; *Hodges* v. *Atkis*, 3 Wils. 398.

(*n*) *The King* v. *Masters and Wardens of the Merchant Tailors' Company*,[1] 2 B. & Ad. 115.

(*o*) *Harrison* v. *Williams*,[2] 3 B. & C. 162.

(*p*) *Cox* v. *Copping*, 5 Mod. 395. *Semble*, S. C. with Anon. Ld. Raym. 337. See also *R.* v. *Worsenham*,

[a] See *Rex* v. *The Justices of Buckingham*, Eng. Com. Law Reps. vol. xv. 240.

[1] Eng. Com. Law Reps. xxii. 40. [2] *Id.* x. 43.

On a question between two, as to the right to a manor, the Court refused to grant a rule for the production of the rolls at the trial, since it was out of the common case between two tenants (*q*).

In the case of *The King* v. *Algood* (*r*), in which most of the previous cases on the subject were referred to (*s*), it was held that a freehold tenant of a manor has no right to the inspection of the rolls, unless there be some cause depending. And where the question is between the lord and a stranger, inspection will not be granted (*t*); but a copyholder who claims an interest may have an inspection of so much of the rolls of a manor as concerns his own interest (*u*), although no cause be depending at the time. Upon a question between the parish of *St. Margaret* and *The Dean and Chapter of Westminster*, as to the right of nominating the parish clerk, *570
the Court refused an inspection of the parish-books to the dean and chapter (*x*).

So the Court has granted a *mandamus* for the inspection of county rates (*y*).

Upon the same principle, one who has an interest in any public books, whether Bank, East India, parish or custom-house books, has a right to inspect them when they are material, and to take copies of them (*z*). In *Grey* v. *Hopkins* (*a*), an order was made for the production of the books of the East India Company, in a cause between parties having stock there, since the books, the Court said, were the title of the buyers of stock; so the books of the commissioners of the lottery, and their numerical lists, are of a public nature, and ticket-holders may have an inspection of them by rule of court (*b*). But the East India Company, it was held, were not obliged to produce their private books or letters (*c*); nor any private books relating to the appointment of their servants (*d*); nor will the Court allow an inspection in such cases unless it be material (*e*); nor the inspection and copying of more than is material to the question (*f*); nor will the Court compel the production of public books upon a question between parties who have

Ld. Raym. 705; *The Queen* v. *Mead*, Ld. Raym. 927. And see the case of *May* v. *Gwynne*,[1] 4 B. & A. 301. The Court will not compel the vestry clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody, for any other than parochial purposes. *May* v. *Gwynne*,[1] 4 B. & A. 301. In an action to try the validity of a church-rate, the Court granted an order for the plaintiff to inspect and copy the parish books, without any order as to the costs of a party attending to exhibit them. *Newell* v. *Simpkin*,[2] 6 Bing. 565. A rated parishioner is entitled, under 22 Geo. 3, c. 83, s. 7, to inspect the accounts kept by the guardians of the poor, although the time for appealing may be gone by, and a *mandamus* granted. *R.* v. *Great Faringdon*,[3] 9 B. & C. 541. On an indictment against the county for not repairing a bridge, it being a question whether the parish or county were liable, the Court refused to compel the former to produce books of certain trustees of lands and bridgewardens, elected by the inhabitants in vestry, and to whom the accounts were submitted, not being public but parochial books, and the application being, in fact, by one litigant party to compel the other to produce his own private books to make out a case against him. *R.* v. *Buckingham Justices*,[4] 8 B. & C. 375.

(*q*) *Wood* v. *Whitcomb*, 12 Vin. Ab. 146, pl. 9. (*r*) 7 T. R. 746.

(*s*) *R.* v. *Shelley*, 3 T. R. 141; *Hodson* v. *Parker*, 27 G. 2, C. B.; Barnes, 237; *Talbot* v. *Villebois*, Mich. 23 G. 3; *Roe* v. *Aylmer*, Barnes, 321; *Baldwin* v. *Tudge*, Ib.

(*t*) *Talbot* v. *Villebois*, 2 Str. 1223.

(*u*) *R.* v. *Lucas*, 10 East, 235; *Bateman* v. *Phillips*, 4 Taunt. 162.

(*x*) *Turner* v. *Gethin*, 12 Vin. Ab. 147, pl. 11.

(*y*) *R.* v. *Justices of Leicestershire*,[5] 4 B. & C. 891. But application must first be made to the justices at their quarter sessions, Ib. But the Court will not grant a *mandamus* for the inspection of churchwardens' accounts, under 17 G. 2, c. 38, without special cause. *R.* v. *Clear*, 4 B. & C. 899. For the clause is not general, but is for the remedy of particular evils. See further, note (*i*) *supra*.

(*z*) 7 Mod. 129; 2 Str. 304; Barnes, 236; 1 Barnard, 455; 2 Str. 954, 1005.

(*a*) 7 Mod. 129; S.C. 2 Ld. Raym. 851; 1 Salk. 281, 285; 2 Salk. 555, 1446.

(*b*) *Scinotti* v. *Bumstead & others*, Hil. 36 G. 3; Tidd. Pr. 531, 3d edit.

(*c*) *Shelling* v. *Farmer*, 1 Str. 645. (*d*) *Murray* v. *Thornhill*, 2 Str. 717.

(*e*) *Benson* v. *Port*, cited 1 Wils. 240; 1 Bl. R. 40; 1 Barnard, 455; 1 Str. 1223.

(*f*) Ib. and *Slade* v. *Walter*, 12 Vin. Ab. Ev. 146, pl. 8.

[1]Eng. Com. Law Reps. vi. 418. [2]*Id.* xix. 167. [3]*Id.* xvii. 439. [4]*Id.* xv. 240. [5]*Id.* x. 466.

no interest in them. It was held that the officers served with a *subpœnâ duces tecum*, in order to decide a wager between two persons as to the amount of the revenue, was not bound to produce the books (*g*).

Records of courts.

A party to a proceeding has usually a right to an inspection of those proceedings where it is necessary for the purposes of a civil suit. Where the plaintiff had been sued in the Court of Conservancy, London, and taken in execution, for which he brought an action of trespass, the Court granted a rule that he should be at liberty to inspect the books of proceedings, so far as they related to the cause against himself (*h*). And in an action for a malicious prosecution, where it was necessary, in order to support the action, that the plaintiff should have copies of the examinations before the justices, and of the warrant on which he was apprehended, the Court granted a rule accordingly, and directed that the originals should be produced at the trial (*i*).

*571 In criminal cases.

*An inspection is never granted in a criminal case, because no one is bound to produce evidence against himself (*k*). Upon an information against one of nine trustees of a charity, incorporated by Act of Parliament, by the name of Surveyors of the Highways of Aylesbury, for executing his office without taking the oaths, the Court denied to the prosecutor (*l*) inspection and copies of their books of elections, and of their receipts and disbursements, because they were of a private nature, and it would be to make a man produce evidence against himself in a criminal case. Nor is it granted in criminal cases, at the instance of the defendant, in any case, with respect to any depositions or examinations of any kind which have taken place. And therefore where an information had been filed against Holland, upon the report of a board of inquiry in India, the Court refused the defendant's motion for an inspection, and said that they had no power to grant it (*m*).

It seems that a proceeding by *quo warranto* is not considered as a criminal one with the rule (*n*). The motion for leave to inspect books is made upon affidavit, stating the circumstances of the case, and that application has been made and refused (*o*). It seems that the Court will not grant the

(*g*) *Atherfold* v. *Beard*, 2 T. R. 616. (*h*) *Wilson* v. *Rogers*, 2 Str. 1242.

(*i*) *R.* v. *Smith*, 1 Str. 126. See *Welch* v. *Richards*, Barnes, 268. In *Herbert* v. *Ashburne*, 1 Wils. 297, the court granted a rule for the inspection of the books of the books of the sessions of the corporation of Kendall, upon a question whether the park lands were within the town or corporation of Kendall, on the ground that they were public books, which every one had a right to see. But in the case of *The King* v. *The Sheriff of Chester*,[1] 1 Chitty's R. 479, Abbot, L. C. J. said, We grant mandamuses to inspect corporation books, as a matter of right to burgesses who have an interest in the corporation, but I know of no right that this Court has to authorize a person to inspect the books of quarter sessions. In the case of the *King* v. *Purcell*, *Vice Chancellor of Oxford*, 1 Wils. 239, that of *R.* v. *Berking*, 7 G. 1, was cited as a precedent of a rule granted by the Court of K. B. to inspect the books and records of the Court, where the indictment was found in a criminal case; but it appears from the statement of Lee, C. J. ib. that that was the case of an indictment for exercising a trade without having served an apprenticeship, and that applications being made that the name of the prosecutor should be disclosed, the Court refused the application, observing that the defendant might have a rule to take a copy of the record, when he might see on the back of the indictment who the prosecutor was. In *Edwards* v. *Vesey*, Cas. Temp. Hard. 128, in an action brought for taking a silver cup of the plaintiff's under a distress upon a fine imposed on the plaintiff, being an under officer to the commissioners of lieutenancy for the city of London, a rule was made for the plaintiff to inspect the books and papers of rates of assessments of the lieutenancy.

(*k*) *R.* v. *Purnell*, 1 Bl. 37; 1 Wils. 239; per Buller, J. 7 T. R. 142; 1 Barnard, 455; 2 Str. 1005, 1223; 3 T. R. 303; 2 Taunt. 115. The grand jury may receive secondary evidence of the contents of the forged instrument, where from its being in the hands of the prisoner, or any other cause, it cannot be produced; and where a witness objects to producing deeds, if they are part of the evidence of the title to his estate, he cannot be compelled to produce them; but if not he may. *R.* v. *Hunter*,[2] 3 C. & P. 592.

(*l*) *The Queen* v. *Mead*, Lord Raym. 927; 12 Vin. Ab. 146, pl. 6; *R.* v. *Dr. Bridgman*, 2 Str. 1203; 1 Lord Raym. 705; 2 Str. 1005, 1210; 1 Wils. 329; 4 Burr. 2489; 1 Bl. R. 37, 351.

(*m*) *R.* v. *Holland*, 4 T. R. 691. (*n*) See *R.* v. *Babb*, 3 T. R. 579.

(*o*) Tidd. Pr. 533, 3d edit.; 3 Wils. 399; Str. 1223.

[1] Eng. Com. Law Reps. xviii. 139. [2] *Id.* xiv. 469.

motion before issue joined, for till then it does not appear whether an inspection is necessary (*p*).

INTENTION.

Intention, when a conclusion of law.

WHERE an act has been done *voluntarily*, the particular intention with which it was done may either be *material* or *immaterial* to the legal charge or claim (*q*).

*572 *Where the intention is *material*, it is in some instances a conclusion of law which may be drawn by the Court either from intrinsic facts or extrinsic circumstances, but most usually it is a question of fact, under all circumstances, for the consideration of a jury.

The question of intention is a conclusion to be drawn by the Court from the circumstances, whenever, by virtue of any rule or principle of law, the conclusion is a necessary one from such circumstances. Thus in cases of homicide, the Courts frequently infer malice from the facts, without an express finding by the jury; in other words, malice arises by construction.

It is a rule of law (where a *general* felonious intention is sufficient to constitute the offence) that a man who commits one felony in attempting to commit another cannot excuse himself, on the ground that he did not intend to commit the particular felony (*r*). Thus, if *A.* intend to shoot *B.*, miss him, but destroy *C.* against whom he had no malice, he is guilty of the murder of *C.*

But in such case the offence contemplated must be a felony; if a man intending to commit a bare trespass, were to shoot another, it would amount at most to the offence of manslaughter (*s*).

It seems that the rule is to be confined to cases where a *general* allegation of a malicious and felonious intention is sufficient, and that it does not extend to offences where a particular and specific intention is essential (*t*).

In the next place, although the fact itself or its circumstances may not supply any conclusive inference as to intention, independently of the finding of the jury, yet they may afford a *primâ facie* presumption, which

(*p*) 3 Wils. 398; 1 Ld. Raym. 253; Carth. 421.

(*q*) It has been said, in the case of an action for an alleged libel, that if the fact be justified, the motive and intention are immaterial. Declaration for a libel imputing perjury; plea, that it was contained in an affidavit in defence of a charge of refusing to grant a license; and held to be good, without any denial that it was done with intent to asperse the plaintiff, or that it was necessary for the defendant's defence, or that it was done with that intent. For P. C. if the matter of fact be justified, the manner is of no consequence. *Astley* v. *Young*, 2 Burr. 801. This is no doubt true, in all cases where by law the fact is by law constituted a peremptory bar; this is in effect but to say that the intention is immaterial where the law makes it immaterial; a simple truism: where however an act may be justifiable as of right, where done with one intention, but is wrongful and actionable if done with another intention, the real intention may be a question of fact, in other words the intention is traversable, although no doubt the maxim "*finis imponit nomen imperi*," is usually of great weight. In *Paster* v. *The Bishop of Winchester*, Ch. Ca. 96. Vin. Ab. (X. b.), issue was joined on the question whether the primary intention of the party was to commit waste; and see *Doe* v. *Williams*, 11 East, 56; *supra*, tit. COPYHOLD. And *Lucas* v. *Nockells*,[1] 10 Bing. 157. And see *Governor of Poor of Bristol* v. *Waite*, 2 A. & E. 264. It has, however, frequently been held that a man may distrein for one service, and avow for another. *Infra*, tit. TRESPASS. The latter cases stand on a somewhat different principle: if a man having a right of way for one specific purpose, use it intentionally for another purpose when he would not have used it for the legal purpose, an actual wrong is done to the owner of the land, which has been used for a purpose foreign to the grant; but where a party has a power to distrein for either of two causes, the party distreined upon suffers no wrong, whether the distreinor intend to proceed for the one cause or the other, or distrein without any actual determination on the subject.

(*r*) East's P. C. 514.

(*s*) *R.* v. *Dobbs*, East's P. C. 513.

(*t*) Thus, if *A.* were to cut *B.* in attempting to murder *C.*, it seems, that *A.* would not be guilty within the stat. 7 W. 4, and 1 Vic. c. 85, for the indictment must allege a specific intention to murder or injure *C.*, which would be negatived by the evidence. If in that case *A.* had actually killed *B.* he would have been guilty of murder; but in order to constitute murder, a general malicious and felonious intention is sufficient, and it is not necessary that it should be specifically pointed at the individual.

[1] Eng. Com. Law Reps. xxv. 71.

on recognized legal principles ought to prevail, unless the presumption be rebutted by competent evidence.

The law constantly notices the universal principle of evidence, that a man shall be taken to intend that which he does, or which is the immediate and natural consequence of his act (*u*).

In many cases, therefore, the allegation of intention, though essential to sustain the charge or claim, requires no other proof than that of the fact itself; the intention being the result or inference which the law draws from the act itself, in the absence of a sufficient legal justification or excuse. Thus in the case of a libel, the publication and noxious application of which have been proved, in the absence of evidence to repel the presumption, a malicious intention (*x*) is to be inferred without further proof.

*573 Where, on the *contrary, the act itself is indifferent, and is innocent or criminal according to the intention of the agent, the intention, like any other matter of fact, requires extrinsic proof.

Where a party disposes of forged bank-notes, it is an inference of law that he intended to defraud the Bank (*y*); and yet, if the jury do not draw the conclusion, but merely find the facts, it seems that the Court cannot.

In the absence of any principle or rule of law, by virtue of which either a conclusive inference or any presumption as to intention ought to be drawn from the act or its circumstances, the specific intention of the agent is a matter of fact on which the jury are to exercise their discretion on the evidence before them, as in ordinary cases, civil as well as criminal (*z*). Thus on a charge of homicide, it may be for the jury to say whether the act was done with a malicious intent to destroy another, or merely to alarm and terrify him, or resulted from mere unavoidable accident, independently of any intention to injure another, or even of carelessness or negligence; and according to that determination, the offence may amount to murder, or merely to manslaughter, or chance-medley. In order, however, to arrive at a just conclusion upon such questions, the jury ought to act upon those presumptions which are recognized by the law, as far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence.

Where the particular intention is essential, evidence of former attempts with that intention is admissible to prove the intent (*a*). It is a general rule, that whenever the fact of intention is required to be established by collateral evidence, it may be rebutted by contrary evidence (*b*).

Primary and collateral intention.

A doubt has existed whether a criminal agent who effects the particular mischief prohibited, but who has a different and primary object in view, can be guilty of an intention to effect the particular mischief, which is but ancillary to the principal purpose. This difficulty seems to have arisen from considering that as a question of law which is in strictness a mere

(*u*) See Ld. Ellenborough's observations, 3 M. & S. 15.

(*x*) See Ld. Ellenborough's observations, *R.* v. *Phillips*, 6 East, 470. Where an act, in itself indifferent, becomes criminal if it be done with a particular intent, then the intention must be alleged and proved; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof, the law implies a criminal intention. Per Lord Mansfield, 5 Burr. 2661. Starkie on Libel, 2d edit.

(*y*) *R.* v. *Mazagora*, 2 B. & C. 261; S. P. *R.* v. *Sheppard*, Russ. & Ry. 169.

(*z*) Bac. Ab. Trial, G.; 1 Hale, 229.

(*a*) *R.* v. *Voke*, Russ. & Ry. C. C. 531. An indictment charging a joint administering of sulphuric acid to several horses, held to be supported by proof of mixing a quantity with corn, and dividing it amongst them; but to make such an act criminal, it must appear to have been done with the intent charged, and not under a mistaken notion of improving the appearance of their skins; and to show the intent, other acts of the party may be shown. *R.* v. *Mogg*,[1] 4 Carr. & P. C. 364. See *Donolly's Case*, and tit. Coin—Forgery.

(*b*) Per Ld. Ellenborough, *R.* v. *Phillips*, 6 East, 475.

[1] Eng. Com. Law Reps. xix. 420.

question of *fact*. If the prisoner did in fact intend the particular mischief, it can be no better defence in point of law (*c*) than of morals that he also intended some other, and perhaps greater injury. Whether he intends the particular consequence, is a question of fact for the jury. A man, it seems, *intends* that consequence which he contemplates, and which he expects to result from his act, and he therefore must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does; in this respect, the legal sense of the term intention does not differ from its usual and ordinary meaning. It is therefore a question for the jury, whether the agent did not, in attempting to attain his primary *object, also intend the collateral mischief which was the necessary or even *574
natural consequence of the means used (*d*).

In *Williams's* case, where the prisoner was indicted for cutting the clothes of the prosecutrix with intent to spoil them, it appeared that the principal object of the prisoner was to injure the person. But Mr. J. Buller left it as a question for the jury, whether the prisoner made the assault with intent to spoil the clothes; informing them that they might consider whether a person who intended the end, *i. e.* the injury to person, did not also intend the means by which it was to be attained (*e*).

In the case of *Coke* and *Woodburne* (*f*), who were indicted under the Coventry Act for wounding Mr. Crisp, with intent to maim him, it clearly appeared that the primary object was to murder him; but the jury finding that they contemplated the maiming as ancillary to the murder, the prisoners were convicted and executed. In a recent case (*g*), it appeared that the prisoner, in order to facilitate the commission of a rape, cut the private parts of the prosecutrix with a penknife; it was left by the learned Judge to the jury, whether the prisoner, although he probably meant to commit a rape, did not also intend to do the prosecutrix a grievous bodily harm, and that the intention might be inferred from the act itself. The Judges were unanimously of opinion that the conviction was right (*h*).

With a view to civil compensation for a loss which must fall on one or other of two (in a moral sense) innocent parties, it is just and politic that

(*c*) See Fost. 439.

(*d*) The intention in such cases seems, in the common use of the word, to depend not upon the necessity of the connection between the act and the consequence, but on the contemplation and expectation of the agent, that the consequence will result from the act. He may not *intend* the consequence, although it be the necessary and certain result of the act; as where one ignorantly administers to another deadly poison, supposing it to be a wholesome medicine, he does not intend the death, although it be the certain consequence of the act. So he may intend a consequence, although that consequence *cannot* result from the act; as where one supposing that which is in its nature perfectly harmless to be poison, administers it under the *expectation* that it will occasion death, there he *intends* death, although it cannot result from the act. It is obvious that in these cases the *intention* is identified with the *expectation* of the particular result which exists in the mind of the agent. Where the party in doing an act contemplates and *expects* any one consequence, or any number of consequences from his act, in common parlance as well as legal construction he intends them all. If a man, intending to get rid of a particular piece of evidence against him, were to burn the document, would it not be a manifest absurdity to say, that he did not *intend* to burn the paper or parchment on which the evidence was written, and that he merely intended to rid himself of the writing which it contained? Equally absurd would it be in point of law, were the publisher of libels on the characters of individuals to insist that his object was not to defame others, which was a mere collateral incident, but to profit by the sale of his libels.

(*e*) Leach, 597. The jury found the prisoner guilty, but the Judges are said to have held, that to bring the case within the stat. 6 G. 1, c. 23 (which was made to prevent a particular and mischievous practice by the weavers, of destroying foreign manufactures introduced into this country), it was necessary that the primary intention should be to destroy the clothes. There were, however, other objections which were fatal to the prosecution.

(*f*) 6 St. Tr. 212.

(*g*) *R.* v. *Cox*, cor. Graham, B., Chelmsford Assizes, 1818, and afterwards by all the Judges, under the stat. 43 Geo. 3, c. 58.

(*h*) The cutting off part of a living sheep, with intent to steal, supports an indictment for killing with intent, &c. if the cutting off must occasion the sheep's death. *R.* v. *Clay*, 1 Russ. & Ry. C. C. 387.

the loss should fall on him who voluntarily did the act, or who might and ought to have prevented the loss from happening (*i*);—to make a man criminal there must usually be either malice or some culpable want of reasonable care and caution.

*575 *INTEREST OF MONEY.

The stat. 3 & 4 W. 4, c. 42, s. 28, enacts, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law. Section 29 enacts, that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass, de bonis esportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of the Act.

General rule. Interest, independently of the above Act, is in general recoverable, in addition to the principal sum, upon an express promise, or where a contract may be implied from circumstances, but not otherwise (*j*) (A).

Evidence of a contract. Interest is recoverable wherever the intention of the parties that it should be paid can be inferred from the circumstances, the particular mode of dealing adopted by the parties, or the usage of the trade (*k*) in which they

(*i*) Though a man do a lawful thing, yet if any damage do thereby fall on another he shall answer it, if he *could have avoided it.* As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at birds and hurt another unawares, an action lies. If I have land through which a river runs to your mill, and I lop the sallows growing by the river side, which accidentally stop the water so as your mill is injured, an action lies. If I am building my own house, and a piece of timber falls upon my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.* P. C. *Lambert* v. *Bessey*, Ray. 421, and see *Guilbert* v. *Stone*, Style, 72. *Weaver* v. *Ward*, Hob. 134. But it is a rule that ignorance of the law is no excuse for a violation of the law, though no moral blame attach.

(*j*) In *Arnott* v. *Redfern*,[1] 3 Bing. 353, Best, C. J. said, "the rule (that is, the negative part of it) merely prevents acts of kindness from being converted into mercenary bargains, and makes it the interest of tradesmen to press their customers for payment of their debts, and thereby checks the extension of credit, which is often ruinous both to tradesmen and customers.

(*k*) *Eddowes* v. *Hopkins*, Doug. 375. Upon an undertaking to pay a sum on the arrival of money in this country from abroad, which was, in reference to certain instructions, to be in discharge of a bill in the hands of the plaintiff, and due from the party on whose account the remittance was to be made, held that the plaintiff could not recover interest on the amount, from the time of the money having come to the defendant's hands. *Hare* v. *Rickards*,[2] 7 Bing. 254, and 5 M. & P. 35; and see *De Haviland* v. *Bowerbank*, 1 Camp. 51. A contract to pay interest upon the balance at the end of each year, including interest, is unobjectionable. *Newall* v. *Jones*,[3] 1 M. & M. 449, and 4 C. & P. 124. The defendant, a prisoner in France, by a written instrument, promised in one month after his arrival in England to pay the plaintiff or order £. sterling, for value received. He arrived in England in 1814; a demand was made in 1818, and in 1819 an action was commenced, which was continued until 1828, when the cause was tried; held, that the same being payable upon a contingency, and the instrument, in its language, leading to the conclusion that the parties did not intend that interest should be payable up to the time of the principal becoming due, the Court refused to depart from the rule, that interest is not due on money secured by a written instrument, unless it appeared to be so intended on the face of it, or is implied from mercantile usage. *Page* v. *Newman*,[4] 9 B. & C. 378

(A) (See for a summary of cases on the subject of interest, *Hoare* v. *Allen*, (n.) 2 Dall. 104.)

[1]Eng. Com. Law Reps. xiii. 3. [2]*Id.* xx. 122. [3]*Id.* xix. 304. [4]*Id.* xvii. 399.

*dealt. As where interest has been allowed on former balances of account (*l*); and where it has been the custom, on advances by bankers to the defendant, to allow interest on the balances struck from time to time on the whole balance, such interest may be recovered (*m*). So, if the customer knew that such was the practice of the house (*n*), otherwise the Court will not allow the banker more than simple interest upon sums actually advanced (*o*). It is not recoverable from a mere stakeholder (*p*).

2dly, It is recoverable where a bond, bill of exchange, or promissory note, has been given (*q*), although no day of payment be specified, for then the money becomes due immediately (*r*), and although the money by the terms of the security be payable on demand, in which case interest runs from the day of the demand (*s*); and if no demand be proved, from the issuing of the writ (*t*). If the bill or note specifiy that interest is payable, it is payable from the date, but otherwise from the time only when it becomes due (*u*). Where the maker promised by the note to pay interest on demand, it was held that this meant from the date (*v*). Interest is recoverable from the drawer of a bill, from the time of notice of dishonour (*x*). So if a bill of exchange be given, although it turns out to be void (*y*); for the intention of the parties to *contract for interest may be inferred from that circumstance (*z*). So where goods sold and delivered were to be paid for by a *577

Written securities.

Where the defendants bound themselves by an instrument in the nature of a bond, but without penalty or any stipulation as to interest, to pay certain sums at certain periods, to be delivered to a third party, in goods, held that the instrument not being a mercantile contract, nor one on which there existed any usage as to interest, it did not carry interest. *Foster* v. *Weston*,[1] 6 Bing. 709.

(*l*) *Nicholl* v. *Thomson*, 1 Camp. 52. And see *Chalie* v. *The Duke of York*, 6 Esp. C. 45.

(*m*) *Bruce* v. *Hunter*, 3 Camp. 467. [See *Eaton* v. *Bell*, 5 B. & A. 347. Eng. Com. Law Reps. vii. 13.]

(*n*) *Moore* v. *Voughton*,[2] 1 Starkie's C. 487.

(*o*) *Dawes* v. *Pinner*, 2 Camp. 482, n; cor. Ld. Ellenborough.

(*p*) Where the defendant, an auctioneer, received a deposit on the sale of premises, and the title being disputed, received notice from the vendor to invest it in Government securities, but without procuring any authority or concurrence of the vendee; held, that being a mere stakeholder, and liable to be called on to pay it over at any time to the party entitled, he was not liable to pay interest, although it appeared that he had mixed it up with his own money at his banker's, of which, after leaving sufficient to answer calls, the residue, including 19-20ths of the deposit, was laid out in securities producing interest. *Harrington* v. *Hoggart*,[3] 1 B. & Ad. 577. Where the contract of sale expressly stated that the auctioneer was agent for the vendor, and there was no proof that he had due notice of the contract having been rescinded, the vendor having failed to make a good title, held that the auctioneer, in an action to recover back the deposit, was not liable for interest. *Gaby* v. *Driver*, 2 Y. & J. 549. And see *Spittle* v. *Lavender*,[4] 2 B. & B. 452; and *Burrell* v. *Jones*, 3 B. & B. 47.

(*q*) *Vernon* v. *Cholmondely*, Bunb. 119. *Robinson* v. *Bland*, 2 Burr. 1077, 1085. In an action of trover for a bill of exchange, the jury may give interest by way of damages, though no special damage be alleged in the declaration. *Paine* v. *Pritchard*,[5] 2 C. & P. 558. Bill payable six months after date, with lawful interest; interest payable from date. *Doman* v. *Dibdin*,[6] 1 Ry. & M. 381. Bond in penalty of 120*l.* conditioned for payment of 120*l.*; plaintiff entitled to recover interest as damages, beyond the amount of the penalty. *Francis* v. *Wilson*,[7] 1 Ry. & M. C. 105. See *Ld. Lonsdale* v. *Church*, 2 T. R. 388. *M'Clure* v. *Dunkin*, 1 East, 436. *Hilhouse* v. *Davis*, 1 M. & S. 169. *Wilde* v. *Clark*, 6 T. R. 603. Bayley, J., in the case of *Cameron* v. *Smith*, 2 B. & A. 308, said that in an action on a bill, interest being in the nature of damages; the jury might disallow it, in case they were of opinion that the delay in payment had been occasioned by the default of the holder. And by the late statute 3 & 4 W. 4, c. 42, the giving interest is discretionary with the jury.

(*r*) *Farquhar* v. *Morris*, 7 T. R. 124, and per Ld. Ellenborough, 15 East, 225. But in *Hogan* v. *Page*, 1 B. & P. 337, it was held that interest was not payable on a single bond.

(*s*) *Parker* v. *Hutchinson*, 3 Ves. 183. *Upton* v. *Lord Ferrers*, 5 Ves. 803. *Blaney* v. *Hendrick*, 2 W. B. 761.

(*t*) *Pierce* v. *Fothergill*,[8] 2 Bing. N. C. 167.

(*u*) *Orr* v. *Churchill*, 1 H. B. 227. *Kennerly* v. *Nash*,[9] 1 Starkie's C. 452. *Doman* v. *Dibdin*,[6] Ry. & Mo. 381.

(*v*) *Hopper* v. *Richmond*,[10] 1 Starkie's C. 508, cor. Ld. Ellenborough.

(*x*) *Walker* v. *Barnes*,[11] 5 Taunt. 240.

(*y*) *Robinson* v. *Bland*, 2 Burr. 1077.

(*z*) Ibid. And see Lord Ellenborough's observations, 15 East, 227.

[1] Eng. Com. Law Reps. xix. 217. [2] *Id.* ii. 479. [3] *Id.* xx. 443. [4] *Id.* vi. 196. [5] *Id.* xii. 261. [6] *Id.* xxi. 465. [7] *Id.* xxi. 391. [8] *Id.* xxix. 296. [9] *Id.* ii. 466. [10] *Id.* ii. 488. [11] *Id.* i. 91.

bill at a certain date, on which interest would have run (*a*); and it was held that interest might be recovered as part of the estimated value of the goods, upon the common count for goods sold and delivered (*b*). But where there was an agreement in writing that the price of goods sold and delivered should be paid for at a price specified, it was held that interest was not recoverable after the expiration of the credit (*c*). So interest is recoverable in an action on a judgment, where the debt itself on which the action was founded bore interest (*d*).

Evidence of a contract to pay interest.

In a late case the Court held, that interest was not recoverable except upon an express contract or an implied one; as in the case of mercantile securities, or where a promise could be implied from the usage of trade, or from the particular circumstances of the case (*e*).

(*a*) *Marshall* v. *Poole*, 13 East, 98; note, the agreement for the sale was in writing; as also in *Porter* v. *Palsgrave*, 2 Camp. 472; *Becher* v. *Jones*, 2 Camp. 428; *Boyce* v. *Warbarton*, Ibid. 480. *Furr* v. *Ward*, 3 M. & W. 23.

(*b*) But in other cases interest seems to have been recovered as damages, in the case of money lent, *Trelawney* v. *Colman*, 1 B. & A. 90; or upon a promissory note. See *Slack* v. *Lowell*, 3 Taunt. 157, where the jury, in a similar case, gave the price and interest as damages, and the Court of C. P. would not set aside the verdict.

(*c*) *Gordon* v. *Swan*, 12 East, 419; the declaration was in *assumpsit* for goods sold and delivered. In *Blaney* v. *Hendrick*, 3 Wils. 205, it was held by Gould, Blackstone, and Nares, Js. (*absente* Eyre, C. J.) that interest might be recovered on an account stated from the day on which it was stated; but that no interest could be recovered in respect of money owing for goods sold and delivered. And in *Mountford* v. *Willis*, 2 B. & P. 337, it was held that interest was recoverable for goods bargained and sold, a time being limited by the agreement (which was in writing) for the payment.

(*d*) *Arnott* v. *Redfern*,[1] 3 Bing. 353. So in affirming a judgment on a writ of error in the Exchequer. Tidd, 1231, 2d edit.; 2 Camp. 428, n.; 13 East, 78; 3 Taunt. 157; 4 Taunt. 298. In an action of debt upon an Irish judgment, a jury ought to give interest or not, as they find that the plaintiff has or has not used proper diligence to obtain payment. *Bann* v. *Dalzell*,[2] M. & M. 228, and 3 C. & P. 376. So (*semble*), in general where the claim to interest does not rest on express contract. Ib. See *Laing* v. *Stone*, Ib. in the note; and *Du Belloix* v. *Waterpark*,[3] 1 D. & R. 16. *Eatwisle* v. *Shepherd*, 2 T. R. 78. On an indemnity given against charges on the sale of land with sureties, the purchaser having been called on to pay the arrears of an annuity, but in the absence of the principal residing abroad, the jury having found neglect in suing the sureties, it was held that interest was not recoverable on the sums paid. *Anderson* v. *Arrowsmith*, 2 P. & D. 403.

(*e*) *Higgins* v. *Sargent*,[4] 2 B. & C. 348. The question was whether in an action of covenant on a policy of insurance on a life, interest was due from the day when the sum insured for became payable; and the Court held that it was not. Abbott, C. J. said, "it is now established as a general principle that interest is allowed to lay only upon mercantile securities, or in those cases where there has been express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should be adhered to; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others." He afterwards observed, "inasmuch as the money recovered in this cause was not due by virtue of a mercantile instrument, and as there was no contract, express or implied, to pay interest, I cannot say that the jury ought to have been told that they were bound to give interest." Bayley, J., held, that as interest was not due by law for money lent, to be repaid either on demand or at given time (*Calton* v. *Bragg*, 15 East, 224), it followed that interest was not due for money payable at a certain time after an event, and that the circumstance of its being due by virtue of a contract under seal, made no difference. Holroyd, J.: "It is clearly established by the later authorities, that unless interest be payable by the consent of the parties, express or implied, from the usage of trade (as in the case of bills of exchange), or other circumstances, it is not due at common law. In *De Haviland* v. *Bowerbank*, 1 Camp. 50, Lord Ellenborough was of opinion that where money of the plaintiff had come to the hands of the defendant, to establish a right of interest upon it, there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in *Gordon* and *Swan*, 12 East, 410, the same noble and learned Judge said, that the giving of interest should be limited to bills of exchange and such like instruments, and agreements reserving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain, payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now in that action the defendant was summoned to render the debt, or show cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. Where, indeed, the interest becomes payable by virtue of a contract, express or implied, then it becomes part of the debt itself, and consequently it would

[1] Eng. Com. Law Reps. xiii. 3. [2] *Id.* xxii. 299. [3] *Id.* xvi. 12. [4] *Id.* ix. 101.

*So interest is recoverable if the money has been used; as where an agent pays the money of his principal into his banker's hands, and uses it as his own (*f*). Where it cannot be recovered.

It has been held, subject to the above exceptions, that interest is not recoverable upon a sale of goods (*g*), or upon money lent (*h*), or money paid, or money had and received (*i*); nor upon the balance of an account stated (*k*); nor upon a policy of insurance (*l*); nor upon an agreement for retaining tithes, no day having been fixed for the payment (*m*).

It has in some instances been held, that though interest be not recoverable *eo nomine*, it is recoverable as damages (*n*). If, however, on grounds *579 of general policy, which may not be unattended with inconvenience in particular cases, a general rule be laid down which excludes a direct

then be no answer to an action of debt for the defendant to show that he had paid the principal sum advanced. Here there being no contract, either express or implied, to pay interest, it was no part of the debt, but could only be recovered by way of damages for detaining the debt. Inasmuch, therefore, as it appears that if the plaintiff had pursued that remedy which by the common law is specifically applicable to his case, he could not have recovered interest, I think that he ought not to be permitted to recover interest by way of damages in an action of covenant." In a very late case (Easter Term, 1829), the court of K. B. held, that interest was not recoverable on a written promise to pay money on a day certain, which had been made abroad, and which had been declared on as a promissory note, but which in point of law was not a promissory note, and where the plaintiff had recovered on the account stated. Contrary to the above rule, laid down in *Higgins* v. *Sargent*, interest has formerly been allowed on a sum awarded to be paid on a certain day. *Pinhorn* v. *Tuckington*, 3 Camp. 468; and see *Chalie* v. *Duke of York*, 6 Esp. C. 46; *Swinford* v. *Burn*,[1] Gow. 9.

(*f*) *Rogers* v. *Boehm & others*, 2 Esp. C. 702; cor. Ld. Kenyon. And see as to assignees, *Travers* v. *Townsend*, 1 Cro. C. C. 384; Executors of *Franklin* v. *Frith*, 3 Bro. C. C. 433; Partners, Pothier Traitè du Contrat. c. 7, n. 116; 2 Atk. 106. See also *Willis* v. *Commissioners of Appeals*, &c. 5 East, 22.

(*g*) *Calton* v. *Bragg*, 15 East, 223. *Gordon* v. *Swan*. 2 Camp. 429; 12 East, 419.

(*h*) Ibid. And 5 East, 22. *De Haviland* v. *Bowerbank*, 1 Camp. 50. But see *Trelawney* v. *Thomas*, 1 H. B 303, where it was allowed on money advanced for the use of another.

(*i*) Ibid. And *De Bernales* v. *Fuller & others*, 2 Camp. 427; 14 East, 490, n., where the money had been paid into the defendant's hands for the plaintiff's use, and applied by the former to another purpose; and see *Crockford* v. *Winter*, 1 Camp. 129, where the rule was held to extend to money obtained by fraud.

(*k*) 6 Esp. C. 45. *Nichol* v. *Thompson*, 1 Camp. 52. But see *Bluney* v. *Hendrick*, 2 Bl. 761; 3 Wils. 205; where the rule for allowing interest was extended to all liquidated sums, although the balance there arose on account stated for goods sold and delivered. And in *Pinhorn* v. *Tuckington*, 3 Camp. 468, Lord Ellenborough held, that where money due on balance of account was awarded to be paid on a particular time and place, interest ran after a demand duly made. See also *Marquis of Anglesea* v. *Chafey*, per Abbott, J., Dorchester Spring Ass. 1818. Manning's Index, 185. And see 1 East, 400; 1 M. & S. 173; Vin. Ab. tit. *Arbitration*, C. 2.

(*l*) *Kingston* v. *Mackintosh*, 1 Camp. 518. And per Le Blanc J. in *De Bernales* v. *Fuller*, 2 Camp. 427. And per Ld. Ellenborough in *De Haviland* v. *Bowerbank*, 1 Camp. 50, and *supra*.

(*m*) *Shipley* v. *Hammond*, 5 Esp. C. 114; but it was said that it would have been otherwise had a day been appointed for payment.

(*n*) *De Bernales* v. *Wood*, 3 Camp. 258; where in an action to recover a deposit on an agreement for the sale of an estate, it was alleged by way of special damage that the plaintiff had lost or been deprived of the sum deposited; and Ld. Ellenborough held, that the plaintiff was entitled to recover interest as special damage. In *Marshall* v. *Poole*, 13 East, 98, the Court said that the interest subsequent to the day appointed for payment, might be considered as part of the stipulated price of the goods. In the case of *Arnott* v. *Redfern*,[2] 3 Bing. 353, which was an action on a Scotch judgment, on a claim for work and labour on a contract made in England, and where the Scotch Court had allowed interest; the Court sustained the verdict on the judgment, on the ground that even in England, where a debt is wrongfully withheld after the plaintiff has endeavoured to obtain judgment, the jury may give interest in the shape of damages. And the case of *Lee* v. *Munn*,[3] 8 Taunt. 45, was cited, where it was held, that an auctioneer who had had a deposit in his hands for four years could not be compelled to pay interest, because the plaintiff had made no demand on him for repayment of the deposit. And also the case of *Eddowes* v. *Hopkins*, Doug. 376, where Ld. Mansfield held, that in cases of long delay, and under vexatious and oppressive circumstances, juries in their discretion might allow interest. Also the cases of *Blackmore* v. *Fleming*, 7 T. R. 446; *Craven* v. *Ticknell*, 1 Ves. j. 60, and *Hilhouse* v. *Davis*, 1 M. & S. 169. But in *Page* v. *Newman*,[4] 9 B. & C. 381, the Court of King's Bench expressed an opinion that it would be more convenient to adhere to a general rule, than to leave it open to inquiry, in each particular case, whether the delay had been attended with vexatious and oppressive circumstances. Ld. Tenterden observed, that if the rule were to be adopted it might frequently be made a question at *Nisi Prius*, whether proper means had been used to obtain payment of the debt, and such as the party ought to have used, which would be productive of much inconvenience.

[1]Eng. Com. Law Reps. v. 438. [2]*Id.* xiii. 3. [3]*Id.* iv. 14. [4]*Id.* xvii. 399.

claim to interest, it would be contrary to the same general principle of policy to allow interest to be recovered indirectly under another description (1).

A trader pledges goods on a promise to pay interest; the creditor is entitled to interest up to the date of the commission (*o*).

Where a defendant sued upon a security, carrying interest, pays money into Court sufficient to cover the principal, with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed, and a jury on trial is bound to give him damages for the interest accruing between the commencement of the action and the payment into Court (*p*).

INTERPLEADER ACT.

By the 1 & 2 Will. 4, c. 58, s. 7, all rules, orders, matters, and decisions to be made and done in pursuance of the Act, except affidavits, may, together with the declaration in the cause, be entered of record.

JURISDICTION.

As to the jurisdiction of an inferior court, where the amount is reduced by a set-off; see Sir. 1191; 2 Wils. 68; 3 Wils. 48. By payment: 1 Taunt. 60; 7 Moore, 68; 1 B. & P. 223; 8 East, 28. A statute which enacts that if any difference shall arise, it shall be decided by commissioners, &c., does not, without express words, oust the jurisdiction of the superior courts. *Lord Shaftesbury* v. *Russel*, 1 B. & C. 666. See tit. AWARD.

*580 *JURY ACT.

6 GEO. 4, c. 50; motions to regulate the trial must be made at *Nisi Prius*. 7 Taunt. 390.

JUSTICES.

IN actions against justices of the peace and peace officers (*q*), may be considered,—

I. *The proofs in an action against a justice of the peace, &c.*
   1. Of notice of action, p. 580.
   2. Of the commencement of the action, p. 583.
   3. Of the cause of action, within the county, &c. p. 584.
   4. Where a conviction has been quashed, ibid.

II. *Proofs in defence by justices*, p. 585.

III. *By constables, &c., acting under a warrant*, p. 594.

IV. *By constables, &c., acting without warrant*, p. 600.

Proof of notice of action.

1. *Notice of action.*—By the stat. 24 Geo. 2, c. 44, s. 1, no writ shall be sued out against, nor any copy of any process at the suit of a subject shall

(*o*) *Crosley's Case*, 7 Vin. Ab. 110. But a mortgagee shall have his interest run upon a bankrupt's estate, because he hath a right in *rem;* but as to other interest, it ceaseth on the bankruptcy. Per King, Chanc., 7 Vin. Ab. 110.

(*p*) *Kidd* v. *Walker*,[1] 2 B. & A. 705. On an award directing payment of money interest may be recovered by action, but not by motion for attachment. *Churcher, Gent. one, &c.* v. *Stringer, Gent. one, &c.*[2] 2 B. & Ad. 777.

(*q*) For actions against officers of excise, &c. see the title.

(1) [On the subject of *Interest*, which seems hardly to relate to the doctrine of *Evidence*, see cases, English and American, collected and arranged in Mr. Day's *notes* to *Atkins & al.* v. *Wheeler & al.*, 2 N. R. 205; *Shipley* v. *Hammond*, 5 Esp. C. 114; *Gordon* v. *Swan*, 12 East, 419; Mr. Howe's *note* to *De Bernales* v. *Wood*, 3 Camp. 258; Mr. Henning's appendix to his late valuable edition of Francis's Maxims of Equity—in which he makes very respectful reference on this subject, to Tate's Digest of the Laws of Virginia; titles, *Interest—Executors and Administrators.*]

[1]Eng. Com. Law Reps. xxii. 174. [2]*Id.* xxii. 183.

be served on, any justice of the peace for anything by him *done in the execution of his office* (*r*), until notice in writing of such *intended writ or process* (*s*) shall have been *delivered* (*t*) to him, or left at the usual place of his abode by the *attorney* (*u*) or agent for the party who intends to sue, or cause the same to be sued out or served, at least *one calendar month* (*x*) before the suing out or serving the same; in which notice shall be clearly and explicitly contained the *cause of action* (*y*) which such party hath or claimeth to have against such justice of the peace; on the back of which notice shall be *indorsed the name of such attorney* (*z*), or agent, together with the *place of* his abode.

Proof of notice, when necessary.

Done in the execution of his office.—The object of the Legislature was to enable the magistrate to tender amends for the *wrong* done; the statute therefore supposes a wrong to have been done in consequence of some excess, or want of authority; for where the justice has not exceeded his authority the enactment is useless. Hence, if the subject-matter be within the *jurisdiction* of the magistrate, and he intend *bonâ fide* (*a*) to act as a magistrate at the time, he is within the protection of this statute, although he acts erroneously (*b*). The statute applies, unless the act be wholly *aliene* to the jurisdiction, and done *diverso intuitu* (*c*).

*And where the subject-matter is within the jurisdiction of the magistrate, it will be presumed that he acted as a justice (*d*); and therefore, where *581

(*r*) *Infra*, 580. (*s*) *Infra*, 581. (*t*) *Infra*, ib.
(*u*) *Infra*, ib. (*x*) *Infra*, 583. (*y*) *Infra*, 581.
(*z*) *Infra*, 582.

(*a*) It seems that the question of *bona fides* is in all such cases one of fact for the jury. *Wedge* v. *Berkeley*,[1] 6 A. & E. 663.

(*b*) See *Weller* v. *Toke*, 9 East, 364; where one magistrate made an order in a case where the authority of two was necessary. So in *Prestidge* v. *Woodman*,[2] 1 B. & C. 12, where a magistrate acted on a subject-matter of complaint, the facts of which arose locally beyond the limits of his jurisdiction. And the distinction was taken between a magistrate and constable in that respect, for a constable is not protected unless he act in obedience to the warrant; *Money* v. *Leach*, 3 Burr. 1742; but a magistrate in all cases where he acts in execution of his office. And see *Gaby* v. *The Wilts and Berks Canal Company*, 3 M. & S. 580. And see Ld. Kenyon's observations, *Greenway* v. *Hard*, 4 T. R. 553; and Ld. Tenterden's, in *Beechey* v. *Sides*,[3] 9 B. & C. 809.

(*c*) Per Ld. Ellenborough, 9 East, 365, & P. C. *Briggs* v. *Evelyn*, 2 H. B. 115. And therefore, if a single magistrate commit the mother of a bastard for not filiating a child, although jurisdiction by the stat. 18 Eliz. c. 3, s. 2, is given to two magistrates, acting jointly, and not to a single one, he is within the protection of the statute. *Weller* v. *Toke*, 9 East, 364. [S. P. *Jones* v. *Hughes*, 5 Serg. & R. 302.] So where by a local Act of Parliament notice was required of any action for anything done in *pursuance* of the Act, it was held that a magistate was entitled to notice who had acted under colour of the Act, although he had exceeded his jurisdiction. *Graves* v. *Arnold*, 3 Camp. 242. [S. P. *Butler* v. *Potter*, 17 Johns. 145. *Jones* v. *Hughes*, 5 Serg. & R. 301.] And see *Styles* v. *Cox*, Vaugh. 111. So where a magistrate committed a man for being on the shafts of a cart standing still, the act authorizing a commitment in the case of riding on them only. *Bird* v. *Gunston*, cited in *Cook* v. *Leonard*,[4] 6 B. & C. 354. Where an Act requires notice before action brought, in respect of anything done in pursuance of or in execution of its provisions, those latter words are not confined to acts strictly in pursuance of the Act of Parliament, but extend to all acts done *bona fide*, which may *reasonably be presumed* to be done in pursuance of the Act; but not where there is no colour for supposing that the act done is authorized: where, therefore, the defendants, being officers acting under a local paving Act, had ordered the plaintiffs to remove a dromedary and monkeys, which were exhibited in the streets, out of the town, and they were removed into a stable, and had thereby ceased to be any nuisance, but the defendants afterwards had attempted forcibly to remove them thence; held, that there being no reasonable ground for supposing that the act authorized them in so doing, they were not entitled to notice of action. *Cook* v. *Leonard*,[4] 6 B. & C. 351. And see *Lawton* v. *Miller*, cited Ib. *Morgan* v. *Palmer*,[5] 2 B. & C. 729. And *Irving* v. *Wilson*, 4 T. R. 415. *Charlesworth* v. *Rudgard*, 1 C. M. & R. 505. So in an action for acting as a magistrate without qualification. *Wright* v. *Horton*,[6] Holt's C. 458. So where a disturbance having taken place on the discharge of a prisoner, the defendant, a magistrate, at a place out of sight of the disturbance, seized the plaintiff, who was wholly unconnected with the transaction. *James* v. *Saunders*,[7] 10 Bing. 429.

(*d*) 2 H. B. 114.

Eng. Com. Law Reps. xxxiii. 167. [2] *Id.* viii. 9. [3] *Id.* xvii. 502. [4] *Id.* xiii. 195. [5] *Id.* ix. 232. [6] *Id.* iii. 156. [7] *Id.* xxv. 184.

one who was lord of a manor, and also a justice of the peace, seized a gun in the house of an unqualified person, it was presumed that he acted as a justice, and notice was held to be necessary (*e*).

Where an action was brought to recover a penalty for acting as a magistrate without a qualification (*f*), it was held that the defendant was not entitled to notice, the question being whether he *was* a magistrate at all (*g*).

Proof of service. The plaintiff must prove that the notice was delivered to the defendant, or was left at his usual place of abode by the plaintiff's agent or attorney. The notice is usually proved by evidence of the service of a duplicate original (*h*); if a single original has been served, notice should be given to produce it.

Form of the notice. *Of such intended writ or process.*—As the notice was prescribed by the Act in order to introduce a strictness of proceeding in favour of magistrates (*i*), it must be precise according to the terms of the Act. The writ or process must be specified (*k*), as well as the cause of action.

Notice of an action *on the case* will not support an action of *trespass* (*l*);
*582 *but notice of a bill of Middlesex has been held to be sufficient, without specifying whether case or trespass (*m*) (A).

(*e*) *Briggs* v. *Evelyn*, 2 H. B. 114. The stat. 5 Ann. c. 14, empowers a justice to seize an engine for the destruction of game in the hands of an unqualified person.

(*f*) Under the stat. 18 G. 2, c. 20.

(*g*) Per Wood, B., *Wright* v. *Horton*, 1 Holt's C. 458.

(*h*) Vide *supra*, 110, and tit. NOTICE.

(*i*) Per Ld. Kenyon, 7 T. R. 835. *Taylor* v. *Fenwick*, 7 T. R. 635.

(*k*) *Lovelace* v. *Curry*, 7 T. R. 631. It is not necessary to name all the parties intended to be included in the action, or to state whether it will be joint or several. *Box* v. *Jones*, 5 Price, 178.

(*l*) *Strickland* v. *Ward*, 7 T. R. 631, in note. But in that case, it is to be observed, the notice did not state the process *at all*, and therefore was clearly defective on that ground, and *qu.* whether the description of the *form* of action might not be rejected as surplusage, the notice containing a true description of the process and cause of action. See the observations of Ld. Loughborough, C. J., and Gould, J. in *Wood* v. *Folliott*, cited 3 B. & P. 552, in the note, who seem to have been of that opinion. In *Sabine* v. *De Burgh*, 2 Camp. 198, Ld. Ellenborough, in allusion to the case of *Lovelace* v. *Curry*, said, "I do not disapprove of anything laid down in that case, but I am not disposed to carry it farther, lest actions of this kind should be entirely defeated."

(*m*) *Sabine* v. *De Burgh*, 2 Camp. 196. And notice stating arrest and imprisonment, and that plaintiff was compelled to pay a sum of money to obtain his discharge, and that *a precept called a latitat* would be issued against him for the said imprisonment, is sufficient. *Robson* v. *Spearman*,[1] 3 B. & A. 493.

(A) (The notice to a Justice in Pennsylvania, of an intended suit for the penalty for taking greater fees than the law allows, need not specify the amount of fees which the justice might legally have taken. *Coats* v. *Wallace*, 17 Serg. & Rawle, 75; and notice under the act of 1772, is necessary, before commencing an action of assumpsit against a justice of the peace, by the administrators of a constable, to recover back money alleged to have been received by him as a justice of the peace, through mistake and fraud. *Wise* v. *Wills*, 2 Rawle, 208, (Gibson, C. J. and Tod, J., dissenting.) A justice who becomes liable to the penalty imposed by statute for marrying a minor, without consent of parent or guardian, is entitled to notice. *Ibid.* So in an action *before a justice*, to recover the penalty imposed by statute for taking illegal fees, notice is necessary. *Prior* v. *Craig*, 5 Serg. & Rawle, 44.] Where the notice to the magistrate stated that the action would be brought in the Court of Common Pleas, of Allegheny County, whereas the action was in fact in the District Court of that county, it was held nevertheless to be good; both those Courts having jurisdiction of the subject-matter. *Lowrie* v. *Verner*, 3 Watts, 317. It seems that if the Court of Common Pleas had not jurisdiction of the case, it might be different. *Lowrie* v. *Verner*, 3 Watts, 317. In an action against a justice to recover the amount of fees taken by him beyond the legal charge, previous notice according to the act of 1772 must be shown, and therefore in such action, judgment may be given for the twenty shillings allowed by that act for preparing the notice. *Collins* v. *Hunter*, 1 Ashmead, 60. Where a notice to a justice of an intended suit against him, for granting a domestic attachment against the plaintiff contrary to the act of assembly, stated generally the cause of action to be, that the defendant had granted such attachment illegally and contrary to the acts of assembly, and then set forth the first section of the act of 1752, and the alteration in the amount of the penalty made by the act of 1807, and concluded my cause of action, therefore is, that the aforesaid attachment was issued by you contrary to the spirit and meaning of the said acts of assembly; without stating in what particulars the attachment had been illegally issued, it was held that the notice was defective and insufficient. *Buley* v. *The Commonwealth*, 5 Rawle, 59; [It is

[1] Eng. Com. Law Reps. v. 355.

Where a notice of the intended process and cause of action was duly served, and the plaintiff having issued a writ of *quo minus* against the justice only, which in a few days he abandoned, and issued a writ against the justice and the constable; held, that the notice was sufficient to warant the latter writ, and proceedings thereupon (*n*).

No evidence can be received of any cause of action which is not specified in the notice (*o*).

Indorsed with the *name* of such attorney (*p*) or agent, together with the *place* of his *abode* (*q*).—An indorsement of the initial letter of the christian name, together with the surname, is sufficient (*r*).

It is sufficient if the attorney describe himself of the town where he resides, as of Birmingham (*s*), provided the description purport to indicate the residence of the attorney; it is otherwise where the notice does not describe the residence; thus, the indorsement "given under my hand at Durham," without any other notification of residence or abode, was held to be insufficient (*t*), being a mere description, not of residence, but of the place of signature.

A notice, describing the plaintiff's attorney as of New-Inn, *London*, instead of New-Inn, *Westminster*, was held to be insufficient (*u*) (1).

(*n*) *Jones* v. *Simpson*, 1 Cr. & J. 174, and 1 Tyrw. 35. And see *Agar* v. *Morgan*, 2 Pri. 126; and *Bax* v. *Jones*, 5 Pri. 168.

(*o*) 24 Geo. 2, c. 44, s. 5. A notice to the magistrate mentions imprisonment only as the cause of action, the declaration being for a battery and imprisonment, the variance is not material, except that it precludes the plaintiff from giving evidence of a battery. *Robson* v. *Spearman*,[1] 3 B. & A. 493. Where the notice was of action for seizure of goods under a warrant directed to J. Birche, and it appeared that the goods were seized under a warrant directed to the constable of Halifax, and not to J. Birche; it was held, that the notice was insufficient. *Aked* v. *Stocks and others*,[2] 4 Bing. 509. It is sufficient to inform the defendant substantially of the cause of complaint. *Jones* v. *Bird*,[3] 5 B. & A. 844.

(*p*) In the case of *Sabine* v. *De Burgh*, 2 Camp. 196, the attorney who had indorsed and served the notice was asked, on cross-examination, whether he had at the time taken out his certificate, and he answered, that he had ordered his clerk to take it out, and had given him money for that purpose; and Lord Ellenborough held that this was sufficient evidence of his being qualified to act as an attorney. It does not appear whether, in that case, the witness had indorsed the notice as an *attorney*, specifically, or merely as *agent;* and *qu.* whether, as the words of the stat. are *attorney or agent*, it is essential that he should actually be an attorney.

(*q*) It is enough to indorse the attorney's place of business, though he do not reside there. *Roberts* v. *Williams*, 2 C. M. & R. 561. And it need not be the attorney on the record. *Ib.*

(*r*) *Mayhew* v. *Locke*,[4] 7 Taunt. 63. So, *semble*, is the surname without the christian name. *James* v. *Swift*,[5] 4 B. & C. 681; per Holroyd, J.

(*s*) *Osborn* v. *Gough*, 3 B. & P. 551. *Wood* v. *Folliott*, ibid. 552. In the latter case, which was under the stat. 23 G. 3, c. 70, s. 30, which requires that the notice shall contain the name and place of abode of the person who is to bring such action, and the action being brought by three owners of a ship, who were described as William Wood, of Rotherhithe, in the county of Surrey, merchant; Alexander Wood, *late* of the same place, mariner; and Osborn Deverson, *late* of the same place, mariner; it was held that the description was sufficient. But it seems that in the case of London, or a very large town, such as Manchester, the town generally would not be sufficient. Per Thompson, B. in *Crooke* v. *Currie*, Tidd, 28 (*n*).

(*t*) *Taylor* v. *Fenwick*, 7 T. R. 635; 6 Esp. C. 138.

(*u*) *Stears* v. *Smith*, 6 Esp. C. 138. But see *Mills* v. *Collett*,[6] 6 Bing. 90.

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held that the statute in Pennsylvania, should be liberally construed, for the protection of justices. *Mitchell* v. *Cowgill*, 4 Binney, 24.] It is not necessary to specify the kind of writ or process intended to be sued out, or the kind of action intended to be brought: It is sufficient, if notice is given that an action will be brought, and if the cause of action is clearly described. *Litle* v. *Toland*, 6 Binney, 84. *Mitchell* v. *Cowgill*, *supra*. Contra, *Kennedy* v. *Shoemaker*, 1 Browne's Rep. 61].)

(1) [In Pennsylvania, the plaintiff may sue out the writ himself, in which case it is not necessary that the place of abode of an agent or attorney should be indorsed; but the plaintiff's place of abode must be specified. *Lake* v. *Shaw*, 5 Serg. & Rawle, 518.

It is a sufficient designation of the abode of the plaintiff's attorney, in a notice to a justice of Washington County, to describe him as *A. B.* of Washington—that being intended, in common parlance, the *town* of Washington. *Litle* v. *Toland*, 6 Binney, 83. A notice subscribed thus—"*A. B.* attorney for *C. D.* No. 79, So. 5th St." is not sufficient notice of the attorney's place of abode. *Kennedy* v. *Shoemaker*, 1 Browne's

[1]Eng. Com. Law Reps. v. 355. [2]*Id.* xv. 60. [3]*Id.* vii. 277. [4]*Id.* ii. 27. [5]*Id.* x. 441. [6]*Id.* xix. 11.

Time of the notice.

At least one calendar month before the suing out or serving the same.—For this purpose, and also to show that the action was commenced within six calendar months, the plaintiff must prove the commencement of the action (*x*); the day on which notice is served is to be included (*y*).

Commencement of the action.

2. *The commencement of the action within six months.*—By sec. 8 of the same stat. no action shall be brought against any justice of the peace for anything done in the execution of his office, or against any constable, headborough, or other officer or person acting as aforesaid (*z*), unless commenced within six calendar months after the act committed. This must be proved as usual by the production of the writ, or an examined copy of the return (*a*).

The suing out the common process of a bill of Middlesex, *latitat*, or *capias quare clausum fregit*, was considered to be the commencement of the action (*b*). But the true time of suing out the writ may be proved in opposition to the *teste*, as where it is sued out in vacation, and bears date as of the preceding term (*c*). The memorandum upon the record, where the proceeding was by bill, also showed the commencement of the action within time (*d*).

The plaintiff must not only show that he sued out a writ within the time, but also that he proceeded upon that writ.

In *Weston* v. *Fournier*, the notice of action was served on the 10th of March 1809, a writ of *latitat* was sued on the 20th of May following, an *alias* writ was sued out February 6th, 1810, and the memorandum of the record was of Hilary 1810. It was objected that the first writ had not been served, and that as it had not been returned, the *alias* writ, which was after the memorandum on the record, could not be connected with it in continuance; and the Court held that the plaintiff had been properly

(*x*) *Infra*, tit. TIME.

(*y*) *Castle* v. *Burditt*, 3 T. R. 623. See tit. HUNDRED and TIME.

(*z*) *Infra*, 600. This clause of the Act (observes Abbott, C. J., in *Parton* v. *Williams*,[1] 3 B. & A. 333,) was intended for the benefit of those who, intending to act right, by mistake act wrong. As where a constable, directed by a warrant to take the goods of *A.*, by mistake takes those of *B.* Ib. So in case of a variance as to the description of goods taken. *Smith* v. *Wiltshire*,[2] 2 B. & B. 619. The true test in all such cases seems to be, that acted on in *Parton* v. *Williams*, viz., whether the party was actuated by an honest belief that he was discharging his duty. In the case of *Alcock* v. *Andrews*, 2 Esp. C. 542 (*n*), Ld. Kenyon lays down the distinction to be between cases where the constable acts *virtute officii*, and those where he acts *colore officii;* and that where the act is of such a nature that the office gives him no authority to do it, he is not to be regarded as an officer. See below, 600. A patrol employed to take up disorderly persons, who is not a constable, is not a *peace officer*. *Cliffe* v. *Littlemore*, 5 Esp. C. 39.

(*a*) *Supra*, tit. HUNDRED; *infra*, tit. TIME. By the stat. 2 W. 4, c. 39, s. 12, every writ bears date on the day when it was issued.

(*b*) Willes, 257; 2 Bl. 925; Burr. 964.

(*c*) *Johnson* v. *Smith*, Burr. 260; B. N. P. 195. And see tit. TIME.

(*d*) See tit. TIME, and *supra*, tit. HUNDRED. Although the commencement of an action cannot be legally proved except by the production of the writ, &c. (per Le Blanc, J. in *Matthew* v. *Haigh*, 4 Esp. C. 100); yet as *against a plaintiff*, proof of the delivery of a declaration by him, at a particular time, will be evidence that the action subsisted at that time. (*Matthew* v. *Haigh*, 4 Esp. C. 100, per Le Blanc, J.; and *Harris* v. *Orme*, 2 Camp. 497, in the note.) But *semble*, this would not be sufficient evidence in an action against a magistrate; for the delivery of a declaration is the plaintiff's own act; and although it might operate as an admission against himself, would scarcely be binding on a defendant; but see further tit. TIME.

Rep. 61. A notice was signed by the plaintiff's attorney, and dated at W.—but there was no *indorsement* of his name, nor was it said in any part of the notice, or on the back of it, that he resided at W.—and it was held not to be sufficient. *Slocum* v. *Perkins*, 3 Serg. & Rawle, 295. A notice directed to the defendant, and signed by the plaintiff, and indorsed thus—"Notice to J. S. Esq. *Henry Read*, living in Poplar lane, between 3d and 4th Streets"—was held to be defective, in not stating that *Read* was the plaintiff's agent, and in not containing anything from which it might be inferred that he was his agent with authority to receive a tender of amends. *Luke* v. *Shaw*, ubi sup.]

[1] Eng. Com. Law Reps. v. 307. [2] *Id.* vi. 285.

nonsuited upon this objection (*e*); for there was no service of the first writ, and it was not returned (*f*).

*Where several writs are sued out, it is necessary to show that the first has been returned (*g*); but where one only has been sued out, it is sufficient to prove it, without proving the return, provided the plaintiff has declared within a year afterwards (*h*). *584 Cause of action.

3. Where the cause of action is a continuing one, by imprisonment, it is sufficient to show that the action was commenced within six months of the end of such imprisonment (*i*) (A). But if the plaintiff gives notice pending the imprisonment, he is bound to proceed within six months of the notice; for as to any subsequent cause of action, there is no notice (*k*).

Trespass or trover for seizing goods must be brought within the time limited from the original seizure (*l*).

The cause of action must be proved to have arisen within the county (*m*). The trespass or other cause of action is to be established by proving the authority of the magistrate given to the bailiff or constable, either by evidence of an oral or written direction; by the production and proof of the warrant, if it be in the plaintiff's power, or if not, by serving the person in possession of it with a *subpœnâ duces tecum*, to produce it, or giving notice to the defendant to produce it, and by giving parol evidence of it after proof that it is in his possession, and his omission to produce it.

In actions against a constable who has acted in obedience to the warrant of a magistrate, if his neglect or refusal to produce the warrant, and grant a copy of it, be relied upon, the plaintiff must prove a demand of the warrant (*n*).

4. By the Stat. 43 Geo. 3, c. 141, in all actions brought against any justice of the peace on account of any conviction made by virtue of any Act of Parliament, or by reason of anything done or commanded to be done by such justice for the levying of any penalty, apprehending any party, or for or about the carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff in such action, besides the value and amount of the penalty which may have been levied upon the plaintiff, in case any levy thereof shall have been made, shall not be entitled to recover any greater damages than the sum of two-pence, nor any costs of suit, unless it shall be expressly alleged in the declaration in the action (which shall be in an action upon the case only), that such acts were done *maliciously*, and without any *reasonable or probable cause*. In case of conviction quashed.

(*e*) 14 East, 491. Note, the imprisonment continued till July; but it was held that the plaintiff was bound to proceed within six months after *notice*. See *Harris* v. *Woolford*, 6 T. R. 617; and *Stanway* v. *Perry*, 2 B. & P. 157; and tit. Time, and Limitations.

(*f*) Bayley, J. observed, that the suing out of the second writ was at least *prima facie* evidence to show that the *first* had not been *served*. 14 East, 493.

(*g*) *Parsons* v. *King*, 7 T. R. 6. *Harris* v. *Woolford*, 6 T. R. 617; *Stanway* v. *Perry*, 2 B. & P. 157; *Smith* v. *Bower*, 3 T R. 662. See tit. Limitations.—Time.

(*h*) *Parsons* v. *King*, 7 T. R. 6.

(*i*) *Massey* v. *Johnson*, 12 East, 67. *Pickersgill* v. *Palmer*, B. N. P. 24; for the whole is one entire trespass.

(*k*) *Weston* v. *Fournier*, 14 East, 491.

(*l*) *Goddin* v. *Ferris*, 2 H. B. 14. *Saunders* v. *Saunders*, 2 East, 254. P. C. *Smith* v. *Wiltshire*,[1] 2 B. & B. 619. So in the case of a custom-house officer, even although a suit for condemnation be pending in the Exchequer. *Godin* v. *Ferris*, 2 H. B. 14.

(*m*) 21 Jac. 1, c. 12, s. 5. (*n*) Vid. *infra*, 595.

(A) (See *Wallace* v. *Commonwealth*, 2 Virg. Cas. 130. *Jacobs* v. *Com'th*, 2 Leigh. 709. *Muse* v. *Vidal*, 6 Munf. 27. *Rogers* v. *Mulliner*, 6 Wend. 597. *Adkins* v. *Brener*, 3 Cow. 206. *Hanlison* v. *Jordan*, Conf. Res. 454. *Flack* v. *Harrington*, 1 Breese, 165.)

[1] Eng. Com. Law Reps. vi. 285.

This statute applies to those cases only where a conviction has been quashed (*o*). To entitle himself to greater damages than two-pence, the plaintiff must *prove* that the act of the magistrate was malicious, and without *reasonable or probable cause; and the question is not whether there was reasonable or probable cause *in fact*, but whether it *appeared to the magistrate* that there was such cause, for it does not follow that he acted maliciously, though there was no reasonable or probable cause in fact. For this purpose, what passed before the magistrate relating to the conviction is proper and necessary evidence (*p*).

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Proofs by justices in defence.

II. By the stat. 21 Jac. 1, c. 12, s. 5, if any action shall be brought against any justice of the peace, mayor or bailiff of a city or town corporate, head-borough, portreeve, constable, tithing-man, churchwarden, or overseer of the poor, and their deputies, or any other who by their aid, or by their commandment (*q*), shall do anything concerning their office (*r*), concerning anything by them done by virtue of their office, such action must be laid within the county where the trespass was committed. The defendant may plead the general issue, and give the special matter in evidence (*s*).

Venue. General issue.

It seems to be a settled rule, that a conviction still subsisting, and valid upon the face of it (*t*), on a subject within the jurisdiction of the defendant

(*o*) *Massey* v. *Johnson*, 12 East, 57. Where, in an action of *trespass*, it appeared to be doubtful whether there had been a conviction or not, the Court would not, on motion to set aside the nonsuit of the plaintiff (on the ground that the action ought to have been laid in case), listen to an affidavit that there had, in fact, been a conviction, but granted a new trial. See also *Gray* v. *Cookson*, 16 East, 15. *Rogers* v. *Jones*,[1] R. & M. C. 129. After the conviction has been quashed, the action must be in case, and not in trespass; but the general rule (which still governs cases which are not within the statute) is, that an action for a commitment under a warrant must be in trespass, and not in case. *Morgan* v. *Hughes*, 2 T. R. 225.

(*p*) *Burley* v. *Bethune*,[2] 5 Taunt. 583.

(*q*) A constable who aids a parish officer in levying a distress for poors-rates is not liable in trespass, although a demand of a warrant was duly made upon him, (but *not on the overseer*,) in pursuance of the statute. *Clarke* v. *Davey*,[3] 4 Moore, 465. Parish officers sued for goods sold and delivered to the poor, are not within the stat. *Blanchard* v. *Bramble*, 3 M. & C. 131.

(*r*) Acts done by unqualified justices, are not actually void. *Margate Pier Comp.* v. *Harrison*,[4] 3 B. & A. 266. And the justices are not trespassers. *Ib.*

(*s*) If the defendant obtain a verdict, or the plaintiff become nonsuited, or suffer any discontinuance, the defendant, by the same statute, is entitled to double costs, on a certificate from the Judge that he was such officer at the time of the trespass, and acting in the execution of his office. The certificate may be granted after the trial. *Harper* v. *Carr*, 7 T. R. 449. By the st. 43 G. 3, c. 85, s. 6, the Act is extended to all persons holding or exercising any public employment, or any office, station or capacity, civil or military, in or out of the kingdom, and who by virtue of any act or law within the kingdom, or any act, law, ordinance or lawful authority in any foreign possession of his Majesty, have or may hereafter have by virtue of such employment, office, station or capacity, authority to commit persons to safe custody. The local venue, as in case of other offences committed abroad, is dispensed with. Commissioners of Requests, with power to commit for contempt, are not within the statute. *Mackey* v. *Gooden*, 1 Dowl. P. C. 463.

(*t*) In *Mann* v. *Davers*,[5] 3 B. & A. 103, where the information, on a conviction charging the plaintiff with having unlawfully returned without a certificate from the parish to which he had been removed, followed the words of the stat. 17 G. 2, c. 5; it was held that the conviction was good, and supplied a defence to an action against the magistrate. *Secus*, where the conviction is apparently erroneous, though it has not been quashed. Thus it was held, that a magistrate could not defend himself on a conviction which alleged that the plaintiff drove to hire, instead of for hire, *Cloud* v. *Turfery*,[6] 2 Bing. 318. So if the conviction vary from the form prescribed by a statute; *Goss* v. *Jackson*, 3 Esp. C. 198; per Lord Kenyon. His Lordship referred to the case of *Davidson* v. *Gill*, 1 East's R. 64, where the Court held that an order for stopping up an old footway must pursue the form given by the statute, which directed that the form *shall* be used, &c. See also *R.* v. *Taylor*,[7] 7 D. & R. 623, where a conviction against an apprentice was held to be bad, both because the form given by the stat. 3 G. 4, c. 23, was not pursued, and because the conviction did not show that the party was an apprentice within the stat. 4 Geo. 4, c. 29, s. 2. In general, where there is a defect in jurisdiction, no appeal is necessary. *R.* v. *Chilvers Coton*, 8 T. R. 178. *Attorney-general* v. *Lord Hotham*, 1 Turn. 219. A conviction not stating the offence to have been proved on oath, is bad. *Ex parte* v. *Aldridge*,[8] 2 B. & C. 600. So, if the adjudication exceed the cause of complaint. *R.* v. *Soper*,[9] 3 B. & C. 857. An order by justices for payment of double value of goods fraudulently removed to prevent a distress, must show on the face of it that the party removing the goods was tenant. *R.* v. *Davies*,[10] 5 B. & Ad. 551. See also *R.* v. *Walsh*,[11] 1 Ad. & Ell. 481; *Fawcett* v. *Fowlis*, 7 R. & C. 394.

[1] Eng. Com. Law Reps. xxi. 397. [2] *Id.* i. 196. [3] *Id.* xvi. 380. [4] *Id.* v. 278. [5] *Id.* v. 238. [6] *Id.* ix. 419. [7] *Id.* xvi. 306. [8] *Id.* ix. 194. [9] *Id.* x. 253. [10] *Id.* xxvii. 125. [11] *Id.* xxviii. 125.

*as a magistrate, is a legal bar to an action for anything done under such a conviction (*u*). The principles on which this position rests have already been considered (*v*).

It is otherwise where the subject-matter is not within the jurisdiction of the magistrate (*x*) (A), or where it appears from the conviction itself that he has been guilty of an excess of jurisdiction (*y*) (1). As where the defendant *gave in evidence four separate convictions of the plaintiff for selling bread on the same Sunday (*z*). For the Court were of opinion that no

Defence by a justice under a conviction. *587

(*u*) Vide *supra*, Vol. I. tit. JUDGMENT. *Strickland* v. *Ward*, ibid. *Gray* v. *Cookson*, ibid.; and 16 East, 21.

(*v*) *Supra*, Vol. I. tit. JUDGMENT; 7 T. R. 361. *Massey* v. *Johnson*, 12 East, 81; 16 East, 21. What Judges of the particular matter have adjudged is not traversable, per Holt, C. J. *Groenvelt* v. *Burwell*, Salk. 396. And if a justice of the peace record that upon his view as a fact which is no fact, he cannot be drawn in question either by action or indictment. 12 Co. 23; 27 Ass. 19; Salk. 397. But if a constable commit a man for a breach of the peace in his presence, the fact is traversable, for he has no judicial authority; he does not commit for punishment, but for safe custody. So leather-searchers, under an Act of Parliament, authorizing them to seize leather insufficiently dried, are liable in trespass for seizing leather which turns out to be sufficiently dried. *Warne* v. *Varley & others*, 6 T. R. 443. The Court of K. B. has no power to review the reasons of justices of the peace, on which they form their judgments in granting licenses, &c.: but if it clearly appear that the justices have been partially, maliciously or corruptly influenced, and have abused the trust reposed in them, they are liable to a prosecution by information, or indictment, or even possibly by action, if the malice be very gross and injurious; per Lord Mansfield. Justices are not liable for what they do at sessions. Staunf. 173. Unless in case of manifest oppression and abuse of power. 2 Barnard, 249; Burn's J. tit. Sessions. See tit. TRESPASS.

(*x*) *Terry* v. *Huntingdon*, Hardr. 480. See the cases cited in the next note.

(*y*) Where justices decide on a matter not within their jurisdiction they are liable in an action. Per Hale, C. B. *Terry* v. *Huntington*, Hardr. 480. And special jurisdictions may be circumscribed, 1st, as to place; 2dly, persons; 3dly, subject-matter. *Ibid.* And if they give judgment on matters arising in another place, or in any matter beyond their jurisdiction, all is void, as *coram non judice*. *Ibid.* See Cowp. 640. 8 East, 404. *Baldwin* v. *Blackmore*, 1 Burr. 595; 2 Bl. R. 1146. So if justices of a county act in a franchise of exclusive jurisdiction. *Talbot* v. *Hubble*, Str. 1154; 2 Tau. 557. In order to justify magistrates in granting authority to collect a composition in lieu of stat. duty, it should be made to appear on oath before both magistrates that the road can be more effectually repaired, by such composition. *Stanley* v. *Fielden*,[1] 5 B. & A. 425. A magistrate is a trespasser who grants a warrant of distress upon documents laid before him, which are the acts of other magistrates, if the want of jurisdiction be manifest; Per Bayley, J. *Ib.* So if a magistrate levy under an order for payment of wages to one employed to keep possession of goods seized under a *fi. fa.*; for such a person is not a labourer within the stat. 22 G. 3, c. 19. *Branwell* v. *Pennecke*,[2] 7 B & C. 536; and per Holroyd, J. it should appear on the warrant that he is a labourer. So a conviction will be bad unless it appear on the face of the conviction that the fact was done within the local jurisdiction of the magistrate. *R.* v. *Hazell*, 13 East, 139; *R.* v. *Chandler*, 14 East, 274. So in the case of an order by justices; *R.* v. *Hulcott*, 6 T. R. 587; where an order for the discharge of a servant was held to be *void* for not stating that he was a servant in husbandry. *A.* contracted with *B.* to build a wall for a certain price within a certain time, but having performed part refused to go on; complaint being made before a magistrate under 4 Geo. 4, c. 34, the information stating the contract, the magistrate convicted *B.*, and committed him. On trespass brought against the magistrate, the Court held that the conviction and commitment did not supply a defence, for the information showed that he had not jurisdiction. And per Bayley, J. if an information laid before a justice alleges that which is within his jurisdiction, he may act upon it, unless the party against whom the information is laid proves the real facts of the case, which take it out of the jurisdiction. *Lancaster* v. *Greaves*,[3] 9 B. & C. 626. Where a member applied against a friendly society under 49 Geo. 3, c. 125, for improperly refusing relief, it was held that upon the construction of the third section the justices before whom the proceedings are had must be both residing within the county, &c. within which the society is held, and that one only being so resident they had not jurisdiction. *Sharp* v. *Aspinall*,[4] 10 B. & C. 47. *Note*, that the defect of jurisdiction appeared on the face of the defendants' (the magistrates) pleas to an action of trespass. A conviction reciting an agreement to weave at certain prices, and alleging a neglect of the work, held not to be a contracting to serve within the 4 Geo. 4, c. 34; the conviction therefore was bad, as without jurisdiction. *Hardy* v. *Ryle*,[5] 9 B. & C. 603. A conviction of two persons jointly of an assault under the 9 G. 4, c 31, imposing a single joint fine on both, instead of a separate one on each, is bad. *Morgan* v. *Brown*,[6] 4 Ad. & Ell. 515. A conviction for having kept open a beer shop at times prohibited by the justices in session, which does not aver that the justices made such order, nor at what time the shop was kept open, is bad. *Newman* v. *Hardwicke*, 3 N. & P. 368. It seems that a conviction which is bad in form, though confirmed at the sessions on appeal, cannot be enforced. *R.* v. *Boultbee*,[7] 4 Ad. & Ell. 498. Justices at sessions cannot quash for a defect in a conviction not mentioned in the note of appeal. *Ib.*

(*z*) Under the stat. 29 C. 1, c. 27.

(A) (See *Bore* v. *Bush*, 6 Mart. N. S 2. *Adkins* v. *Brener*, 3 Cow. 206.)

(1) [See *Vosburg* v. *Welsh*, 11 Johns. 175.]

[1]Eng. Com. Law Reps. vii. 154. [2]*Id.* xiv. 97. [3]*Id.* xvii. 456. [4]*Id.* xxi. 265 [5]*Id.* xvii. 460. [6]*Id.* xxxi. 119. [7]*Id.* xxxi. 118.

more than one penalty could be incurred for selling bread on the same Sunday, and therefore that the levying under the last three convictions was illegal (*a*).

In such a case it is not essential for the plaintiff to prove that the conviction has been quashed, for it is wholly void (*b*). So where the defendant, being a justice of the peace, having convicted the plaintiff of destroying game, committed him to prison without first endeavouring to levy the penalty, the plaintiff having effects on which a distress might have been levied (*c*).

It seems to be perfectly well settled, that if the magistrate have general jurisdiction over the subject-matter, evidence is inadmissible to show that he came to an erroneous conclusion in the particular case (*d*) (A), for that is properly the subject of an appeal.

*588 *Upon a complaint or information before a magistrate of a matter over which he possesses jurisdiction, and consequently where he has a right to enter upon the inquiry, it is for him to decide upon the evidence adduced as to the truth of those facts; and when he has done so, it is, upon the

(*a*) *Crepps* v. *Durden*, Cowp. 640. There the want of jurisdiction appeared on the face of the conviction. See the observations of Lord Ellenborough, and of Bayley J. in *Gray* v. *Cookson*, 16 East, 21.

(*b*) *Ibid.* (*c*) *Hill* v. *Bateman*, 2 Str. 710. *Robson* v. *Spearman*,[1] 2 B. & A. 493.

(*d*) *Gray* v. *Cookson*, 16 East, 21; *Strickland* v. *Ward*, 7 T. R. 631. In *Brittain* v. *Kinnaird*,[2] 1 B. & B. 432, in trespass against a magistrate for taking and detaining a vessel, it was held that a conviction of the defendants under the Bumboat Act was conclusive evidence that the vessel in question was a boat within the meaning of the Act, and properly condemned. See *R.* v. *Mitton*, 3 Esp. C. 201; where Lord Mansfield observed, We cannot hear objections to the conviction which do not appear on the face of it, in a motion in arrest of judgment, for disobedience of an order made on it. In *ex parte Gill*, 7 East, 376, the Court held that they had no authority to discharge one who had been convicted by two magistrates for having absented himself as an apprentice from his master's service, the conviction being apparently regular, although he swore that on coming of age he had avoided the indentures before the offence alleged, and had insisted on that fact before the magistrates. Where a warrant was granted by a magistrate, on a conviction for not doing statute duty on a road in the township of Ingleby, in the parish of Arncliffe, it was held that it could not be objected on an action brought, that the plaintiff was not, as an occupier of lands in the township of Arncliffe, subject to the repair of roads in Ingleby, for that might have been objected on the hearing before the magistrate, or on an appeal. *Fawcett* v. *Fowlis*,[3] 7 B. & C. 394; and *qu.* whether it could be objected that the surveyor had been improperly appointed for the whole parish. The case is distinguishable from those where it has been held that one who is not an occupier of lands in or an inhabitant of a parish may maintain trespass for a distress for rates; in such cases there is an entire want of jurisdiction; here the plaintiff having lands within the parish was *prima facie* liable; there was a surveyor for the whole parish, and the plaintiff was *prima facie* liable. Had there been separate surveyors for the two townships, there would have been a total defect of jurisdiction. Per Holroyd, J. See also *Lowther* v. Lord *Radnor*, 8 East, 113. Where an order for wages alleges that it was made on a hearing, and upon examination on oath, a plaintiff in replevin cannot, in his plea to a cognizance founded on the order, aver that the servant did not duly make oath. *Wilson* v. *Weller*,[4] 1 B. & B. 57. And it seems that replevin does not lie in such a case. In trespass against two magistrates for giving the plaintiff's landlord possession of a farm under the stat. 11 Geo. 2, c. 19, s. 16, a record of their proceedings under the Act, setting forth all that was necessary to give them jurisdiction, is a conclusive answer. *Basten* v. *Carew*,[5] 3 B. & C. 653. Where a justice committed a party charged, under 7 & 8 Geo. 4, c. 30, with cutting down a tree growing on premises in his own occupation, belonging to another person, held that in the absence of all proof of malice, he could not be charged as having acted without jurisdiction, and liable in an action of trespass and false imprisonment; if the trees were excepted in the lease the tenant might be a trespasser, and if liable in trespass it is by no means clear that he might not be liable criminally. *Mills* v. *Collett*,[6] 6 Bing. 85, and 3 M. & P. 242. Where upon a conviction by justices under the stat. 9 Geo. 4, c. 3, s. 27, of a common assault, there was nothing on the face of it showing any attempt to commit felony, which it was in the discretion of the justices to find, the Court refused a *certiorari*. Anon.[7] 1 B. & Ad. 382. And see *Brittain* v. *Kinnaird*,[2] 1 B. & B. 482. In the case of *Terry* v. *Huntington*, Hard. 480, where the commissioners of excise had exceeded their authority, in adjudging low wines to be strong wines, it seems that evidence was admitted in proof of the fact, in order to negative the authority of the commissioners, in an action of trover brought to recover the value of goods levied under a warrant of the commissioners; vide *infra*. And see *Fullers* v. *Fotch*, Holt. R. 287; Carth. 346.

(A) (See *Dressen* v. *Cox*, 2 Martin, N. S. 631. *Bugnet* v. *Watkins*, 1 Dow. R. 136. *Hurst* v. *Wickwire*, 10 Wend. 102. *Adkins* v. *Brewer*, 3 Cow. 206. *Flack* v. *Ankeny*, 1 Breese, 144).

[1] Eng. Com. Law Reps. v. 355. [2] *Id.* v. 137. [3] *Id.* xiv. 59. [4] *Id.* v. 18. [5] *Id.* x. 211. [6] *Id.* xix. 11. [7] *Id.* xx. 405.

ordinary principle of jurisprudence, to be presumed that he has decided rightly in law and in fact. It is not to be supposed that he has decided contrary to his conscience and belief in matter of fact, for the purpose of extending his jurisdiction; and it would be contrary to the policy and principles of law, to allow him to be treated as a trespasser for an error in judgment (*e*) (1).

If a magistrate make an order corruptly, and against the evidence, but in a case where he has jurisdiction, a different remedy is open to the party injured (*f*), by appeal (where one is given), or by a criminal information or indictment against the magistrate, for the corrupt and malicious act (*g*). The whole difference seems to lie between a *want* of jurisdiction in the subject-matter, and an *abuse* of that jurisdiction. These principles seem to be now fully established by the case of *Gray* v. *Cookson* (*h*), where the magistrate *having made an order as against an apprentice, it was held *589
that the want of jurisdiction could not be established against him in an action of trespass, by evidence of the previous dissolution of the apprenticeship. But though evidence be not admissible to show that a magistrate came to a wrong conclusion as to the particular facts, where the subject-matter was generally within the scope of his jurisdiction; still it seems that evidence is admissible to show such a total defect of jurisdiction as excluded the power to inquire into the particular case: if the circumstances were

(*e*) See *Sutton* v. *Johnston*, 1 T. R. 493. 16 East, 21. It is an universal rule, that where a magistrate has jurisdiction he is not responsible in any form of action for mere mistake in matters of law. *Mills* v. *Collett*,[1] 6 Bing. 85.

(*f*) See the observations of Lawrence, J., 8 East, 119, *Lowther* v. *Earl of Radnor and another*. In that case the defendants having (as justices) made an order upon the plaintiff for the payment of wages to Sopp, alleged in the order to be due to him for work and labour in digging and steaning a well, the plaintiff having made default in appearing after summons, the order was confirmed on appeal by the plaintiff to the sessions. The defendants then issued a warrant of distress, on the execution of which the action was founded; a verdict was found for the plaintiff, subject to a case, in which were stated the terms of a *special contract* between the plaintiff and Sopp, as to the making the well. But the Court were clearly of opinion that the plaintiff could not make the defendants trespassers by showing that the real facts of the case would not support the complaint, without showing that such facts were proved before them at the time; and Grose, J. doubted whether the Court could look beyond the order itself. The case was ultimately decided on the ground that the defendants had jurisdiction under the stat. 20 Geo. 2, c. 49 (and see 31 Geo. 2, c. 11, s. 3), to make the order in question.

(*g*) Vide *supra*, note (*v*).

(*h*) 16 East, 13—23. But note, that in giving judgment, Lord Ellenborough delivered the opinion of the Court, that the apprenticeship, which was for a less term than seven years, and therefore voidable by the stat. 5 Eliz. c. 4, had not been actually avoided by an act of delinquency committed by the apprentice in running away from his master. See the cases cited by Mr. Buller, Cowp. 642, where Gould, J. is said to have ruled in two instances, one in Shropshire and one in Lancashire, that although a conviction under the game laws was good in point of form, yet, that as in truth the party was not subject to the game laws, the plaintiff was entitled to a verdict. These decisions, however, appear to be wholly inconsistent with the principles on which the authority of the *res judicata* depends. See Vol. I. tit. JUDGMENT, and see *Brittain* v. *Kinnaird*,[2] 1 B. & B. 432. *Supra*, 587, note (*d*).

(1) [Judicial officers are not liable to action or indictment for acts done by them in a judicial capacity within their jurisdiction, but only to impeachment, if they act corruptly. *Yates* v. *Lansing*, 5 Johns. 282. S. C. 9 Johns. 395. *Moor* v. *Ames*, 3 Caines's Rep. 170. *Brodie* v. *Rutledge*, 2 Bay, 69. An action does not lie against a justice for entering judgment and issuing execution against two defendants, upon the confession of one only. *Little* v. *Moore*, 1 Southard's Rep. 74. Nor, as it seems, for demanding excessive bail on a criminal charge. *Evans* v. *Foster*, 1 N. Hamp. Rep. 374. In North Carolina, however, a justice has been held liable to an action for maliciously and unjustly refusing to grant an appeal from his own judgment. *Hardison* v. *Jordon*, Cam. & Nor. 454. And in Kentucky, the doctrine is thus held—that an action will not lie against a justice for a judicial act within his jurisdiction, *unless he has acted from impure and corrupt motives*. *Gregory* v. *Brown*, 4 Bibb, 28. In South Carolina, it is held that a justice may be *indicted* for corrupt or oppressive conduct. *The State* v. *Johnson*, 2 Bay, 385. *Lining* v. *Bentham*, 2 Bay, 1. {And the law is the same in *Pennsylvania*, *Boyer* v. *Potts*, 14 Serg. & Rawle, 158.} In Vermont, it has been held that an indictment cannot be maintained against a justice for mal-administration, but that he is liable to a suit by the party grieved. *The State* v. *Campbell*, 2 Tyler, 177.]

[1]Eng. Com. Law Reps. xix. 11. [2]*Id.* v. 137.

such as wholly to exclude the power of inquiry in the particular case, the order or conviction will not operate as a defence; for a magistrate cannot give himself jurisdiction by finding that as a fact which is not a fact (*i*). Thus if one be rated to the poor who is neither an inhabitant nor occupier of land within the parish, and his goods be distrained for the rate, he may maintain an action against the person levying (*j*). But in general magistrates cannot be affected as trespassers, if the facts stated before them were such as they had jurisdiction to inquire into, and nothing appeared to contradict such statement. And therefore where magistrates levied money of a friendly society under warrants, after complaint made, and hearing, for the relief of one of the members, no defence being made; it was held, that they were not liable in trespass, although they had in truth no jurisdiction, the rules of the society containing an arbitration clause (*k*).

Proof of the conviction.

Before the stat. 21 Jac. 1, when a defence of this nature was specially pleaded the practice was, as appears from the entries, to set out the information, and all the proceedings before the justices (*l*). And that statute did not alter the nature of the defence, but merely took away the necessity of pleading it specially (*m*). It seems, however, that proof of the conviction, especially where it recites the previous proceedings and shows them to be regular, would be deemed sufficient (*n*). The warrant of commitment must

(*i*) Per Lawrence, J., *Welsh* v. *Nash*, 8 East, 403; and see the observations of the Court in *Fawcett* v. *Fowlis*,[1] 7 B. & C. 394.

(*j*) *Lord Amherst* v. *Lord Somers*, 2 T. R. 372. *Nichols* v. *Walker*, Cro. Car. 394; *Milward* v. *Caffin*, 2 Blacks. 1331; and per Lord Tenterden in *Fawcett* v. *Fowlis*,[1] 7 B. & C. 394; *Weaver* v. *Price*,[2] 3 B. & Ad. 409.

(*k*) *Pike* v. *Carter*,[3] 3 Bing. 78; and see *Lowther* v. *Earl of Radnor*, 8 East, 13.

(*l*) See Cowp. 647.

(*m*) Per Lord Mansfield, C. J., in *Crepps* v. *Durden*, 2 Cowp. 649.

(*n*) In the case of *Hill* v. *Bateman*, 2 Str. 710, *supra*, the Court held, that where such actions are brought against justices of the peace, they are obliged to show the regularity of their convictions; and the informations laid before them, on which their convictions are grounded, must be produced and proved in Court. But though the point does not appear to have been expressly decided, it is probable that where all the proceedings are stated on the face of the conviction, and appear to be regular, the recital itself would be deemed to be at least *prima facie* evidence of the facts recited. See *Strickland* v. *Ward*, 7 T. R. 631; *Brittain* v. *Kinnaird*,[4] 1 B. & B. 432; *R.* v. *Picton*, 2 East, 196. In *Brucklesbank* v. *Smith*, 2 Burr. 656, all the proceedings were regularly proved in evidence; and see *Gray* v. *Cookson*, 16 East, 21. But it seems that where no summary form is given by a particular statute, if the conviction did not show that the proceedings were regular, as if it did not show that the defendant was summoned or was present, the defect would be fatal, and could not, as it seems, be supplied by extrinsic evidence. On this ground convictions have been frequently quashed in the Court of K. B. In *R.* v. *Dyer*, 1 Salk. 181, Lord Holt says, "These summary jurisdictions ought to be held strictly to form, and everything ought to appear regular in them." And in several instances convictions have been quashed for not showing that the defendant was summoned, or had an opportunity of defending himself. *R.* v. *Hawker*, Cold. 391. *R.* v. *Mallinson*, 2 Burr. 681. *Stanbury* v. *Bolt*, cited Cowp. 642. *R.* v. *Hall*,[5] 6 D. & R. 84. *R.* v. *Simpson*. 10 Mod. 345. See also the cases of *Buchanan* v. *Rucker*, 9 East, 192; *Cavan* v. *Stewart*,[6] 1 Starkie's C. 525; where colonial judgments were held to be inoperative, for want of showing that the defendants against whom they had been obtained had been effectually summoned. In *Stanbury* v. *Bolt*, cor. Fortescue, J., Trin. 11 G. 1, cited Cowp. 642, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the party had been summoned, and the conviction was adjudged void for that reason only. And though the proceedings should on the face of the conviction appear to be regular, yet it seems that the party convicted would be at liberty to show that there was in fact no information, summons, or appearance. Where a statute gives a summary form of conviction, which does not state the previous proceedings, it seems to me more doubtful whether extrinsic proof of an information and summons is not requisite to support the conviction and the proceedings under it. In the case of *Doe* d. *Lord Thanet* v. *Gartham* (which is shortly reported in [7]1 Bingh. 357), the plaintiff sought to recover a schoolhouse, &c. after a sentence of expulsion pronounced against the defendant by the visitors and feoffees of the school (the lessors of the plaintiff), but there was nothing to show that the defendant had been summoned to answer the charges made against him. Bayley, J., saved the point, and the Court of Common Pleas afterwards held that the plaintiff was not entitled to recover; and see *R.* v. *Dr. Gaskin*, 8 T. R. 209; and Lord Kenyon's observations in *Harper* v. *Carr*, 7 T. R. 275. In the late case of *Dingsdale* v. *Clarke*, the Court of K. B. held, that where the statute prescribed a summary form of conviction, reciting that the party had been duly convicted, it was sufficient for the magistrate to prove the recorded conviction, without proof of any previous steps.

[1]Eng. Com. Law Reps. xiv. 59. [2]*Id.* xxiii. 107. [3]*Id.* xi. 37. [4]*Id.* v. 137. [5]*Id.* xvi. 255. [6]*Id.* ii. 496. [7]*Id.* viii. 347.

*also be produced and proved, and evidence given (if there be no internal reference) to connect it with the conviction (*f*).

*In general, an order or warrant of commitment by a magistrate must be *591

(*f*) Where *T. O.* laid an information against the plaintiff on a charge of vagrancy, the plaintiff was examined and heard upon the charge, and the magistrate made out a warrant of commitment which falsely recited that the plaintiff had been charged on the oath of *T. S.*, and *T. S.* negatived the fact in evidence, and a conviction was drawn up a month afterwards, but dated on the day of commitment, it was held that the imprisonment was sufficiently connected with the conviction, however informally the conviction and warrant were drawn; and that the allegation in the warrant as to the oath of *T. S.* might be rejected as surplusage. *Massey* v. *Johnson*, 12 East, 67. A warrant of commitment is sufficient, if it substantially exhibit the *corpus delicti*, though it does not state the cause with the technical precision of an indictment. A commitment for treasonable practices is legal. *R.* v. *Despard*, 7 T. R. 736. And a commitment for embezzlement is sufficient, if it show in substance an offence which warrants a commitment, though it does not state the act to have been done feloniously. *R.* v. *Croker*,[1] 2 Chitty's R. 138. Where the prisoner was committed under a warrant of execution, which recited that he had been committed for two months, or until he paid a penalty of 5*l.*, for an offence under the st. 1 & 2 G. 4, c. 118, s. 33, without stating how the penalty was to be distributed, and to whom paid; the Court refused to discharge the defendant out of custody, saying, that the warrant did not require the same certainty as a conviction, and that they were bound to presume that there had been a legal conviction to support the warrant. *R.* v. *Rogers*,[2] 1 D. & R. 156; 5 D. & R. 260,[3] 1 R. & M. 129. And see *R.* v. *Helps*, 3 M. & S. 331. And the warrant need not state the circumstances on which the conviction or order is founded; that at least is not necessary where the warrant refers to the conviction or an order. *Coster* v. *Wilson*, 3 M. and W. 411. A warrant committing a collector of rates for a parish to gaol, there to remain until he should have made a true account, and until the amount should be paid over by him or his sureties, was held to be good, notwithstanding the conclusion directing the gaoler to detain him unless he should be discharged by due course of law. *Goff's Case*, 3 M. & S. 203. But a commitment ought to show the authority of the party committing. *R.* v. *York*, 5 Burr. 2684. The 5th exception was; that the warrant of commitment did not show that Sir J. Fielding, who made it, was a justice of the peace. And the commitment will be bad if it do not substantially show an offence charged, where the warrant is previous to conviction and an offence committed, and the legal duration of imprisonment, where the commitment is in execution. A commitment was held to be defective which stated that the defendant with force and arms made an assault on, &c. with intent feloniously to steal and carry away, for it did not charge any felony within the stat. 7 G. 2, c. 22; 5 T. R. 169; *R.* v. *Remnant*, Nolan, 205; and see *Branwell* v. *Penneck*,[4] 7 B. & C. 533; *supra*, 386, note (*y*). A commitment in execution of a rogue and vagabond under the stat. 23 G. 3, c. 88, is bad, unless it state that the defendant was apprehended with the implements of housebreaking upon him at the time of such apprehension. *R.* v. *Brown*, 8 T. R. 26. So a warrant setting out the grounds of commitment in the disjunctive is bad. *R.* v. *Evered*, Cald. 26. A commitment in execution must state that the party has been convicted; it is insufficient to state that he was charged on oath with the offence. *R.* v. *Cooper*, 6 T. R. 509. A commitment for punishment for a contempt is bad, which does not specify a time certain. *R.* v. *James*,[5] 5 B. & A. 894. And see *Ex parte Page*, 1 B. & A. 568. *R.* v. *Payne*,[6] 4 D. & R. 72. So where the commitment was until he shall pay a sum due for the maintenance of a bastard child and legal fees, or be otherwise delivered by due course of law, where the time ought to have been limited to three months. *Robson* v. *Spearman*,[7] 3 B. & A. 493. So of a general commitment until the putative father pay two several sums, one for maintenance, the other for costs. *In Re Addis*,[8] 1 B. & C. 87. So a commitment for maliciously carrying away a post from a fence is bad; for it is no offence under the stat. 1 G. 4, c. 56, unless the party charged has wilfully or maliciously committed the damage, injury or spoil alleged. *R.* v. *Harpur*,[9] 1 D. & R. 222. A conviction under the stat. 17 G. 2, c. 38, of a late overseer, for refusing and neglecting to deliver over *a parish book*, which adjudges that he be committed until he deliver up all and every the books concerning his said office of overseer, belonging to the parish, is void as to the excess, and a warrant of commitment is void *in toto*. *Groome* v. *Forrester*, 5 M. & S. 314. The conviction produced and proved will not justify the commitment, unless the offences stated be identical. Where the conviction stated an offence against the stat. 6 G. 3, c. 48, and the commitment was for an offence against the stat. 15 C. 2, c. 2, it was held to be insufficient. *Rogers* v. *Jones*,[3] 3 B. & C. 409; and it seems that the guilt of the plaintiff is not evidence in mitigation. S. C. 1 Ry. & M. 129. But in some cases, as under the stat. 7 & 8 G. 4, c. 30, s. 39, it is expressly provided, that no warrant of commitment shall be held to be void by reason of any defect therein, provided it be alleged that the party has been convicted, and there be a good and valid conviction to sustain the same. See *Daniel* v. *Phillips*, 1 C. M. & R. 662. And where the commitment, after a regular conviction for destroying fish in the prosecutor's pond, stated merely a conviction for fishing, &c. without stating any offence in law, it was held that the conviction, though good, supplied no defence. *Wickes* v. *Clutterbuck*,[10] 2 Bingh. 483. In trespass and false imprisonment against a justice, held, that assuming that he had power to commit a person refusing to give evidence, where a specific charge is made, and before the party can be brought into contempt, he ought to be fully apprised that there is such charge under inquiry before the justice; where both the warrant and the evidence were silent upon that point, the Court refused to disturb the verdict which had been found for the plaintiff; and considering the facts not sufficient to raise the general question, abstained from giving any opinion on that point. *Cropper* v. *Horton*,[11] 8 D. & Ry. 166. See *Bennett* v. *Watson*, 3 M. & S. 1. A warrant issued at the right time is not avoided by too early a date. *Newman* v. *Hardwicke*, 3 N. & P. 368.

[1]Eng. Com. Law Reps. xviii. 279. [2]*Id.* xvi. 26. [3]*Id.* xxi. 397. [4]*Id.* xiv. 97. [5]*Id.* vii. 292. [6]*Id.* xvi. 189. [7]*Id.* v. 355. [8]*Id.* viii. 29. [9]*Id.* xvi. 36. [10]*Id.* ix. 490. [11]*Id.* xvi. 342.

in writing (*g*); but an order to detain in custody one convicted under the statute 13 G. 3, c. 80, of killing game on a Sunday, and detained by order of a magistrate until the return of a warrant of distress, may be by parol (*h*). So also an order of a magistrate for the detainer of a prisoner, in order to his further examination on a charge of felony, may be by parol, and without showing any particular cause for which he was to be examined (*i*). If the commitment was upon a warrant granted in defect of goods upon which a distress might be made, the defendant should prove the conviction or demand of the penalty, the warrant of distress and return to it, and the warrant of committal (*j*).

*592 *It is no objection to the conviction that it has been drawn up in regular form since the time of conviction, or even since the commencement of the action (*k*). But it is otherwise in case of an order of justices (*l*), or warrant of commitment, which cannot be made out so as to justify a preceding commitment (*m*). And it seems that mere want of form in the proceedings will be immaterial, provided they show that the plaintiff was convicted of the offence for which the warrant afterwards issued (*n*). Where the war-

(*g*) 2 Haw. c. 16, s. 13. Where a statute requires a warrant, a commitment without a written one is bad, unless it be for a temporary detention until the warrant is made out. *Hutchinson* v. *Lowndes*,[1] 4 B. & Ad. 118. So a commitment for contempt must be in writing. *Mayhew* v. *Locke*, 2 Marsh. 377.

(*h*) *Still* v. *Walls*, 7 East, 533.

(*i*) 1 Hale, P. C. 585; 2 Hale, P. C. 120. In *Scavage* v. *Tatham*, Cro. Eliz. 829; 2 Haw. c. 16, s. 12; it was held that the party could not be detained for sixteen days, and that the space of three days was a reasonable time. Yet it seems that detention for even a longer space of time might be justifiable under special circumstances. See also *Kendall* v. *Roe*, 12 Howell's St. Tr. 1376. The practice, it has been said, is to commit from three days to three days, by a written mittimus. 1 Chitty's C. L. 75: Burn's J., tit. *Examination*, 816. A warrant of commitment for re-examination, for an unreasonable length of time, is void. *Davies* v. *Capper*,[2] 10 B. & C. 28. A magistrate cannot justify a detention without conviction, to enable the party to settle with the complainant. *Bridgett* v. *Coyney*,[3] 1 M. & Ry. 211. The reasonableness is a question for the jury. *Cave* v. *Mountain*, 1 Scott, N. S. 132. Although, on a charge of feloniously cutting trees, they turn out to be under the value of 20*s*. *Ibid.*

(*j*) By the stat. 5 G. 4, c. 18, s. 1, where a penalty is payable on conviction, the magistrate is authorized to direct the defendant to be detained in custody until the return of the distress warrant, unless the offender shall give sufficient security to the satisfaction of the magistrates for his appearance on the return-day of the warrant, such day not being more than eight days from the taking such security. And if it shall appear by *confession* or *otherwise*, to the satisfaction of the justice, that the offender has not sufficient goods within his jurisdiction whereon to levy all such penalties, costs and charges, the justice may at his discretion, without issuing a distress warrant, commit, as on a return of *nulla bona*.

(*k*) *Gray* v. *Cookson*, 16 East, 21, where Ld. Ellenborough says, "I have always considered, that if a conviction were produced at the trial, which would justify the conviction, it would be sufficient." And see *Massey* v. *Johnson*, 12 East, 67.

(*l*) *R.* v. *Justices of Cheshire*,[4] 5 B. & Ad. 438.

(*m*) *Hutchinson* v. *Lowndes*,[5] 4 B. & Ad. 118. *Qu.* as to the suspension or revocation of an order or warrant. *Barons* v. *Luscombe*,[6] 3 Ad. & Ell. 589.

(*n*) *Massey* v. *Johnson*, 12 East, 67. But it must appear to the Court that the party has been legally convicted of the offence stated on the face of the conviction. In the case of *Moult* v. *Jennings*, *cor.* Eyre, C. J., cited Cowp. 642, upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing, and Eyre, C. J. said, that if the nature of the oaths had not been specified in the conviction, so that they might appear to the Court, the conviction would have been void. And in *Cole's Case* (Sir W. Jones, 170), it was held by the whole Court, that if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void as *coram non judice*. So in *Goss* v. *Jackson*, 3 Esp. C. 198, it was held by Ld. Kenyon, that a conviction under the stat. 33 G. 3, c. 84, which varied from the form given by the statute, was void; but note, that in that case the order had not been served on the party convicted, and no demand had been made of the penalty before distress made, as the statute requires. See also *Davidson* v. *Gill*, 1 East, 64, where it was held that an order of justices, under the stat. 13 G. 3, c. 78, s. 19, for stopping up an old footway, and setting out a new one, which did not follow the form prescribed in the schedule, and set forth the length and breadth of the new footway, was defective, and that the objection might be taken in a collateral proceeding; for the statute requires that the form set forth in the schedule *shall* be used on all occasions. But the general rule is, that a party shall not take advantage of a defect in a collateral proceeding, where he might have taken the objection by way of appeal. *Supra*, Vol. I. tit. JUDGMENT. *R.* v. *Grandon*, Cowp. 315. Upon an indictment for disobeying an order of sessions, the Court held that they could hear no objections to the order which did not appear on the face of it; and that where a Court, having competent jurisdiction has pronounced an order, as

[1] Eng. Com. Law Reps. xxiv. 36. [2] *Id.* xx. 20. [3] *Id.* xvii. 244. [4] *Id.* xxvii. 105. [5] *Id.* xxiv. 36. [6] *Id.* xxx. 168.

rant recited a charge on the oath of *T. S.*, and the conviction purported to be founded on the oath of *S. O.*, it was held that the recital in the warrant might be rejected as surplusage, and that it might be considered as a valid commitment under the conviction as to the remainder (*o*). It should appear on the face of the proceedings, not only that the party has been convicted of an offence within the jurisdiction of the magistrate, but also that the proceedings against him were regular; that there was an information against him (*p*) on oath, where such an information is required, and that he appeared *to answer the charge, or at least was summoned (*q*). And it seems that even supposing the proceedings to be apparently regular, evidence would be admissible to impeach the judgment in this respect (*r*). *593

Evidence in answer to a conviction, &c.

Although a legal adjudication by a magistrate is, so long as it subsists, a bar to an action of trespass in respect of any act done by virtue of it, yet it seems to be clear, upon principles already adverted to (*s*), that the plaintiff may rebut the evidence of a conviction, or other judicial act, by evidence showing the total illegality of the proceedings, by proof that the act was not a judicial one, *inter partes*, but was wholly unwarranted, fraudulent and void. Thus he may prove that a warrant of commitment in case of felony was granted maliciously, and without any information to support it (*t*); or in case of a distress or commitment under a conviction, that he was never summoned, and therefore had no opportunity to make his defence (*u*).

Justification under a commitment.

If the defendant justify under a commitment by him as a justice of the peace, as in case of felony, he should be prepared to prove the information on oath, the proceedings upon it, and the warrant of commitment. If he has committed for a contempt committed against him in the execution of his office, he should be prepared to prove the circumstances of the contempt, and a committal by warrant, specifying the offence (*x*) (1). Under a commitment for refusing to be bound over as a witness at the assizes or sessions, the defendant should prove the informations, examinations, and depositions, the calling on the plaintiff to enter into the recognizance, his

long as it remains in force, it must be obeyed. *R.* v *Mitton*, 3 Esp. C. 200. Otherwise, where the defect of jurisdiction appears on the face of the previous conviction or indictment. *R.* v. *Hollis*,[1] 2 Starkie's C. 536.

(*o*) *Massey* v. *Johnson*, 12 East, 67. But it was proved in fact, that *S. O.* had given information on oath; and Le Blanc, J. observed, that the case would have assumed a very different shape had there been no information on oath on which to found the proceedings.

(*p*) See *Massey* v. *Johnson*, 12 East, 67; and see Vol. I. tit. JUDGMENT. If a magistrate maliciously grant a warrant to apprehend and commit a party for felony, without any information against him, he is a trespasser, for there is a false imprisonment by some one, the party having been committed to prison without any charge having been made; and it is an imprisoment by the justice, and not by the constable, who was bound to obey the warrant. *Morgan* v. *Hughes*, 2 T. R. 225.

(*q*) 12 East, 82; 7 T. R. 275. In *Stanbury* v. *Bolt*, *cor.* Fortescue, J. Trin. 11 G. 1, cited Cowp. 642, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned, and the conviction was adjudged void for that reason only.

(*r*) See the observations of Le Blanc, J., 12 East, 81, 2; and *supra*, Vol. I. tit. JUDGMENT. [See *Vosburgh* v. *Welch*, 11 Johns. 175.]

(*s*) *Supra*, Vol. I. tit. JUDGMENT; Vol. II. tit. FRAUD.

(*t*) *Morgan* v. *Hughes*, 2 T. R. 225.

(*u*) *Harper* v. *Carr*, 7 T. R. 275. And see the cases, Vol. I. tit. JUDGMENT; also *Stanbury* v. *Bolt*, *supra*, 589.

(*x*) *Mayhew* v. *Locke*,[2] 2 Marsh, 377.

(1) [It seems that a justice cannot commit for a contempt, only where the contempt has been committed in the face of the court. *The State* v. *Applegate*, 2 M'Cord, 110. *Lining* v. *Benthan*, 2 Bay, 1. *The State* v. *Johnson*, 3 Bay, 385. *Richmond* v. *Dayton*, 10 Johns. 393. See also *Fitler* v. *Probasco*, 2 Browne's Rep. 137. *Moore* v. *Ames*, 3 Caines's Rep. 170. For abusive words while out of court, relating to his judicial character, he may require the party to find security of the peace, and for good behaviour, and in default thereof commit. 10 Johns. *ubi sup.* Or he may proceed by indictment. 2 Bay, *ubi sup.*]

[1]Eng. Com. Law Reps. iii. 464. [2]*Id.* ii. 27.

refusal, and the warrant of committal (*y*). If the warrant direct an imprisonment not authorized by law, it will not be available in defence (*z*).

Evidence in answer to a conviction.

In the case of *Terry* v. *Huntington* (*a*), the Court seem to have been of opinion, that in an action of trespass the plaintiff might show that the commissioners had exceeded their jurisdiction, in adjudging a subject-matter to be within their jurisdiction which was not within it, *i. e.* in adjudging low wines to be strong wines. This, however, seems to be inconsistent with later authorities, particularly that of *Gray* v. *Cookson:* in these cases, the question, whether the subject-matter was or was not within the jurisdiction, was the very point upon which the commissioners in the one case, and the magistrate in the other, had to adjudicate; and therefore the same principle which protects a party who acts judicially, and gives effect to his judgments, until they have been reversed by proper authority, although he may have acted erroneously, extends to such cases, and to all where the question of jurisdiction arises upon matter of fact in the course of a cause,

*594 *and therefore necessarily becomes the proper subject for adjudication in the cause. If in the case of *Terry* v. *Huntington* it had appeared on the face of the information that the subject-matter of the proceeding was *low wines,* whereas the statute gave jurisdiction in case of *strong wines* only, the commissioners would clearly have acted illegally in proceeding to adjudicate where they had no power by the statute to adjudicate at all. But if the information related to *strong wines* only, a subject-matter over which they had jurisdiction, they were bound to proceed; and then, whether the subject-matter of the complaint, upon the evidence, came within the meaning of the statute, they were bound judicially to decide.

Where justices were proceeding upon a summary conviction under the game laws, it was held that as exercising a judicial authority their proceedings ought not to be private, and that they were not warranted in removing the plaintiff, and were therefore liable to an action of trespass (*y*).

But no person has by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission (*z*).

If an Act of Parliament give a justice of the peace jurisdiction over an offence, it impliedly authorizes him to grant a warrant to bring before him a person charged with that offence (*a*).

Tender of amends.

If amends have been tendered within a month after notice, and such tender has been pleaded, it is a question for the jury whether the amends so tendered were sufficient (*b*).

Where the defendant has paid money into Court (*c*), having neglected to tender amends, or having tendered insufficient amends, the proceedings are the same as in other cases where money is paid into Court.

III. Before the statute 24 Geo. 2, c. 44, an officer charged with the exe-

(*y*) See *Bennett* v. *Watson*, 3 M. & S. 1.

(*z*) A commitment of a putative father of a bastard, until he should pay a sum due for the maintenance of a bastard child, &c. or until he should be otherwise delivered by due course of law, is bad; the stat. 49 Geo. 3, c. 68, s. 3, merely authorizing a commitment for three months, unless, &c. *Woburn* v. *Skearman*,[1] 3 B. & A. 493, and vide *supra*.

(*a*) Hardr. 480. (*y*) *Daubny* v. *Cooper*,[2] 10 B. & C. 237.

(*z*) *Collier, Gent. one, &c.* v. *Hicks*,[3] 1 B. & Ad. 663.

(*a*) *Bane* v. *Methuen*,[4] 2 Bing. 63.

(*b*) 24 Geo. 2, c. 44, s. 2. The tender may be pleaded, with the plea of not guilty, or any other pleas, by leave of the Court. Ibid. If the jury find the amends to be sufficient, they are to find for the defendant in such case; or if the plaintiff be nonsuited, or discontinue, or judgment be given for the defendant on demurrer, he is entitled to like costs as if he had pleaded the general issue only. But where the tender of 40*s.* was admitted by the replication, and the notice of action was for taking goods of the value of 40*s.* only, the plaintiff was nonsuited. *Stringer* v. *Martyr*, 6 Esp. C. 134.

(*c*) 24 Geo. 2, c. 44, s. 4.

[1]Eng. Com. Law Reps. v. 355. [2]*Id.* xxi. 64. [3]*Id.* xxii. 161. [4]*Id.* ix. 317.

cution of a magistrate's warrant was placed in a perilous situation; he was liable to an indictment if he refused to execute a warrant, and to a vexatious action if he did. In order to his relief the above statute was made, the object of which was to substitute the magistrate by whom the warrant was granted, and who was supposed to be cognizant of the legality of it, in lieu of the officer, who was merely the instrument to execute it, and probably ignorant of the grounds on which it issued (*d*). Defence by a constable, &c., under a warrant.

By the stat. 24 G. 2, c. 44, s. 6, no action (*e*) shall be brought against *any constable (*f*), headborough, or other officers (*g*), or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace (*h*), until demand has been made, or left at his usual place of abode, by the party intending to bring such action, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for six days after such demand; and in case, after such demand and compliance therewith, any action be brought against such constable, &c. for any such cause as aforesaid, without making the justice of the peace who signed or sealed the said warrant (*i*) defendant, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice of the peace; and if such action be brought jointly against such justice of the peace, and such constable, &c.; then, on proof of such war- *595

(*d*) See the observations of Lawrence, J., 5 East, 477. *Jones* v. *Vaughan.*

(*e*) This clause embraces actions of *tort* only, and does not extend to an action brought against an officer for money had and received, which has been levied by him under a conviction which was afterwards quashed. *Feltham* v. *Terry*, East. T. 13 Geo. 3, K. B.; B. N. P. 24. See also *Irving* v. *Wilson*, 4 T. R. 485. *Wallace* v. *Smith*, 5 East, 122. It is now settled, although it had been doubted, (see Lord Kenyon's observations in *Harper* v *Carr*, 7 T. R. 270), that the statute does not extend to actions of replevin. *Fletcher* v. *Wilkins*, 6 East, 283; for there would be great inconvenience in depriving the subject of his remedy by replevin; it might happen that no damages could compensate for the loss of the particular chattel, of which the party might be for ever deprived, if he could not sue in replevin. *Milward* v. *Caffin*, 2 Bl. R. 1330. See also *Waterhouse* v. *Keen*,[1] 4 B. & C. 200.

(*f*) Evidence of parties acting as constables or watchmen, is *prima facie* evidence of their being such so as to entitle them to the benefit of any provision extended to them in that capacity. *Bulter* v. *Ford*, 1 C. & M. 662; 3 Tyr. 667, and *supra*, tit. Character.

(*g*) Churchwardens, and overseers of the poor, acting under a warrant of distress for a poor's-rate, are within these words, when sued in actions to which the statute extends. *Harper* v. *Carr*, 7 T. R. 271. So is a gaoler who detains a prisoner under a magistrate's warrant. *Butt* v. *Newman*, Gow. 97. Where by statute commissioners had authority to appoint constables, watchmen and other officers requiring a month's notice of the cause of action for anything done or to be done by virtue of the Act, to the clerk of the commissioners, before any action brought, it was held to extend to acts done by constables and watchmen. *Bulter* v. *Ford*, C. & M. 662. 3 Tyr. 677.

(*h*) The Act does not extend to a warrant granted by a Judge of the Court of K. B. *Gladwell* v. *Blake*, 1 C. M. & R. 636.

(*i*) The general requisites of a warrant are, 1st, That it be under the *hand and seal* of the justice. 2 Co. Ins. p. 52. 2 Hale, 111. 2dly. It must express the *date* in order to show that it was prior to the arrest. 2 Hale, 111; Dalt. c. 117–121. But the *place*, it seems, need not be stated, although it must be averred in pleading; the county, however, ought at all events to be set forth in the margin, if not in the body. 2 Haw. c. 13, s. 23; Dalt. c. 117. 3dly. Must state the *offence*, which may be done generally, in case of treason or felony; in other cases it seems that the special cause should be set forth, so far at least as to show the nature of the offence, and the jurisdiction of the magistrate; 2 Haw. c. 13, s. 25; 2 Hale, 111. It ought not to be *general* to answer such matters as shall be objected against him, for then it will not appear whether the offence be within the jurisdiction of the magistrate, or whether it be bailable or not. 2 Ins. 52, 591; 2 Hale, 111. Hence a general warrant to arrest all persons suspected of an offence (*Swallowes's Case*, 24, C. 1; 2 Hale, 112), or to search all suspected houses (2 Haw. c. 13, s. 17), or to seize persons guilty of a specified offence, is illegal. (Ibid. and see *Money* v. *Leach*, Burr. 1742. *Entick* v. *Carrington*, 2 Wils. 275; 11 St. Tr. 321). And 4thly, the warrant may be general, to bring the party before any justice of peace of the county, or special, to bring him before the justice who granted it; 2 Hale, 112, *Foster's Case*, 5 Co. 59, b. In the former case, it seems to be in the election of the officer to go before whom he pleases. Adjudged, 5 Co. 59, b. *Foster's Case*, against the opinion of Fineux, 21 H. 7, 21, a. 2 Hale, 112. [See *Kerlin* v. *Heacock*, 3 Binney, 215.]

[1] Eng. Com. Law Reps, x. 310.

rant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction (1).

The defendant in order to avail himself of this clause must produce and prove the warrant (*k*), by evidence of the justice's hand-writing, &c., and show that he acted in *obedience* to it (*l*). The principal test for ascertaining whether the defendant has acted in obedience to the warrant is to inquire whether the magistrate would be liable for the act of the defendant; for where he would not be liable, the officer is not within the protection of the statute (*m*) (2). As where a bailiff, on a warrant to take up a *disorderly* *596 person *under the Vagrant Act (*l*), takes up one who is not so (*m*), or being authorized to apprehend the author, printer or publisher of a libel, executes it on one who is neither the author, printer or publisher (*n*). So where bailiffs, in order to levy a poor's under a warrant of distress, break and enter a house, and break the windows (*o*); or where a bailiff executes a warrant in a place beyond the limits of its legal operation (*p*). Or in

(*k*) As to the form of warrant, vide *supra*, note (*i*).

(*l*) See 3 Burr. 1767. [See Davis' Justice, Chap. III.]

(*m*) Per Ld. Mansfield, 3 Burr. 1768; B. N. P. 24; 1 Bl. 555; 2 M. & S. 260. The constable is not discharged, unless the party grieved has a remedy once against the magistrate. *Sly* v. *Stevenson*,[1] 2 C. & P. 464. *Parton* v. *Williams*,[2] 3 B. & A. 333. The clause was intended to protect the officer in those cases only where the justice remains liable; per Abbott, C. J. Ib. And see *Cotton* v. *Kadwell*,[3] 3 N. & M. 399. It does not apply where the officer being directed to seize specified things takes others. *Crozier* v. *Cundy*,[4] 6 B. & C. 232; or exceeds the local limits of jurisdiction. *Mitton* v. *Green*, 5 East, 233; or uses unnecessary violence. *Bell* v. *Dockly*, 2 M. & S. 259.

(*l*) 17 Geo. 2. (*m*) 3 Burr. 1767.

(*n*) *Money* v. *Leach & others*, Burr. 1742; note, the warrant under the hand and seal of Ld. Halifax, one of his Majesty's principal secretaries of state, directed the defendants to bring the author, &c. before him, but they discharged the plaintiff by the Earl's order, without carrying the defendant before him. In *Entick* v. *Carrington*, (2 Wils. 275), it was observed by the Court, that the defendants had not taken a constable with them, as directed by the warrant, and that they had not pursued the warrant in the execution thereof, inasmuch as they had carried the plaintiff and his books before Lord Stanhope, and not before Lord Halifax, as directed by the warrant, which was wrong, because a secretary of state cannot delegate his power, but ought to act in this part of his office personally, and therefore, and also because the Court held that a Secretary of State is not a justice of the peace, it was decided that neither a Secretary of State, nor the messengers, were within the stat. 24 Geo. 2, c. 44.

(*o*) *Bell* v. *Oakley & others*, 2 M. & S. 259.

(*p*) *Dawson* or *Lawson* v. *Clarke*, 3 Burr. 1761, 1767; *Milton* v. *Green*, 5 East, 233. A constable cannot justify the execution of a warrant except within the district or place for which he is appointed. Where a warrant to search for nets was directed "to the constable of Shipborne, to Samuel Carter, and to all other officers of the peace in the county of Kent," it was held that the defendant, who was borsholder of Little Peckham, which adjoined to Shipborne, could not justify the execution of the warrant in Shipborne, being neither constable of Shipborne, nor Samuel Carter; and the general description, it was held, was to be construed "*reddendo singula singulis*," as directed to each constable in his own district. *Blatcher* v. *Kemp*, 1 H. B. 15, in note, cor. Ld. Mansfield. And see 2 Ld. Raym. 1296; *The Queen* v. *Tooley*, 1 Salk. 175; Case of the village of Chorley, Fost. 312; 2 Bl. R. 1135, *Hill* v. *Barnes*. The reason is, that if the execution of warrants were granted to mere strangers, force would often be repelled with force, and infinite mischief would attend the departure from the ancient rules of local magistracy. But if a warrant be directed to a constable by name, he may execute it anywhere within the scope of the warrant and the jurisdiction of the justice (Ibid. and Bac. Ab. tit. *Constable*, D). In Westminster constables are to be appointed out of different parishes for the whole city and liberty, by 29 Geo. 2, c. 25; and in London, by ancient custom, the constables of the twenty-six wards have power to execute warrants throughout the city. Bac. Ab. Ed. 6, tit. *Constable*, D.) And now, by the stat. 5 G. 4, c. 18. s. 6, a constable or other peace officer may execute any

(1) [An action of trespass against a constable, who arrested a plaintiff on a warrant of a debt, and assaulted and beat him, was held to be within the statute of Pennsylvania, which requires a copy of the warrant to be demanded. *Osborn* v. *Burkett*, 1 Browne's Rep. 393.]

(2) [A warrant by a justice, not directed to any particular person in office, is bad. *Hall* v. *Moor*, Addison's Rep. 376. But a warrant, directed to —— constable, is good, if executed by the constable of the district. *Paul* v. *Vankirk*, 6 Binney, 124.

A constable, justifying under process from a justice, need not produce written evidence of the justice's appointment: Oral evidence that he has acted as such is sufficient. *Noland* v. *Moore*, 2 Littell's Rep. 367. A warrant issued by a justice may be good, although his name only is signed, without the addition of his official character. *Siler* v. *Ward*, 1 Car. Law Repos. 548.]

[1]Eng. Com. Law Reps. xii. 217. [2]*Id.* v. 307. [3]*Id.* xxviii. 363. [4]*Id.* xiii. 154.

general where the officer exceeds his authority in the execution of the warrant, or executes it in an illegal manner (*q*).

warrant of any justice or magistrate within the jurisdiction for which such justice or magistrate shall have acted in granting or indorsing such warrant, as if such warrant had been addressed to such constable or other peace officer specially by his name, notwithstanding the parish or place in which such warrant shall be granted shall not be the parish, township, hamlet or place for which he shall be constable or peace officer, provided the same be within the jurisdiction of the justice or magistrate so granting or indorsing such warrant. The effect of this statute is, it has been held, to put warrants addressed to peace officers in their official character, on the same footing on which warrants specially directed to them formerly stood; it does not oblige, but authorizes officers to execute the power. *Gimbert* v. *Coyney*, 1 M'Clel. & Y. 469. A constable to whom a warrant is directed, may, for special cause only, as sickness, execute it by deputy. Ibid. Roll. Ab. 591; Moor, 845; Cromp. 222; 3 Bull. 77; 3 Burr. 1259.

(*q*) See 2 Hale, 115; 2 Haw. c. 13, s. 28. Bailiffs and constables sworn as, and commonly known to be, officers, are not bound to show their warrant to the party, but private persons to whom warrants are directed, and even sworn and known officers if they act beyond their own precincts, are bound to show their warrants if demanded. (2 Haw. c. 15, s. 28; 6 Co. 54; 9 Co 69; 1 Hale, 583; 2 Hale, 116.) So in executing a warrant of distress of a justice of the peace to levy a penalty, they must show the warrant if required, and suffer a copy to be taken by the stat. 27 Geo. 2, c. 28. It is enough for a sworn and known officer to say, "I arrest you for felony, &c. in the King's name." (2 Hale, 116, 8 Edw. 4, 14, a.; 14 Hen. 7, 9, b.; 9 Co. R. 69, *Mackally's Case.*) It may be executed in a franchise within the county, for it is the King's suit, in which a *non omittas* is virtually included. 2 Hale, 116. But before the late statute it could not be executed out of the officer's precinct, unless specially directed to him. 2 Haw. c. 13, s. 30; and *supra*, note (*p*). After the arrest he must bring the party to gaol, or to the magistrate, according to the import of the warrant. 2 Hale, 113, and *supra*, 595, note (*i*). But if the time be unseasonable, or if there be danger of rescue, or if the party be sick, and not able at the present to be brought before a justice, the constable may secure him till the next day, or till such time as may, under the circumstances, be seasonable. 2 Ed. 4, 9 & 10; and 2 Hale, 120. And after he has brought him before the justice, the party is still in his custody until the justice discharge or bail him, or till he be actually committed. 40 H. 4, 7, a.; and 2 Hale, 120.—Doors can *in no case* be broken, without *previous notification* of the cause, and request to admit. 2 Haw. c. 14, s. 1; 2 Hale, 116, 7; Fost. 320. A constable may justify the breaking of doors on a warrant to arrest for felony; and even on a warrant to arrest for breach of the peace, an officer may break open the doors of the party. Dalt. c. 78; 1 Hale, 582; 2 Hale, 117; 2 Haw. c. 14, s. 3. So he may, under a warrant of a justice to levy a forfeiture in execution, on any stat. which gives the whole or any part of the forfeiture to the King. 2 Haw. c. 14, s. 5. So under a warrant to arrest for felony, or breach of the peace, the officer may break the doors of another house. 2 Hale, 117; 5 Co. R. 93; Fost. 319. But if the felon be not there, he is a trespasser. *Semaine's Case*, ibid.—An officer may lawfully break open doors after proper notice, and refusal, under a warrant to search for stolen goods, and although no stolen goods be found there. 2 Hale, 157. But it is there said that the owner is justified, or otherwise, according to the event; and see *Bostock* v. *Saunders*, Bl. 912; S. C. 3 Wils. 434. This, however, seems to have been overruled in the case of *Cooper* v. *Booth*, 3 Esp. C. 135; and vide *infra*, 600. Where one *known* to have committed treason or felony, or to have given a grievous wound, is pursued, even by a private person, *without warrant*, he may break open doors to take the offender; but it seems that *no one* would be justified in doing this *without a warrant*, on mere suspicion. See 2 Haw. c. 17, s. 7, and the authorities there cited; Fost. 321; 1 Hale, 582. A demand of admission is necessary in execution of process for a misdemeanor. *Launock* v. *Brown*, 2 B. & A. 592. Doors may be broken after notification, in order to arrest on the Speaker's warrant, for a contempt of the House of Commons. *Bardett* v. *Abbott*, 5 Dow, 165; 14 East, 1; 4 Taunt. 401. A sheriff in executing civil process against the person of *A. B.* is justified or not in entering the house of a stranger to take *A. B.*, according to the event. *Johnson* v. *Leigh*,[1] 6 Taunt. 246. It seems that in the execution of civil mesne process the officer is justified in breaking an *inner door*, though the defendant be not there at the time; but a previous demand of admittance is necessary. *Ratcliffe* v. *Burton*, 3 B. & P. 223. It is necessary to show that such a breaking was necessary before a resort is had to violence. Ibid.; and see *White* v. *Wiltshire*, Palmer, 54. So no demand of a warrant is necessary where overseers distraining under a poor's rate, sell within four days goods in possession of the bailiffs of a landlord under a distress for rent. *Whitby* v. *Robert*, M. & Y. 107; *Kay* v. *Grover*,[2] 7 Bing. 312. Or in case of an excessive distress for a poor's rate. *Starch* v. *Clark*,[3] 4 B. & Ad. 113. It is stated to have been held that a constable who acts without warrant, and not upon the view, is not within the statute. *Ballinger* v. *Ferris*, 1 M. & W. 630, cor. Lord Abinger, qu. It seems to be a general rule applicable to all such enactments, that they enure to the protection of a party who acted under an honest *bona fide* belief that he was acting in execution of powers conferred upon him, although he may have mistaken the extent of that power, or have exceeded it, or failed to comply with the directions of the statute. *Smith* v. *Shaw*,[4] 10 B. & C. 284, and see *Daniel* v. *Wilson*, 5 T. R. 1. Where a landlord apprehended his late tenant for lopping trees under a supposed custom, and gave him in custody for an alleged offence against the Malicious Trespass Act (7 & 8 G. 4, c. 30), it was held that a month's notice of action was necessary if he acted under the *bona fide* belief that he was acting under the statute. *Beechy* v. *Sides*,[5] 9 B. & C. 806; *Reed* v. *Cowmeadow*,[6] 6 A. & E. 661; see also *Cooke* v. *Clarke*,[7] 10 Bing. 19; *Wells* v. *Ody*, 2 C. M. & R. 128. Where the justices granting a warrant for a poor's rate, cautioned the officer not to take goods under a distress for rent, which notwithstanding was done by him; held, in an action for trespass by the landlord, that

[1] Eng. Com. Law Reps. i. 374. [2] *Id.* xx. 143. [3] *Id.* xxiv. 34. [4] *Id.* xxi. 75. [5] *Id.* xvii. 502. [6] *Id.* xxxiii. 165. [7] *Id.* xxv. 16.

*It is said that if the defendant act in obedience to the warrant he is under the protection of the statute, not only where the magistrate wants
*598 jurisdiction *over the subject-matter, but also where the warrant itself is illegal (1). For the policy on which this clause of the Act was founded requires that an officer who really acts in obedience to the warrant of a magistrate, shall be protected (*r*), and he is not to judge of the legality of the warrant. A warrant recited a complaint upon oath, that a quantity of sugar had been stolen from a ship in the Thames, and that there was just cause to suspect that the same goods were knowingly concealed or deposited in the premises occupied by Price & Co. (the plaintiffs), and then directed the defendants to search for and secure the said goods. The defendants under this warrant seized a quantity of sugar which they found on the premises of the plaintiffs, but which turned out to be the property of the plaintiffs. The Court held that this seizure was made in obedience to the warrant, for the defendants had executed it in the only way in which it was capable of being executed, that is, by making it attach on all goods which fell within the description contained in it; they had acted with as much precision in the execution of the warrant as the magistrates had done in the granting of it (*s*).

Where the defendant has acted in obedience to such a warrant, it is incumbent on the plaintiff to prove (*t*) that a demand has been made, or left at the usual place of the defendant's abode, by himself or his attorney, in writing (*u*), signed by the party demanding the same, of the perusal and copy of such warrant (*v*). A written demand signed by the attorney is sufficient (*x*).

The defendant may answer such proof by evidence that he did grant the plaintiff a perusal and copy of the warrant within the six days prescribed by the statute, or even at a subsequent time, provided it were before the commencement of the action (*y*), and will then be entitled to a verdict, notwithstanding any defect of jurisdiction in the magistrate (*z*).

the justice having jurisdiction, and being compellable to issue the warrant, the officer was not within sec. 6 of the 24 Geo. 2, c. 44, although there had been no demand of perusal and copy of the warrant. This section was intended to protect officers, where the magistrate issuing the warrant, would have been liable in case the officer had acted strictly pursuant to it. *Kay* v. *Grover*,[1] 7 Bing. 312, and 5 M. & P. 140; and see *Parton* v. *Williams*,[2] 3 B. & A. 330, and *Crozier* v. *Cundy*,[3] 6 B. & C. 232.

(*r*) See the observations of the Court, 2 B. & P. 161, *Price* v. *Messenger;* but *qu.* whether the officer would be protected where he was directed by the warrant to do that which was *manifestly illegal.* See the observations of Eyre, C. J., 2 Wils. 291; and 4 Bl. Comm. 291. The words of the statute are, *notwithstanding any defect in jurisdiction in any such justice.* See Lord Eldon's observations, 2 B. & P. 161. If a magistrate by his warrant direct it to be executed in *G.*, the constable is justified in executing it there, though the place be beyond the magistrate's jurisdiction; per Lord Ellenborough, 5 East, 237.

(*s*) *Price* v. *Messenger & others*, 2 B. & P. 158.

(*t*) Such proof is usually given as part of the plaintiff's original case; but it seems to be competent to him to rely on proof of the trespass in the first instance, and to prove the demand in reply. See *Price* v. *Messenger*, 3 Esp. C. 96. Where the defendant justified as under a distress for a poor's rate, and the question was merely in respect of parochiality; it was held that the defendant, admitting the demand of a copy of the warrant, was entitled to begin. *Burrel* v. *Nicholson*, 1 M. & R. 304.

(*u*) As to proof of the service of the notice, vide *supra*, 581.

(*v*) By the stat. 22 G. 2, c. 44, s. 5.

(*x*) *Jory* v. *Orchard*, 2 B. & P. 39.

(*y*) *Jones* v. *Vaughan*, 5 East, 448.

(*z*) If the magistrate be joined, and a verdict be given against him, then by the stat. 22 G. 2, c. 44, s. 6, the plaintiff shall recover his costs against him, to be taxed in such a manner as to include the costs which the plaintiff is liable to pay to the defendant, for whom the verdict is so found.

(1) [In Pennsylvania, if a constable has pursued his warrant, he can be affected by want of jurisdiction in the magistrate only when he is sued alone, having, after a proper demand, refused to furnish a copy of the warrant for six days: But when he is jointly sued with the magistrate, whether after demand and refusal or not, and has pursued his warrant, he is entitled to an acquittal. *Jones* v. *Hughes*, 5 Serg. & Rawle, 302.]

[1]Eng. Com. Law Reps. xx. 143. [2]*Id.* v. 307. [3]*Id.* xiii. 154.

If the officer fail to bring himself within the protection of the statute, he stands in the same situation as at common law; and the rule seems to be that the officer is justified in executing a warrant, legal in itself, granted by one who had a general jurisdiction over the subject-matter, although it was erroneously or corruptly granted in the particular case (*a*). It would manifestly *be unjust, that a mere ministerial officer, who was bound at his peril *599
to execute the process, should suffer for doing what he supposed to be perfectly legal in the execution of a warrant apparently valid, and which was rendered illegal by facts not within his knowledge. But it is a general principle of law, that where courts of justice *assume a jurisdiction* which they do not possess, an action of trespass lies against the officer who executes process, because the whole proceeding was *coram non judice;* and where there is no jurisdiction there is no Judge, and the proceeding is as nothing (*b*) (1). And therefore where a justice on a conviction on the Game Laws issued a warrant of commitment to prison, without first endeavouring to levy the penalty on the goods of the party convicted, it was held that the constable who had executed the warrant was justified, although the justice was a trespasser (*c*). So if a justice were maliciously to grant a warrant of commitment for felony, without information on oath (*d*) (2). But it was held, that if a justice had no authority to apprehend a party in respect of the matter specified in the warrant, but only to issue a summons, then there being no pretence for the jurisdiction, the warrant would be no justification to the officer (*e*). So if it appear on the face of the warrant that the *offence* is one over which the justice of peace had no jurisdiction (*f*). So if he issue a warrant to bring the party before him, at a place out of the county for which he is a justice (*g*). So if the warrant on the face of it be void and illegal for uncertainty; as, if it be a general warrant to apprehend all persons suspected of a particular offence, without naming any; for it is the duty of a magistrate, and not of the officer, whose duty is ministerial, to judge of the grounds of suspicion; and whether a particular person be guilty or not, is a fact to be decided on a subsequent trial (*h*). So a churchwarden or overseer is a trespasser in executing a warrant of distress

(*a*) 2 Haw. c. 13, s. 11. *Terry* v. *Huntington*, Hardr. 484; Bac. Ab. tit. *Constable*, D. *Hill* v. *Bateman*, Str. 710. [*Paul* v. *Vankirk*, 6 Binney, 124; *Warner* v. *Shed*, 10 Johns. 138; *Haskell* v. *Sumner*, 1 Pick. 459; Yelv. 42 a. note.] The contrary has been asserted, and the case 10 H. 7, 17, has been much relied on as an authority for the assertion. There it was held that one who by the order of a bishop arrested another for saying that he was not bound to pay tithes, was a trespasser, as it could not be justified by the stat. 2 Hen. 4, c. 15, which authorizes bishops to arrest for heresy. The answer is, that there the order itself was *manifestly illegal;* besides, it was not in writing. See 2 Haw. c. 13, s. 11.

(*b*) P. C. in *Perkin* v. *Proctor and another*, 2 Wils. 384; case of the Marshalsea, 10 Rep. 76, a. b. As where a rate is unduly made, the warrant of justices will not excuse the churchwardens of the poor, who distrain for it. *Nicholls* v. *Walker & Carter*, Cro. Car. 395. See *Brown* v. *Compton*, 8 T. R. 422, in which the case of *Orby* v. *Hales*, 1 Ld. Ray. 3, was overruled. But see p. 598, note (*r*).

(*c*) *Hill* v. *Bateman*, Str. 710.

(*d*) *Morgan* v. *Hughes*, 2 T. R. 225. But a magistrate may grant a warrant on reasonable suspicion, although there be no direct charge on oath. *Elsee* v. *Smith*,[1] 1 D. & R. 202.

(*e*) *Shergold* v. *Holloway*, Str. 1002; 2 Sess. C. 100. So if a justice of the peace make a warrant to arrest for a debt. *Moore* v. *James*, Willes, 122.

(*f*) Bac. Ab. tit. *Constable*, D. 14. Hen. 8, 16. Cromp. 147, 8, 9.

(*g*) Ibid.

(*h*) 4 Bl. Comm. 291; 3 Burr. 1372; 1 Bl. R. 562; 11 St. Tr. 307, 321; Comm. Jour. 22 & 25; Ass. 1766; 2 Wils.

(1) [See Yelv. 42, *a. note* (1), and cases there collected. Keilw. 106. *Sandford*, v. *Nichol & al.*, 13 Mass. Rep. 286. *Pearce* v. *Atwood*, ibid. 324. *Hoit* v. *Hook*, 14 Mass. Rep. 210. *Cable* v. *Cooper*, 15 Johns. 152. *Butler* v. *Potter*, 17 ib. 145. *Conner* v. *Commonwealth*, 1 Binney, 38.]

(2) [But the *officer* may justify under a warrant, which is regular on the face of it, without showing that it was founded on a complaint under oath. *Sanford* v. *Nichols & al.*, 13 Mass. Rep. 286.]

[1]Eng. Com. Law Reps. xvi. 19.

under a rate illegally made, as in an extra-parochial place, for there was no jurisdiction (*i*).

It has been laid down by Lord Hale (*j*), that although an officer who under the warrant of a justice of the peace breaks open doors to search for stolen goods, is justified, although none be eventually found, yet that the owner is justified or not, according to the event; and in *Bostock* v. *Saunders*, (*k*), on similar grounds, it was held that an excise officer was liable
*600 in trespass for *breaking and entering the plaintiff's house under a warrant of commissioners, granted upon his own information, to search for tea suspected to have been concealed there (*l*), none having in fact been found. But in a subsequent and similar case (*m*) it was held that since the warrant was granted upon the judgment of the commissioners, warranted by oath, the action was not maintainable. The commissioners had authority to issue the warrant; it was legal when it was issued, and when it was executed; and (Ld. Mansfield observed) it would be a solecism to say that the legal execution of a legal warrant could be a trespass. It was also held, that it was not incumbent on the defendant to prove at the trial that he had reasonable or probable grounds for laying the information; for by the Act the oath of the officer is made evidence of the truth of the fact; and the probability of the suspicion is left to be judged of by the magistrate.

Where an officer has improperly allowed one committed in execution till payment of a fine to go at large, he may afterwards retake him (*n*).

A warrant to levy rent due to a gas-light company, without a previous summons and hearing by the magistrate, is illegal; although a summons and hearing are not in terms required by the Act; and the party suing out the warrant, cannot justify under it, although it would have protected the clerk to the company or an officer (*o*).

By a constable, &c., without a warrant.

IV. A constable who acts without a warrant, or who does not act in obedience to the warrant, is, it has been held, within the protection of the 8th sect. of the stat. 24 G. 2, c. 44 (*p*); and the words in the stat. 21 J. 1, c. 12, s. 5, by *virtue of their office*, apply to all cases where the party intends to act in the character of a constable, although he acts improperly, for where he really acts in the course of his office he wants no protection from the statute (*q*). And therefore, if a constable of his own authority, and

(*i*) *Nicholls* v. *Walker*, 2 Roll. Ab. 560; 2 Hale, 119; Cro. Car. 394. Vide *supra*, 598, note (*r*).

(*j*) 2 Hale, 150. (*k*) 2 Bl. R. 912, and 3 Wils. 434.

(*l*) Under the stat. 10 G. 1, c. 10, s. 13, which enacts, that in case any officer, &c. shall suspect any tea, &c. to be concealed, with intent to defraud, &c., on oath made to the commissioners, &c. setting forth the grounds of his suspicion, it shall be lawful for them to authorize the officer to enter such house, &c. See also as to warrants to search for stolen goods, the statute 22 G. 3, c. 58.

(*m*) *Cooper* v. *Booth*, 3 Esp. C. 135. (*n*) *Butt* v. *Jones*,[1] 1 Gow. 99, cor. Dallas, C. J.

(*o*) *Painter* v. *Liv. Gas Light Comp.*, 3 Ad. & Ell. 433; and see *Webb* v. *Batchelour*, 1 Vent. 273; Freeman, 396, 407, 457, 488. *R.* v. *Benn*, Vent. 273. *Harper* v. *Carr*, 7 T. R. 275.

(*p*) As where a constable, acting under a warrant to seize the goods of *A.*, seizes those of *B.*, the action must be brought within six months. *Parton* v. *Williams*,[2] 3 B. & A. 330, overruling the case of *Postlethwaite* v. *Gibson & another*, 3 Esp. C. 226. And see *Theobald* v. *Crichmore*, 1 B. A. 227; *infra*, note (*q*). And *Smith* v. *Wiltshire*, 5 Moore, 322; where constables under a warrant to seize black, seized coloured kerseymere cloths.

(*q*) Per Abbott, L. C. J.[3] 2 Starkie's C. 445; and see *Alcock* v. *Andrews*, 2 Esp. C. 541; where Ld. Kenyon observed, that where a man doing an act within the limits of his official authority, exercises that authority improperly, or abuses the discretion placed in him, to such cases the statute extends. And see *Theobald* v. *Crichmore*, 1 B. & A. 227; where a constable, who had broke into a house to levy a church-rate, granted under the stat. 53 Geo. 3, c. 127, was held to be within the 12th section, which requires an action for anything done in pursuance of the Act to be brought within three months; and Ld. Ellenborough observed, that the object of the clause was clearly to protect persons acting illegally, but in supposed pursuance of the statute, with a *bona fide* intention of discharging their duty. Where watchmen having reasonable ground of suspicion that a felony had been committed by the plaintiff, went to his house to apprehend him, but beat him, and used more violence than was necessary, it was held that they were protected by a clause requiring notice pre-

[1]Eng. Com. Law Reps. v. 473. [2]*Id.* v. 307. [3]*Id.* iii. 424.

without *any warrant, and without any reasonable or probable cause, arrest a person on a charge of felony, and carry him before a magistrate, the *venue* must be laid in the proper county (*r*); and he cannot without a warrant justify an arrest for a breach of the peace which is not committed within his own view (*s*), unless a wound has been given which is likely to occasion death (*t*); but it is a justification to show that the plaintiff was committed to his custody on a legal charge, provided he acted *bonâ fide* and without collusion (*u*). If there be no evidence of collusion, in such a case he is in point of law entitled to a verdict (*x*). It seems, however, that a constable is not bound to act on a charge made by another, in respect of an offence committed in the absence of the constable (*y*). And if a reasonable charge be made, it is a good defence to him under the general issue, although he afterwards, and on further inquiry, discharges the accused without taking him before a magistrate (*z*), and although it afterwards turn out that the charge was wholly unfounded (*a*). So *although no specific *602 charge be made to the constable, yet if a felony has been committed, and

viously to an action for anything done under the statute. *Bulter* v. *Ford*, 1 C. & M. 662; 3 Tyr. 677. Reasonableness of belief is a question for the jury. *Wedge* v. *Berkeley*,[1] 6 A. & E. 663. A constable who acts only under colour of his office, or to discharge an old grudge, is not entitled to notice. *Wedge* v. *Berkeley*,[1] 6 A. & E. 667.

(*r*) Under the stat. 21 Jac. 1, c. 12, s. 5. *Straight* v. *Gee & Carver*,[2] 2 Starkie's C. 445.

(*s*) *Coupey* v. *Henley & others*, 2 Esp. C. 540; 2 Haw. c. 13, s. 8. Where an affray takes place in the presence of a constable, he may either keep the parties in custody until the fray be over, or carry them immediately before a magistrate. *Churchill* v. *Matthews*, 2 Sel. N. P. 911. If any one stand in the way of a constable to hinder him from preventing a breach of the peace, the constable is justified in taking him into custody, but not in striking him. *Levy* v. *Edwards*,[3] 1 C. & P. 40. And see *White* v. *Edmunds*, Peake's C. 89, and *infra*. Where a party read a notice in church during an interval when no part of the church service was going on, it was held that though a constable was justified in removing or detaining him till the church service was over, he could not afterwards detain him to carry him before a magistrate. See 1 W. & M. c. 18, s. 18. *Williams* v. *Glenister*,[4] 2 B. & C. 699. Using loud words in the street, though disorderly, is not an offence which warrants a peace officer in taking a party into custody. *Hardy* v. *Murphy*, 2 Esp. C. 294; and see *Booth* v. *Henley*,[5] 2 C. & P. 288. A police officer is not justified under 10 Geo. 4, c. 44, s. 7 (Police Act), in laying hold of and removing a person in a crowd, merely because he was conversing with a known reputed thief. *Stocker* v. *Carter*,[6] 4 C. & P. 477. The London Police Act, which warrants the apprehension of suspected persons or reputed thieves, does not warrant an apprehension on mere suspicion of a particular felony. *Cowles* v. *Dunbar*,[7] 1 M. & M. 37. A watchman cannot justify collaring a person who was turning against the wall of a public street for a particular occasion, to prevent him from so doing. *Booth* v. *Henley*,[5] 2 C. & P. 288.

(*t*) *Ibid.*

(*u*) *White* v. *Taylor and Simcoe*, 4 Esp. C. 80. *Hobbs* v. *Branscomb*, 3 Camp. 420. *Cowles* v. *Dunbar*,[7] 1 M. & M. 37. In the former case the defendant Simcoe had made a malicious charge of felony against the plaintiff to the defendant Taylor, a constable at the watch-house, who committed him upon it to the Compter. On an action of trespass, Taylor was acquitted, and Simcoe found guilty. In *Isaacs* v. *Brand*,[8] 2 Starkie's C. 167, Lord Ellenborough intimated his opinion in point of law, that a charge made by a principal thief, on his apprehension, against a party for receiving the goods, did not authorize an arrest by the officer without a warrant; but it was left to the jury to say whether there was probable cause. In *Hill* v. *Yates*,[9] 2 Moore, 80, where a constable acted under the statute 15 C. 2, c. 2, s 2, which authorizes a constable to arrest persons whom he suspects to be conveying a burthen of young trees, it was said that the question of probable cause was for the Judges, and that it could not be left to the jury. To kill an officer who takes another into custody on a mere charge and without warrant, is murder, though the charge does not specify all the particulars necessary to constitute felony. *R.* v. *Ford*, Russ. & Ry. C C. L. 329.

(*x*) Per Le Blanc, J. in *White* v. *Taylor and Simcoe*, 4 Esp. C. 80. (*y*) *Ibid.*

(*z*) *M'Cloughan* v. *Clayton and another*, Lancaster Summer Assizes, 1816, cor. Bayley, J.,[10] 2 Starkie's C. 445; and 1 Holt, C. 478.

(*a*) *White* v. *Taylor*, 4 Esp. C. 80. *M'Cloughan* v. *Clayton*, 1 Holt. C. 478. In *Samuel* v. *Payne*, Doug. 345, Ld. Mansfield said, "If a man charge another with felony, and require an officer to take him into custody, it would be most mischievous if the officer were first bound to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable." In that case, after a search warrant granted, no goods having been found, the defendant who first made the charge, and Payne a constable, and his assistant, arrested the plaintiff on a Saturday, he was detained till Monday, and then discharged, after an examination before a magistrate; there was a verdict against all three; but the Court afterwards held that the charge was a sufficient justification to the constable and his assistant, and cited *Ward's Case*, Clayton, 44, pl. 76; 2 Hale's P. C. 84, 89, 91; and Haw. b. 2, c. 12, s. 13.

[1]Eng. Com. Law Reps. xxxiii. 167. [2]*Id.* iii. 424. [3]*Id.* xi. 306. [4]*Id.* ix. 227. [5]*Id.* xii. 130. [6]*Id.* xix. 482. [7]*Id.* xii. 265. [8]*Id.* iii. 297. [9]*Id.* iv. 62. [10]*Id.* iii. 161.

information of the felony, and its circumstances, has been communicated to the constable, but no specific charge is made against any one, he will be justified in arresting a party whom he suspects to have committed the felony, but who turns out to be innocent, provided he acted *bonâ fide* in pursuit of a supposed felon (*b*). And though no felony has in fact been committed, nor any charge made, yet if a constable has reasonable grouud for suspecting that another has committed a felony, or that he is about to commit one, he may detain that person for the purpose of investigation (*c*). But he is bound to carry such person before a justice to be examined as soon as he reasonably can (*d*).

*603 Venue. *Although one who acts in aid of a constable is within the protection of the stat. 21 J. 1, c. 12, s. 5, (*e*), as to the *venue*, and as to his defence under the general issue; yet one who is the prime mover, and who sets the constable in motion, by making a complaint and charge to him, is not within the statute (*f*); and where there is a doubt whether a private person acted

(*b*) *Ledwith* v. *Catchpole*, Cald. 281. Smith had lost linens; Stevens came with Smith to the defendant, a marshalman to the Lord Mayor, and Stevens informed the defendant that one Madox had put the linens into a hackney coach at a public house; that the plaintiff had put his head into the coach there; that afterwards the coach stopped at another house, and that the plaintiff met it there. Smith suspecting the plaintiff to have been concerned in the theft, took the defendant on a Sunday to the plaintiff in order to have him apprehended, but when they came, neither Smith nor any other person charged the plaintiff with felony; Smith said, "I have lost some cloth, but I do not say it was he who stole it; I know nothing of that; but stolen it was." The defendant then arrested the plaintiff, who was discharged the next day by the magistrate. The defendant pleaded the general issue, and the plaintiff had a verdict for 20*l.*; but the court granted a new trial. Lord Mansfield observed, "the first question is, whether a felony has been committed or not? And then the fundamental distinction is, that if a felony has been actually committed, a private person may, as well as a peace officer, arrest; if not, the question always turns upon this, was the arrest *bona fide;* was this act done fairly, and in pursuit of an offender, or by design, or malice and ill-will? Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons are usually taken up upon descriptions in advertisements. Many an innocent man has been and may be taken up upon such suspicion; but the mischief and inconvenience to the public in this point of view is comparatively nothing. It is of great consequence to the police of the country; I think there should be a new trial." Note, that Buller, J. doubted whether the constable was justifiable, since to hold that he was, would imply that he was to some purposes a judicial officer, which he said was going father than had yet been adjudged him: *tamen qu.* for to a certain extent, even a private person is justified, or not, in arresting, according to the particular circumstances of suspicion on which he must exercise his discretion. See Haw. b. 3, c. 12, s. 2; and 4 Taunt. 34. *Secus*, in case of misdemeanor. *Fox* v. *Gaunt*,[1] 3 B. & Ad. 798. A constable arrests *B.*, a respectable person, on information by *A.* that *B.* had robbed him; in confirmation of which a supposed intercepted letter is shown him; held, that it was properly left to the jury to say whether the circumstances afforded reasonable ground for the arrest, and whether the jury in his situation would have so acted. *Davis* v. *Russell*,[2] 5 Bing. 354.

(*c*) *Wright* v. *Court and others*,[3] 4 B. & C. 596. *Davis* v. *Russell*,[2] 5 Bing. 354. A plea that the constable detained the plaintiff for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses, and bringing them to prove the *felony*, was held to be bad on demurrer. And the Court seem to have been of opinion, that the handcuffing a party so arrested, could not be justified without showing an attempt to escape, or that it was otherwise necessary. [3]4 B. & C. 596.

(*d*) *Beckwith* v. *Philby*,[4] 6 B. & C. 635. Whether the constable had reasonable cause for suspicion was a question of fact for the jury; per Lord Tenterden, C. J. Ib. Watchmen and beadles may at common law arrest and detain for examination persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there be no proof of a felony having been committed. *Lawrence* v. *Hedger*, 3 Taunt. 14. Watchmen may imprison any person who encourages prisoners in their custody to resist. *White* v. *Edmonds*, Peake's C. 89. The London Police Act, 3 G. 4, c. 55, s. 21, which authorizes the apprehension of *suspected persons*, applies to *reputed thieves* only, and not to persons suspected of particular thefts. *Cowles* v. *Dunbar*, 1 M. & M. 37. Where, under the 21 J. 1, c. 12, s. 5, two of the defendants in an action of trespass and false imprisonment, being constables and acting in aid of the other defendant, were entitled to an acquittal; held, that the plea stating them to be acting in aid of the other defendant, and not he in aid of them, the protection did not extend to him. *Bond* v. *Rust*,[5] 2 C. & P. 342.

(*e*) *Supra*, 600.

(*f*) *Mac Cloughan* v. *Clayton*,[6] 1 Holt's C. 478; 2 Starkie's C. 445. Because, as is said, the person who puts the constable in motion, is *prima facie* a trespasser, and therefore ought to allege and prove the truth of the suggestions on which he induced the constable to act. And though two of the defendants, being constables, are within the statute, and entitled to an acquittal by reason of a wrong *venue*, another defendant, who pleads that the other defendants, as constables, acted in his aid, not being a constable, is not entitled to an acquittal,

[1]Eng. Com. Law Reps. xxiii. 187. [2]*Id.* xv. 463. [3]*Id.* x. 412. [4]*Id.* xiii. 287. [5]*Id.* xii. 160. [6]*Id.* iii. 161.

as the prime mover, or merely acted in aid of the constable who undertook to act as of his own authority, is a question of fact for the jury (*g*). A private person may, as well as a constable, justify the arrest of one actually guilty of treason or felony (*h*), or who has given a wound likely to prove mortal. A defendant cannot justify in aid of an officer who had himself no authority to do the act (*i*). Defence by a private person, without warrant.

If a felony has been committed, although not by the party arrested, a private person may justify the arrest, if he acted *bonâ fide* upon fair and sufficient grounds of suspicion (*k*); such a defence must, however, be specially pleaded (*l*). Where no treason or felony has been committed, or dangerous wound given by *any one*, it seems that a private person cannot at *common law justify an arrest upon suspicion (*m*); except, indeed, where the hue and cry has been raised, and there is no reason to suppose that it is groundless (*n*). A private person cannot arrest for any offence inferior to felony, not committed within his view (*o*); but if an affray be committed in his presence, he may stay the affrayers till the heat be over, and then deliver them to the constable (*p*), and also stop those who are going to join *604

as acting in their aid. *Bond* v. *Rust*,[1] 2 C. & P. 342. *A.* being robbed, suspects *B.* and delivers him in charge to a constable present; trespass is maintainable against *A. Stonehouse* v. *Elliot*, 6 T. R. 315. Where a stat. authorized a constable to arrest on the information of another, but the defendant, instead of merely giving information to the constable, *directed* him to arrest, it was held that he acted as principal, and was not entitled to notice, although he acted *bona fide*. *Hopkins* v. *Crowe*,[2] 4 A. & E. 774.

(*g*) *Straight* v. *Gee and Carver*,[3] 2 Starkie's C. 445; where it was so left to the jury by Abbot, L. C. J. *Bond* v. *Rust*, 2 C. & P. 342. Where a prosecutor having obtained a warrant points out the party to the constables, he acts in their aid. *Nathan* v. *Cohen*, 3 Camp. 257; per Ld. Ellenborough.

(*h*) Haw. b. 2, c. 12, s. 15. It is there said, that a private person who is not himself induced to believe that the party is guilty, would not be justified in arresting him by command of a constable. [See *Wakely* v. *Hart*, 6 Binney, 316.]

(*i*) A constable seizing a person by the direction of a custom-house officer, who had himself no power to seize, is not within the protection of the Custom-house Act. *Norton* v. *Miller*,[4] 2 Chitty, 140.

(*k*) See Haw. b. 2, c. 12, s. 8, 9, 10, &c. where a number of justifying causes of suspicion are enumerated, some of which are very large and indefinite, such as "Common fame,"—"Keeping company with persons of scandalous reputation,"—"Behaving in such a manner as to betray a consciousness of guilt." It is laid down as essential, that the party himself who arrests must be induced by the grounds of suspicion to believe the party arrested to be guilty. See Lord Mansfield's observations in *Ledwith* v. *Catchpole*, Cald. 291. Whether the grounds of suspicion are sufficient to justify the party so arresting seems to be a question of law. (Haw. b. 2, c. 12, s. 18; 2 Inst. 52; 2 Hale, 78; Finch, 340. *Mure* v. *Kay*, 4 Taunt. 34.) And the grounds must be set forth in pleading the justification, in order that the Court may judge whether the suspicion was reasonable (Ibid.); and unless the plea set forth the causes of suspicion with certainty, it will be bad on demurrer. Ibid. The plea will be bad, unless it show a felony committed. If a constable join in a plea with one who gave the defendant in charge, if it be bad for one, it will be bad for both; and per Best, C. J., there is no difference between seizing a man and ordering him to be seized. *Hedges* v. *Chapman*,[5] 2 Bing. 523.

(*l*) See the last note; and *Mure* v. *Kay*, 4 Taunt. 34.

(*m*) See Lord Mansfield's observations in *Ledwith* v. *Catchpole*, Cald. 291. Lord Tenterden's, in *Beckwith* v. *Philby*,[6] 6 B. & C. 635. A *private person*, without warrant, may arrest, 1st, If there be a felony done; 2dly, if the party arresting has probable cause, which is traversable; 3dly, the arrest must be by the party suspecting. *Sir Anthony Ashley's Case*, 12 Co. 92. In trespass and false imprisonment upon a charge of felony, held that evidence showing that the defendant had reasonable grounds of suspicion was admissible in reduction of damages. *Chinn* v. *Morris*,[7] 1 Ry. & M. 244.

(*n*) Haw. b. 2, c. 12, s. 16. The Hue and Cry is the pursuit of an offender from town to town till he be taken; which all who are present when a felony is committed, or dangerous wound given, are by the common as well as statute law bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 Inst. 116, 7; 1 Hale, 588; 2 Hale, 99, 102; Haw. b. 2, c. 12, s. 5. As to the mode of raising the Hue and Cry, see Haw. b. 2, c. 12, s. 6. But in the case of *Guppy* v. *Brittlebank*, 5 Price, 525, where the defendant pleaded the general issue, and a justification that the plaintiff, at Ashborne fair, tendered a forged note to *T. M.*, and that the plaintiff had probable cause to suspect, and did suspect, that the plaintiff had feloniously uttered the note, knowing it to be forged; wherefore the defendant, &c., and verdict thereon for the defendant, the Court held that the arrest, though without warrant, was justifiable. Suspicion that a party has on a former occasion committed a misdemeanor, will not justify a private person in apprehending him without a warrant. *Fox* v. *Gaunt*,[8] 3 B. & Ad. 798.

(*o*) But see *Guppy* v. *Brittlebank*, 5 Price, 525, *supra*.

(*p*) Haw. b. 2, c. 13, s. 8. [*Phillips* v. *Trull*, 11 Johns. 486.]

[1] Eng. Com. Law Reps. xii. 160. [2] *Id.* xxxi. 177. [3] *Id.* iii. 424. [4] *Id.* xviii. 279. [5] *Id.* ix. 508. [6] *Id.* xiii. 237. [7] *Id.* xii. 170. [8] *Id.* xxiii. 187.

either party (*q*). So also a private person may at common law lawfully lay hold of one committing treason or felony, or doing any act which would manifestly endanger the life of another, and detain him till it may reasonably be supposed that he has changed his purpose (*r*); or may justify the breaking into the house of another for the purpose of preventing him from committing felony (*s*).

KNOWLEDGE.

See tit. Coin.—Forgery.—Negligence.—Notice.

LANDLORD AND TENANT.

See Ejectment.—Use and Occupation.—Waste.

LARCENY.

Particulars of proof.

Upon an indictment for larceny (*t*) it is necessary to prove, in ordinary cases, 1st. A *caption* and *asportation*; 2dly. With a *felonious intention* (A); 3d. Of the *goods and chattels of another*, as described in the indictment. And where there has been a *bailment* of the goods to the prisoner by the owner, it is further necessary to prove, either, 1st, a felonious intent on the part of the prisoner, *in procuring the delivery* to him, which defeats
*605 the bailment, *or that the delivery was procured *by force or duress*; or, 2dly, that before the asportation the *bailment* had been *determined* by the tortious act of the bailee; or, 3dly, that the bailment had been *determined* according to the intention of the parties.

Caption and asportation.

1st. A caption and asportation; the latter seems necessarily to include the former, although the converse is not true, for there may be a taking into the possession without an asportation or removal. To constitute a caption, the property must have been taken into the possession of the prisoner. Therefore, where the prisoner cut the girdle of another, and in consequence the purse fell to the ground, but was not otherwise taken possession of by the prisoner, it was held to be no felony (*u*), but a momentary possession is sufficient (*v*). It need not be by force (*x*); and it is not purged by a re-delivery (*y*); any the least removal is sufficient to constitute an *asportation* (*z*). As if plate be taken out of a trunk and laid beside it (*a*); or the goods be removed from one end of the waggon to the other (*b*); or an ear-ring be forced by violence from the ear, and fall upon the hair (*c*). or a bag be lifted from the bottom of the boot of a coach, though not taken out (*d*). Proof that the skins of sheep were taken, and the carcases left, is

(*q*) Ibid. b. 1, c. 63.
(*r*) Ibid. b. 2, c. 12, s. 19.
(*s*) *Handcock* v. *Baker*, 2 B. & P. 260. The defendant in that case had broken into the plaintiff's house, to prevent him from committing murder on his wife; Chambre, J. said, it is lawful for a private person to do anything to prevent the perpetration of a felony.
(*t*) See the different definitions of larceny, East's P. C. 533. The true meaning of larceny is, "the felonious taking the goods of another, without his consent and against his will, with intent to convert them to the use of the taker." Per Grose, J., in delivering the opinion of the Court. *Hammon's Case*, Leach, 1089. See 4th Report of the Criminal Law Commissioners.
(*u*) 1 Haw. c. 54; 1 Hale's P. C. 532; Dalt. 100; Cromp. 34.
(*v*) *R.* v. *Peat*, Leach, 367; Hale, 533; 3 Inst. 69.
(*x*) East's P. C. 687.
(*y*) 3 Inst. 69; Staun. 27; 1 Hale, P. C. 533.
(*z*) 1 Haw. c. 33.
(*a*) Kel. 31; 1 Hale, P. C. 508.
(*b*) *R.* v. *Corslet*, Leach, 272; S. C. East's P. C. 556.
(*c*) *R.* v. *Lapier*, Leach, 360; 1 Haw. c. 33; 3 Inst. 108, 109; 2 Vent. 215; 7 Ass. 39; 1 Hale's P. C. 508; Dalis. 21; Cromp. 30. *R.* v. *Simpson*, Kel. 31.
(*d*) *R.* v. *Walsh*, Moody's C. C. 14.

(A) (A person who is deaf and dumb is liable to a criminal prosecution for larceny, and he may be tried upon an indictment, as on a plea of not guilty, the purport being explained to him by signs, by some person sworn to interpret the indictment as it shall be read by the clerk. *Commonwealth* v. *Hill*, 14 Mass. R. 207.)

evidence of the stealing of the sheep (*e*). The pulling of wool from the back of a lamb is a sufficient asportation (*f*). There must, however, be an actual and complete *removal* of the thing from the place, after it has been taken into the possession of the prisoner. And, therefore, the setting a bale of goods on one end without removing it to a different place, is not an asportation (*g*); and where a purse taken by the prisoner from the pocket of another, remained still attached by a string to keys in the pocket, it was held that the asportation was not complete (*h*); and so it was held where goods remained attached by a string to part of the shop (*i*).

A caption and asportation by the hand of one, is that of all who are present aiding and abetting (*k*) (A); and it is not essential to prove that they were done immediately and directly by the prisoner; it is sufficient to show that he committed the act by means of an innocent instrument (*l*). After the goods have once been stolen the prisoner is guilty of a fresh felony wherever he carries the goods, for the property is not altered; and therefore, where *goods are stolen in one county and carried into another, the prisoner is guilty of a felony in the latter county (B). *606

Felonicè.

2dly, That the taking was *felonious.*—It is the peculiar province of the jury to decide upon the *intention* of the prisoner (*m*). The question, whether a particular taking was felonious, is a question of law arising principally upon the intention of the prisoner, as found by the jury. The felonious quality consists in the *intention* of the prisoner to defraud the owner,

(*e*) *R.* v. *Rawlins*, East's P. C. 617. Upon an indictment on 14 Geo. 2, c. 6, charging the party in one count with stealing, and in a second with killing a sheep, with intent to steal the whole of the carcase, it appearing that the sheep had been killed with intent to steal the fat, held that the prisoner might be convicted on the second count; but that there being no evidence of any removal of the animal whilst living, the first count could not be supported. *Williams's Case*, 1 Ry. & M. C. 107, S. P. as to stealing lambs, *Loom's Case*, ib. 160.

(*f*) *R.* v. *Martin*, Leach, 205. (*g*) *R.* v. *Cherry*, East's P. C. 556.

(*h*) *R.* v. *Wilkinson*, 1 Hale's P. C. 508; East's P. C. 556.

(*i*) *Cherry's Case*, East's P. C. 556. *Farrell's Case*, Leach's C. C. L. 266; East's P. C. 557. *Secus*, where a mail-bag was lifted from the bottom of the boot of the coach, although not entirely removed from the boot. *R.* v. *Walsh*, 1 R. & M. (C. C. L.)

(*k*) See tit. Accessory.

(*l*) See tit. Accessory; East's P. C. 555; 1 Haw. c. 33, s. 8; 1 Hale's P. C. 507; 3 Ins. 108.

(*m*) East's P. C. 685; Summ. 61; 1 Hale's P. C. 504. Secreting a letter, containing bills, with the intention merely of cheating the revenue of the postage, is not within the 52 Geo. 3, c. 143, s. 2; *Sharpe's Case*, 1 Ry. & M. C. 125. Where the prisoner took by violence from a gamekeeper wires and a pheasant, which he had set, and which the latter had found and seized, and were claimed by the prisoner as his own, held that it was for the jury to say, whether he took them under a *bona fide* impression that he was only getting back his own property, however he might be liable to penalties for having them in his possession. *R.* v. *Hall*,[1] 3 C. & P. 409. Where the jury found that the prisoner's intention, *ab initio*, was to get goods out of the prosecutor's (a tradesman) possession, upon a pretended sale for cash, and then clandestinely to remove them, and convert them to his own use, it was held to be a felonious taking. *Campbell's Case*, 1 Ry. & M. 179. So where the jury found that the prisoner never intended to pay for oxen which he had bargained for for ready money, and the owner had not consented to their being taken away. *Gilbert's Case*, 1 Ry. & M. 185. *Pratt's Case*, ib. 250.

(A) (See *State* v. *Hardin*, 2 Dev. & But. 407. *Morton* v. *The People*, 8 Cow. 137.)

(B) (A foreigner committing larceny abroad, coming into the state of New York, and bringing the stolen property with him, may be indicted, convicted, and punished in the same manner as if the larceny had been originally committed there. *People* v. *Burke*, 11 Wend. 129. But see *People* v. *Gardner*, 2 John. R. 477. *People* v. *Schenck*, ibid. 494.)

(1) [If a person aid and abet in stealing goods in one county, and they be afterwards carried into another county without his assistance, where he is afterwards concerned in the possession and disposal of them, he is guilty of larceny in the latter county. *Commonwealth* v. *Dewitt*, 10 Mass. Rep. 154.

It is held in North Carolina and New York, that stealing property in another state, and bringing it there is not there punishable as larceny. *The State* v. *Brown*, 1 Hey. 160. *Secus*, in Connecticut and Massachusetts. *The State* v. *Ellis*, 3 Conn. Rep. 186. *Commonwealth* v. *Cullens*, 1 Mass. Rep. 116. And a person receiving in Massachusetts goods stolen in another state, knowing them to be stolen, may be there punished as an accessory after the fact. *Commonwealth* v. *Andrews*, 2 Mass. Rep. 14.]

[1]Eng. Com. Law Reps. xiv. 373.

and to apply the thing stolen to his own use (*n*) (A). It is sufficient if the prisoner intend to appropriate the value of the chattel, and not the chattel itself, to his own use; as where the owner of goods steals them from his own servant or bailee, in order to charge him with the amount (*o*). The intention must exist at the time of the taking, and no subsequent felonious intention will render the previous taking felonious; as where goods are removed by the prisoner during a fire, with intent to preserve them for the owner, and he *afterwards* determines to appropriate them to his own use (*p*); or where a bailment is procured without any felonious intent on the part of the bailee, and he afterwards, and before the determination of the bailment, converts the property (*q*). The usual indication of a felonious intent is the secrecy and privacy with which the act is done, and the asserting a dominion over the property by the prisoner, or the actual conversion of it, by sale or otherwise, to his own use (B). On the other hand, the inference of a felonious intent may be rebutted by evidence to prove, that the taking was in joke; was by mistake; was accidental; that the goods had been lost by the owner, and found by the prisoner (*r*) (1).

*607 *The notoriety and openness of the taking, where possession has not been gained by force or by stratagem (*s*), is a strong circumstance to rebut

(*n*) See the case of *R.* v. *Morfit & Conway*, cor. Abbott, J. Maidstone Lent Assizes, 1810, and afterwards by the Judges. It was there held that the taking of oats by a servant, with intent to give them to the master's horses, from the granary of the master, by means of a false key, was a felony. See Burn's J. by Chetw. vol. 3, p. 76. So it was decided by Thompson, C. B. that the taking a horse by stealth from the stable of a prosecutor, and destroying it by throwing it down into a coal-pit, in order to defeat a prosecution founded on a former larceny in stealing the same horse, amounted to a felony. But where the prisoner took the horses of the prosecutor with intent to ride them, and then to leave them without returning them, it was held to be trespass only. *Dissentiente* Grose, and *dubitante* Ld. Alvanley, *R.* v. *Strong & Phillips*, 3 Burn, 177, 23d edit. Miners employed to bring ore to the surface are paid according to the quantity raised; a miner removing a portion from another's heap to his own, is not guilty of stealing the goods of the owner of the mine. *R.* v. *Webb*, Moody's C. C. 431.

(*o*) 7 Hen. 6. f. 43.

(*p*) *R.* v. *Leigh*, East's P. C. 694. *Mucklow's Case*, 1 Ry. & M. 160.

(*q*) *Infra*. 609; East's P. C. 594, 837.

(*r*) But even in this case the taking must have been *bona fide*, and not under a mere pretence of finding, although the property has been deposited in an unusual place, as in a hay-mow (2 East's P. C. 664; 1 Hale, 506; 2 Hale, 507); or has been left in a hackney-coach by mistake (*Lamb's Case*, East's P. C. 664; *Wynnes's Case*, ibid.; *Seares's Case*, 1 Leach, 215, n.); or be found on the highway, if the prisoner knew the owner (*R.* v. *Walters*, 3 Burn's J. 180, 23d edit.); or be taken out of a bureau sent to be repaired. *Cartwright* v. *Green*, 8 Ves. 405; or be taken from a seat by the roadside. *Milburne's Case*, 1 Lewin's C. C. 251. Where the prisoner at first opened a letter, believing it intended for himself, and finding it to contain bills, appropriated them to his own use, held not to amount to larceny, the party not having any *animus furandi* at the time he received it. *Mucklow's Case*, 1 Ry. & M. 160.

(*s*) The mere doing it openly and by force does not excuse from felony. Kel. 82; 2 Ray. 276; 2 Vent. 94; Kel. 83. And in general, the taking with a felonious intention without lawful consent, by means of any trick or stratagem, amounts to felony. As where a tradesman is prevailed on to bring his goods to an appointed place, under pretence that the price shall be paid; and having been prevailed on to leave them there in the care of a third person, the prisoner fraudulently gets them from that person without paying the price. *R.* v. *Campbell*, Moody's C. C 179; and see *R.* v. *Gilbert*, ib. 185; *R.* v. *Pratt*, ib. 250.

(A) (To constitute larceny the possession must be acquired *animo furandi*. *The People* v. *Anderson*, 14 John. R. 294. Larceny may be committed by a man stealing his own property where the intent is to charge another with the value of it. *The People* v. *Palmer*, 10 Wend. 165. It is felony for a man who elopes with another's wife to take his goods, though with the consent and at the solicitation of the wife. *People* v. *Schuyler*, 6 Cow. 572.)

(B) (Where a shawl was dropped in an exhibition room, and picked up by the defendant, placed in a conspicuous situation, and afterwards appropriated to his own use clandestinely, it was held that he was not guilty of larceny. *State* v. *Roper*, 3 Dev. 473. So where the defendant found a pair of saddle-bags in the common highway, on which there were no marks by which the owner could be identified, it was held not to be larceny, the felonious intent being wanting. *Tyler* v. *The People*, 1 Breese, 277. See also *Porter* v. *The State*, Martin & Yerger, 526. *Wright* v. *The State*, 5 Yerger, 154. *State* v. *Braden*, 2 Penn. R. 68.)

(1) [The *bona fide* finder of lost goods cannot be held guilty of larceny by any subsequent act of his, in concealing or appropriating them to his own use. *The People* v. *Anderson*, 14 Johns. 294. *Sed vide* 2 Tyler, 379, *The State* v. *Jenkins*.]

the inference of a felonious intention (*t*); and it is a good defence to show that the taking was *bonâ fide* under process of law, or under a supposed claim of right, however unfounded such claim may be. The law has not deemed it to be so necessary to provide against an open and notorious invasion of property, for which the party may have his remedy against the known trespasser by a civil action, as against a taking accompanied with secrecy, or effected by force and terror, or by artifice. It is a question of fact, whether the goods were taken *bonâ fide*, under a claim of right, or with a roguish and felonious intent (*u*). Where the taking is obtained by fraud or stratagem, it may amount to felony, although the owner consented to the act in ignorance of the prisoner's real intention; and proof that the prisoner obtained possession of the property by means of stratagem and artifice is strong evidence of the felonious intent. It is, however, to be observed, that no intention will make the taking felonious where the owner *intends* to part with the *property altogether* to the prisoner; in such case the party is liable to an indictment for obtaining the property by false pretences; and this seems to be the strong test of distinction between a larceny, and an obtaining of money or goods by false pretence (*v*). If by means of a false pretence the prosecutor be induced to part with the temporary possession only, reserving a right of ownershsp, the prisoner, provided he intend to appropriate the property to his own use, is guilty of felony (A); but if the owner be induced by the artifice to part with his whole interest, without any reservation, the defendant is guilty of a misdemeanor only (*w*).

3. The proof of the chattels stolen must of course correspond with the description in the indictment (*x*) (B). In order to satisfy the allegation that *the property was of the goods and chattels of the person specified, it must be proved, either that that person was the owner (1), or that he

Ownership. Possession. *608

(*t*) [*The State* v. *Smith*, 2 Tyler, 272.] It may be that the taking is no more than a trespass, and the circumstances in such case must guide the judgment; as, where a man takes another's property openly before him or others, otherwise than by apparent robbery, or having possessed himself of them, avows the fact before he is questioned. 1 Hale, 507; East's P. C. 661. See *R.* v. *Phillips & Strong*, 2 East's P. C. 662.

(*u*) 1 Hale, 507; 1 Haw. c. 33, s. 8; *Farr's Case*, Kel. 43.

(*v*) And therefore where the servant of a pawnbroker, having general authority to act in his master's business, delivered up a pledge to the pawner on receiving a parcel from him, which he supposed to contain valuables which he had just before seen in the pawner's possession, it was held to be no larceny, for the party authorized intended to transfer the entire property. *R.* v. *Jackson*, Moody's C. C. 119. *Secus*, where a prisoner obtains from a servant a parcel, by falsely pretending to be the person to whom it is directed, for the servant has no authority to part with it but to the right person. *R.* v. *Longstreeth*, Moody's C. C. 137. And see *R.* v. *Pratt*, Moody's C. C. 250.

(*w*) *Supra*, 606, note (*m*); *infra*, 613.

(*x*) See tit. VARIANCE. If an animal, living or dead, have the same appellation, and it makes no difference in the charge whether it be living or dead, it may be described when dead by the appellation given it when living. *R.* v. *Puckering*, Moody's C. C. 242. Upon an indictment for receiving a lamb, knowing, &c., held that it was immaterial as to the prisoner's offence, whether the lamb was alive or dead at the time of receiving. *Puckering's Case*, 1 Moody's C. C. 242. The stealing parchment records of the Court of C. P. not relating to the realty, is the subject of larceny to the value of the parchment. *Walker's Case*, 1 Ry. & M. 155; *secus*, if they relate to the realty. See *R.* v. *Westbeer*, Leach, C. C. 12. Where the prisoner being sent to the post-office received a letter containing the halves of bank-notes, which he embezzled; held that they were "goods and chattels" of the master. *R.* v. *Mead*,[1] 4 C. & P. 535. On an indictment under 7 & 8 Geo. 4, c. 29, s. 26, for stealing one "sheep," it appearing to have been under a year old or a lambteg, the variance was held to be fatal, the Act having the word "lamb." *R.* v. *Birkett*,[2] 4 C. & P. 216. A set of new handkerchiefs, in a piece, may be described as so many handkerchiefs, though not separated from each other. *R.* v. *Nibbs*, Moody's C. C. 25. The goods of a ready-furnished lodging may be described as the lodger's. *R.* v. *Brunswicke*, 1b. 25.

(A) (See *State* v. *Long*, 1 Hayw. 154.)

(B) (See *Hooker* v. *State of Ohio*, 4 Ohio R. 350.)

(1) [Bees are *feræ naturæ*, and although confined in the top of a tree by the owner of the tree, yet while

[1]Eng. Com. Law Reps. xix. 514. [2]*Id.* xix. 351.

had the legal custody of the goods; for the offence of larceny includes a trespass, to which possession is essential (*y*) (1), and therefore unless the person whose property is alleged to have been stolen be either actually or constructively in possession, the taking cannot amount to a larceny. But it is a general maxim, that the ownership of goods draws after it the possession; and, therefore, it is sufficient to prove that the goods are the property of the party whose goods and chattels they are alleged to be in the indictment, although they were at the time in the actual possession of some other person, as a servant or agent; and so it is sufficient to prove that the goods were in the legal custody of the person alleged to be the owner in the indictment, who has the actual legal custody of the goods, as the agent or bailee of the actual owner. For such possesson and interest are sufficient against a wrong-doer (*z*) (2). Where, however, the prisoner himself had possession of the goods delivered to him with the consent of the owner, a different consideration, as will presently be seen, arises; and the question will be, whether the prisoner had a *bare charge* of the goods, the possession of which still remained in the owner, or he had acquired a legal possession of them distinct from that of the owner (*a*).

On a charge of stealing bills of exchange, against one employed in the Post-office, it is not necessary to prove the execution or making of the bill (*b*) (A).

Of the party described (*c*).—In order to satisfy the allegation that the

(*y*) 1 Haw. c. 33; Kel. 24; Dalt. 3, c. 101; East's P. C. 554.

(*z*) See Criminal Pleadings. A box belonging to a benefit club, which by the rules was to be deposited with one of the keys, with the landlord, was held to be properly laid as the property of the landlord, although he had no key at the time of its being stolen. *R.* v. *Wymer*,[1] 4 C. & P. 391; and see *R.* v. *Willis*, Moody's C. C. 375.

(*a*) Vide *infra*, 610, 613. And see *Campbell's Case*, Leach, 942, 3d edit., where a prisoner decamped with a bank-note delivered to him by his landlady that he might change it, and held to be larceny. *R.* v. *Parker*, East's P. C. 671. *R.* v. *Nicholson & others*, East's P. C. 699. *Adams's Case*, Russel, 1060. *Walsh's Case*, 4 Taunt. 258, 284.

(*b*) *R.* v. *Ellis*, Russ. & R. C. C. L. 188.

(*c*) As to variance in the description of the property or owner, see Crim. Plead. 2 ed. 193, 201–2. Where

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they remain there and are not secured in a hive, they are not the subject of larceny. *Wallis* v. *Mease*, 3 Binney, 546. A mere letter is not a subject of larceny. *Payne* v. *The People*, 6 Johns. 103. Nor anything which is destitute of both intrinsic and artificial value. *The State* v. *Bryant*, 2 Car. Law Repos. 269. Therefore an indictment was quashed, which charged the defendant with stealing "one half ten shilling bill, of the currency of the State." Ibid. And therefore, on an indictment for stealing a bank-note, it must be proved to have been genuine. *The State* v. *Tillery*, 1 Nott & M'Cord, 9. But a slave is the property of his master, and a subject of larceny. *Bryce* v. *The State*, 2 Overton's Rep. 254. *Plumpton* v. *Cook*, 2 Marsh. 45. *The State* v. *Hall*, 1 Taylor, 126.]

(1) [In *Pennsylvania* v. *Becomb & al.* Addison's Rep. 386, it is said that taking deer-skins, hung up in the woods at an Indian hunting camp, may be larceny, though the skins were not in the possession of any one at the time.]

(2) [The legal possession which a master has of his runaway slave is sufficient to warrant an indictment for stealing him from his master, after he has run away. *The State* v. *Miles*, 2 Nott & M'Cord, 1. *The State* v. *Davis*, 2 Car. Law Repos. 291.]

(A) (In an indictment for the larceny of bank-notes, it is not indispensably necessary to produce the notes upon the trial. *Moore* v. *Commonwealth*, 2 Leigh, 701. Nor is it necessary to prove that the note is a genuine one and of some value, by any positive evidence, if the jury shall be satisfied that the person stole the bank-note and afterwards passed it away as a genuine note. *Cummings* v. *Commonwealth*, 2 Virg. Cas. 128. But on the trial of an indictment for stealing foreign bank bills, it is incumbent upon the prosecutor to produce at least *prima facie* evidence of the existence of such banks and of the genuineness of the bills. *The People* v. *Caryl*, 12 Wend. 549. As to bills it is not necessary to prove by positive testimony that the names subscribed to them were in the hand-writing of the officers of the banks, but should at least be proved by a witness familiar with the bills that he believed them to be genuine; evidence of the same character and degree should be given which on indictments for forging foreign bills is usually resorted to, to prove them counterfeit. *Ibid.* When a note is given, payable in foreign coin, the value of each coin in current money must be averred in an indictment for larceny, and under such averment, evidence of the value may be received. *United States* v. *Hardyman*, 13 Peters, 176.)

[1] Eng. Com. Law Reps. xix. 436.

property stolen was of the goods and chattels of *A. B.* as alleged in the indictment, it is sufficient to show that *A. B.* had the legal custody of the property, although the ownership resided in another (*d*) (1); as where the goods are stolen from a servant in the absence of the master. For every larceny includes a *trespass, which is an injury to the possession; and there- *609
fore it seems that where property has been lost by the owner and found by the prisoner, the taking cannot be felonious, since no one was in possession (*e*).

In Phipoe's case (*f*) it was held that the taking was not felonious, since the note had never been for a moment in the peaceable possession of the prosecutor. But it is a general rule of law, that the right of property draws after it the possession (*g*); therefore it is sufficient to prove the ownership, according to the allegation in the indictment, although the alleged owner never had the actual possession; and in general the possession of an agent is the possession of the principal, with respect to third persons, even although the agent or bailee be not responsible to the principal for the loss of the goods (*h*). But as between the owner and a bailee, the possession of the latter is not necessarily the possession of the former, as will afterwards be seen. It is a consequence from the general principle, that a joint-tenant, or tenant in common, cannot be guilty of larceny in respect of the joint property, since he has a right to the possession (*i*). So where the wife delivers possession of the husband's goods, the person taking them upon such delivery is not guilty of larceny, since she has an interest in the goods (*k*); but it is otherwise where the goods are obtained by force or fraud from the wife (*l*). The property is not altered by a *tort;* and therefore if *B.* steal the goods of *A.*, and *C.* steal the same from *B.*, the property still remains in *A.*, and may be so described (*m*). So if *B.* receive goods from the sheriff under a *tortious* replevin (*n*).

Every larceny includes a trespass, and is an injury against the possession of the owner; and therefore in general a bailee who has possession of the goods under a contract cannot be guilty of felony in stealing them, so long

Bailment, where existing.

the owner might easily have been ascertained, an indictment for stealing the goods of a person unknown is not maintainable. *R.* v. *Robinson*, cor. Richards, C. B., Durham, 1817. Where the indictment alleged that certain persons unknown committed a burglary, and that the prisoner received the goods, &c. and it appeared that an indictment had been found the same assizes, charging *A. B.* as the principal, and the prisoner as accessory to the same robbery, ten of the Judges were of opinion that the prisoner was rightly convicted. *R.* v. *Bush*, Russ. & Ry. C. C L. 372.

(*d*) See the cases Crim. Pleadings, 2 ed. 201–2.

(*e*) 1 Haw. c. 33; 3 Ins. 102; 1 Hale, P. C. 504; East's P. C. 25, 554; but see above, 606, note (*r*). [See *The State* v. *Brader*, 2 Overton, 68.]

(*f*) Leach, C. C. L. 3d edit. 774. A banker's cheque is delivered to a servant in order to be delivered by him to *G. M.*; it is felony in the servant to appropriate the amount to his own use. *R.* v. *Heath*, 2 Moody's C. C. L. 33. And it may be described as a banker's cheque of the value specified, without stating the drawees to be bankers. *Ib.*

(*g*) See the *dictum* of Gould, J., East's P. C. 674.

(*h*) Crim. Pl. 2d ed. 203.

(*i*) 1 Hale's P. C. 513. East's P. C. 558.

(*k*) 1 Haw. c. 33, s. 19; *Harrison's Case*, Leach, 56; East's P. C. 559. *R.* v. *Clarke*, Moody's C. C. 375. *Qu.* For a stranger acting in conjunction with the wife (with whom he has committed adultery) may commit a felony in taking the husband's goods. *R.* v. *Tolfree*, Moody's C. C. 243. In *R.* v. *Willis*, Moody's C. C. 375, it was held that a wife could not be guilty of stealing the property of a friendly society deposited in her husband's custody.

(*l*) 1 Hale's P. C. 514; East's P. C. 558; St. West. 2, c. 34.

(*m*) 1 Haw. c. 33; 3 Ins. 102; 1 Hale's P. C. 504; 13 Ed. 4, 9, 10.

(*n*) 1 Hale's P. C. 507; 3 Ins. 108; Kel. 43; 1 Sid. 254; Raym. 276.

(1) [In Massachusetts, evidence that the person, whose the chattels described in an indictment for larceny are alleged to be, is mere bailee of an officer who had attached them—having engaged to redeliver them on demand—will not support the indictment; as he is a mere servant of the officer, and has no property in the chattels. *Commonwealth* v. *Morse*, 14 Mass. Rep. 217. *Sed Vide* 1 N. Hamp. Rep. 289, *Poole* v. *Symonds*.]

as the contract continues undetermined (A). As where a tailor is entrusted with cloth, or a carrier with goods, to be carried, or a goldsmith with plate (*o*), or a weaver delivers materials to workmen out of the house to be woven (*p*). In such and all other cases where the party has a legal possession of the property distinct from that of the owner, he is not guilty of felony in appropriating the goods, unless indeed, as will afterwards be seen, the possession be obtained by fraud, and with a felonious intent to steal the goods, for then the party acquires no legal possession as against the owner, for the law will not permit him to take advantage of his own wrong; and in point of law no contract exists (*q*).

*610 Proof to defeat a bailment.

*Where a person has a legal possession of the goods distinct from that of the owner, he cannot be guilty of felony so long as the legal possession subsists; and therefore, where such distinct possession has been given, further evidence is essential to answer or rebut the inference of a legal possession by the prisoner. But it is to be observed, that to render this necessary, the possession must be *distinct* from that of the owner, for if the party have but a *bare charge* of the goods under the immediate control and superintendence of the owner, without any possession distinct from that of the owner, he may be guilty of larceny in taking the goods, notwithstanding his manual tenure of them; and therefore a servant is guilty of felony in stealing his master's goods, although he has the custody of them for a particular purpose (*r*). As where a butler steals his master's plate (*s*) (B). Even though the servant has the goods for a specific purpose, as where money had been delivered to a servant to be delivered to a third person, and he spent part, and embezzled the rest (*t*).

Servant.

Where a servant received money from his master to buy licenses with, which he embezzled, it was held that he was not guilty of felony (*u*) at common law. But this was denied in *Lavender's* case (*v*).

There the money had been delivered by the master to the prisoner to be taken to one *Flawn*, as the consideration for bills to be given for the money in a few days (*x*), and the prisoner instead of delivering the money spent part, and embezzled the remainder, and it was held to be larceny.

(*o*) East's P. C. 693.

(*p*) But see 1 Haw. c. 33, s. 56.

(*q*) The taking in such case is not warranted by the contract; there was no assent to the taking for the fraudulent purpose intended. See tit. Intention. But if the owner intend to transfer his property, then, although the taker may have been guilty of fraud in obtaining goods which he never meant to pay for, yet the taking is with the assent of the owner, who means that the goods shall be the absolute property of another.

(*r*) E. P. C. 554. 1 Hale, 506. 1 Haw. c. 33. [*State* v. *White*, 2 Tyler, 252.] See the stat. 21 Hen. 8, c. 7, which makes it felony in servants, not being apprentices, to withdraw themselves, and go away with caskets, &c. delivered to them by their masters to keep, with intent to steal the same, or to embezzle the same, or convert the same to their own use with the like purpose, if the said caskets, &c. be of the value of 40*s*. To bring a case within this statute, it must appear that the servant was such both at the time of the delivery and of the stealing. 1 Haw. 33, s. 12. 2 East's P. C. 562; and it must be proved that the goods were kept for the purpose of being returned. *Watson's Case*, East's P. C. 562.

(*s*) East's P. C. 564.

(*t*) *R.* v. *Lavender*, East's P. C. 566.

(*u*) *Watson's Case*, East's P. C. 562.

(*v*) East's P. C. 566.

(*x*) A distinction was taken between the case where the prisoner receives money to be delivered specifically to another, and where it is not to be so delivered; but Buller, J. denied the distinction, which certainly appears to be a very subtle one, and adhered to the case of *R.* v. *Paradice*, cited *R.* v. *Wilkins*, 2 Leach, 591, as good law. In that case, the prisoner having received several bills from his master, by whom he was employed as book-keeper, to be transmitted from Devizes by the post, to the prosecutor's banker in London,

(A) (But where one got staves upon the land of another upon a contract to have half for getting them—it was held, that while they remained on the land undivided, the manufacturer was neither a tenant in common with the owner of the land nor a bailee of the staves, and therefore he or any other person with his consent or connivance would be guilty of larceny in taking them. *State* v. *Ines*, 2 Dev. & Bat. 544.)

(B) (The taking by the defendant of an article delivered to him as a servant, to remove from one room to another, and converting the same to his own use, is larceny and not embezzlement. *United States* v. *Clew*, 4 Wash. C. C. R. 700. [*The State* v. *Self*, 1 Bay. 242].)

So where a carter went away with his master's cart, it was held that he was guilty of felony (*y*).

Where a porter was sent by his master with goods to be delivered to a customer, and he broke open the parcel and sold them, it was held to be felony (*z*).

But although it be clear that in general a servant has nothing more than a bare charge of his master's goods, and that the possession of the servant is the possession of the master, it has been doubted whether, when a servant or clerk had received the possession of the goods by delivery to him for his *master, and the master never had any other possession than such possession by the servant or clerk, the latter was guilty of felony in stealing the goods (*a*). But the statute 39 Geo. 3, c. 85, which recited that doubts had been entertained on the subject, removed them (*b*.) *611

In Sheares's case (*c*), where a servant received oats into his master's barge, and afterwards separated five sacks from the rest, and carried them away, it was held to be as much a felony as if he had taken the oats from his master's granary. So in Abrahat's case (*d*), the prosecutor having purchased corn which was on board a vessel in the Thames, sent the prisoner, who was his servant, and who had for many years been employed by him in superintending the unloading of vessels in the Thames, to receive it into the prosecutor's barge; whilst the corn-meters were unloading the corn from the Dutch vessel where it lay, into the prosecutor's barge, the prisoner came alongside in a boat, and requested that two empty sacks, which he handed on board the Dutch vessel, might be filled with oats, and desired that these might be added to the score, and not placed to a separate account, and took away the sacks so filled and sold them, and the Judges held that he was guilty of larceny. Where the owner has never had any possession of the money or goods, except by an agent, who is not a clerk or servant, the appropriation by the agent is not a felony. Thus where the prisoner received a draft from his employer with a felonious intention to embezzle part of the proceeds, but applied the draft itself according to the intention of his principal, by receiving the amount from the banker of the principal, but afterwards, instead of applying the amount in the purchase of American stock, according to the direction of his principal, appropriated part of the proceeds (*e*), he was not (it was held) guilty of stealing the draft, because he had applied the draft itself according to the intention of the principal; nor of stealing the produce of the draft, since the principal never had any possession of that, as distinct from the possession of the agent.

In general, where the party has a bare charge of the goods, or the use of them, subject to the immediate control and dominion of the master, the possession still remains in the latter; as, where a guest uses plate in the owner's house (*f*), a weaver delivers goods to his journeymen to be worked

went to Salisbury and endorsed one of the bills, and got cash for it; and all the Judges (except Lord Camden, who was absent) held it to be larceny; on the ground that the possession still continued in the master. East's P. C. 565.

(*y*) *Robinson's Case*, East's P. C. 565.

(*z*) *R.* v. *Bass*, Leach, 285. See Kel. 35. *Vale* v. *Bayle*, Cowp. 294.

(*a*) Lord Hale held, that if a servant went with a bond to receive money, which he embezzled, he was not guilty of felony at common law, because the bond was delivered to him by the master; nor under the statute, because the money was not delivered to him by the master. Hale, 668. See *Waite's Case*, East's P. C. 570; *R.* v. *Bazeley*, East's P. C. 571; *R.* v. *Bull*, cited Leach, 980. But see *R.* v. *Sheares*, East's P. C. 568.

(*b*) Vide *infra*, 615. (*c*) East's P. C. 568.

(*d*) East's P. C. 569. Leach, 960. See *R.* v. *Meeres*, Show. 50; Goulds. 186. Where a servant employed to sell goods for his master, received 160 guineas, and concealed some of them in his own chamber, and broke open the house at night to steal them, it was held to be no burglary, since he had possession of the money.

(*e*) *R.* v. *Walsh*, 4 Taunt. 258. (*f*) East's P. C. 554.

up in the house (*g*), or where a banker's clerk has access to the money-drawer for a special purpose (*h*). So goods, which remain in the presence of the owner, remain in his possession, although actually delivered to another (*i*), as to a servant, or to a porter to be carried. Where a banker's clerk took notes from the till, under colour of a cheque from a third person, which cheque he had obtained by having entered a fictitious balance in the books, in favour of that person, it was held that he was guilty of felony; the
*612 *fraudulent obtaining of the cheque being nothing more than mere machinery to effect his purpose (*k*).

Bailment. Precedent. Felonious intent.

Where the defendant has *primâ facie* the legal custody of the goods, as distinct from that of the owner, with his consent, the evidence may be rebutted, 1st, By proof that the prisoner originally obtained that possession with a felonious intention, by fraud, threats, or duress; for the law will not permit him to avail himself of his own fraud, and to set up as a defence a delivery by contract or consent, which was procured by stratagem and deceit, in order to perpetrate the offence.

2dly, By proof that the privity of contract had been determined by the wrongful act of the bailee; or, 3dly, That it had been determined according to the original intent of the parties.

1st. By proof of a precedent felonious intention, or that the possession was obtained by fraud or duress. As where the prisoner hired a horse from the owner with intent to steal it (*l*) (1). So where the prisoner, intending to steal the mail-bags from a post office, procured them to be let down to him by a string from the window of the post-office, under pretence that he was the mail-guard (*m*). So, although the general rule of law be, that the taking must be *invito domino*, according to the maxim, "*volenti non fit injuria*," yet if the owner consent from fear, under a reasonable apprehension of violence, the taking will be felonious (*n*); as where a woman gives money to preserve her chastity (*o*); for in such cases, where the party is not a free agent, but parts with property from fear and terror, there is no consent. But if the taking be by *procurement* of the owner, the maxim applies, and it is no larceny (*p*). But it is otherwise where the owner merely *facilitates* the execution of a felonious intent, as by placing himself in the way of robbers (*q*); or by allowing his servant to act the part of an accomplice (*r*).

Determination by tort.

2dly. That the privity of contract had been determined by the precedent wrongful act of the bailee. After the determination of the special contract, by any plain and unequivocal wrongful act of the bailee, inconsistent with that contract, the property, as against the bailee, revests in the owner,

(*g*) Ibid.
(*h*) *R.* v. *Murray*, East's P. C. 683. *Bazeley's Case*, East's P. C. 571.
(*i*) East's P. C. 682, 684. *Chisser's Case*, East's P. C. 677, 683; *Atkinson's Case*, Leach, 339; 1 Hale, 585; *Campbell's Case*, Leach, 642.
(*k*) *R.* v. *Hammon*, 4 Taunt. 304.
(*l*) *R.* v. *Munday*, East's P. C. 594. *Major Semple's Case*, Leach, C. C. L. 469. So where the owner of cattle hired the prisoner to drive them to a fair. *R.* v. *Stock*, Moody's C. C. 87; and see *Armstrong's Case*, 1 Lewin's C. C. 245.
(*m*) *R.* v. *Noah Pearce*, East's P. C. 603. [See *Dodd* v. *Hamilton*, 2 Taylor, 31.]
(*n*) East's P. C. 74. *Blackham's Case*, East's P. C. 555. 1 Hale, 533. East's P. C. 665.
(*o*) *Blackham's Case*, East's P. C. 711, 555.
(*p*) *R.* v. *Daniel & others*, Fost. Dis. 121. 4 Bl. Comm. 230. East's P. C. 665. *R.* v. *Eggington & others*, East's P. C. 666.
(*q*) *Nordon's Case*, Fost. 129. East's P. C. 666.
(*r*) *R.* v. *Eggington & others*, East's P. C. 666. [See 2 Taylor, 44.]

(1) [S. P. *The State* v. *Self*, 1 Bay, 242. *The State* v. *Gorman*, 2 Nott & M'Cord, 90. *The State* v. *Barna*, 2 Taylor, 44.]

although the actual possession remain in the bailee (*s*). If a carrier break open a box delivered to him for the purpose of carriage, and steal part of the contents, he is guilty of felony, for the breaking open the box is clear and unequivocal evidence of his determination of the bailment; and the privity of contract being thus determined, it can no longer affect the question as to the commission of a felony in taking the goods (*t*); but if the carrier should, contrary to his duty, sell the whole package entrusted to him, without any previous breaking, or other act sufficient to determine the privity of contract, he would not be guilty of felony (*u*) (1).

*Where the prosecutor sent forty bags of wheat to the prisoner, a warehouseman and wharfinger, for safe custody, until they should be sold by the prosecutor, and the prisoner's servant, by the direction of the prisoner, emptied four of the bags, and mixed their contents with other inferior wheat, and part of the mixture was disposed of by the prisoner, and the remainder was placed in the prosecutor's bags which had thus been emptied, and there was no severing of any part of the wheat in any one bag with intent to embezzle that part only which was so severed, it was held that the prisoner was guilty of larceny in taking the wheat out of the bag (*x*) (2). *613

In many instances, however, where a party is regarded as having the custody only of goods and not a right to the possession, he may be guilty of larceny, notwithstanding the delivery to him. As in the case of a

(*s*) Per Gould, J. *Charlwood's Case*, East's P. C. 691. *Townsend's Case*, East's P. C. 627; 13 Ed. 4, 9.

(*t*) 1 Hale, 504; 1 Haw. c. 33, s. 5, 7; 3 Ins. 107; East's P. C. 695.

(*u*) Ibid. See the next note.

(*x*) *R.* v. *Brazier*, cor. Holroyd, J., Nottingham Summer Assizes 1811, and afterwards by eleven of the judges. The distinction, which has constantly been recognized, although its soundness has been doubted, seems to be a natural and necessary consequence of the simple principle upon which this branch of the law rests; and although it may at first sight appear somewhat paradoxical and unreasonable, that a man should be less guilty in stealing the whole than in stealing a part, yet such a distinction will appear to be less objectionable, when it is considered how necessary it is to preserve the limits which separate the offence of larceny from a mere breach of trust, as clear and definite as the near and proximate natures of these offences will permit; and that the distinction results from a strict application of the rules which distinguish those offences. If the carrier were guilty of felony in selling the whole package, who did the like act, so would every other bailee or trustee, and the offence of larceny would be confounded with that of a mere breach of trust, and indefinitely extended. On the other hand, in taking part of the goods after he has determined the privity of contract, the case comes within the simple definition of larceny, for there is a felonious caption and asportation of the goods of another, which stands totally clear of any bailment. It is true that the sale and delivery of the whole package by the carrier, being inconsistent with the object of the bailment, determines the privity of contract; but then the question arises, what caption and asportation constitute the larceny, for these are in all cases essential to the offence. A mere intention on the part of the carrier to convert the goods, unaccompanied by any overt act, whereby he disaffirms the contract, is insufficient; and the act of conversion itself, such as the delivery of the whole of the entire package to a purchaser, is insufficient, because it is merely contemporaneous with the extinction of the privity of contract, which is not determined, except by the conversion itself; but if the package be first broken, and by that overt act the contract be determined, a subsequent caption and asportation, either of part, or, as it seems, of the whole of the goods, is a complete larceny within the definition, unaffected by any bailment. This distinction is explained by Lord Hale upon the principle above stated. Hale, 504, 5; East's P. C. 697. Kelynge, C. J. explains it upon the ground of a presumed previous felonious intention on the part of a carrier when he first took the goods; but this is not satisfactory, since the same presumption would arise when the carrier disposed of the whole of the package. For further illustrations of this doctrine, see the *Miller's Case*, East's P. C. 698. The *Porter's Case*, East's P. C. 697. *Wynne's Case*, East's P. C. 664. Cases of *Sears and Bass*, East's P. C. 664; Leach, 285.

(1) [If a load of goods, consisting of several packages, be delivered to a carrier to be transported to a specified place, and he fraudulently take away one of the packages and convert it to his own use before they arrive at the place of destination, it is larceny. *Commonwealth* v. *Brown*, 4 Mass. Rep. 580. So if the servant, employed by a carrier to drive his team to a certain place, drive to another place, and fraudulently take and convert the load to his own use. Ibid. *Dame* v. *Baldwin*, 8 Mass. Rep. 518.]

(2) [If a miller, having received an article to grind, fraudulently separate a part of it from the rest, for his own use, the contract of bailment is thereby determined, and the conversion to his own use of the part so separated, *animo furandi*, is larceny. *Commonwealth* v. *James*, 1 Pick. 375.]

servant (*y*), carter (*z*), porter (*a*). So where a man not being a general drover, but hired by the day to drive cattle to a market, sold part of them, it was held that he was guilty of larceny (*b*). In a later case, where the prisoner agreed for 4*s*. to take a heifer from *Y.* to *M.*, and instead of doing so, sold her and embezzled the proceeds, it was held that he was properly convicted (*c*).

*614 *3dly, or lastly, it may be shown that the bailment had been determined according to the intention of the parties; as, that a package delivered to a carrier had reached the place of destination, and was there delivered (*d*).

Variance. Upon an indictment for felony, the prosecutor cannot usually proceed on two distinct felonies committed at different times, but must make his election on which he will proceed (*e*).

Two cannot be convicted upon an indictment charging a joint larceny, unless there be evidence to satisfy the jury that they were concerned in a joint taking (*f*).

Presumptive evidence. As the caption and asportation can seldom be directly proved by an eye-witness, presumptive evidence must in general be resorted to. The most usual and cogent evidence of this nature consists in proof of the prisoner's *possession* of the stolen goods (1). The force of this presumption depends upon the consideration that the prisoner who *can* account for his possession of the goods, will, if that possession be an honest one, give a satisfactory account of it.

The effect of this evidence is to throw upon the prisoner the burthen of accounting for that possession, and in default to raise a presumption that he took the goods. Evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent, for the

(*y*) *Supra*, 611.
(*z*) Ibid.
(*a*) Ibid.
(*b*) *R.* v. *Macnamee*, Moody's C. C. 368.

(*c*) *R.* v. *Jackson*, 2 Moody's C. C. 32. This case, it will be observed, differed from that of Macnamee in two circumstances; the prisoner was not hired for the day but entered into a special agreement for the job, and as but one heifer was entrusted to him, which he sold, there was no separation of a part from the whole, as in Macnamee's case. In *Smith's Case*, Moody's C. C. 473, where the prisoner having received the prosecutor's horse to be agisted, sold it, he was held to have been properly convicted, the prosecutor having parted with the *possession*.

(*d*) 1 Hale, 504, 5; 21 H. 7, 14. But if a bailee receive goods for a special purpose, he is not guilty of felony in not returning, but disposing of the goods after the object of the bailment is answered. *R.* v. *Banks*, Russ. & Ry. C. C. L. 441; overruling the authorities, 2 East's P. C. 690, 694, and 2 Russ. 1089, 1090.

(*e*) Where two horses were stolen from different persons at different times, but were taken at the same time by the prisoner into a different county, it was held that the prosecutor was bound to elect. *R.* v. *Smith*,[1] 1 Ry. & M. 295. Where seventy sheep were put on Thornly Common on the 18th of June, and were not missed till November, and the prisoner was in possession of four of those sheep in October, and of nineteen other of them on the 23d of November, Bayley, J. allowed evidence of both to be given. *R.* v. *Dewhirst*, Lanc. Sp. Ass. Ap. 1825. Where numerous articles had been stolen, the Court held, that it was no ground for compelling the prosecutor to elect upon a suggestion that they were probably stolen at various times, if they might have been stolen at once; but with respect to the receiver, it appearing that they had been received at several times, the prosecutor was bound to elect; held also, that evidence of the other acts of receiving was properly admitted to show the guilty knowledge. *Dunn's Case*, 1 Ry. & M. 146.

(*f*) *Hempstead and Hudson* were indicted jointly for stealing cutlery to the amount of 40*s*. in a dwelling-house. The two prisoners were in the employment of the prosecutor, a cutler, as porters; cutlery was found on the person of Hempstead to the amount of 6*l*., and similar cutlery on the person of Hudson to the value of 6*s*. only; each confessed that the property in his possession belonged to his master; and the jury were of opinion, that although the prisoners were in the same room together (from which the property had been stolen), yet there was not sufficient evidence to prove that they had acted in conjunction. Both were found guilty; but the Judges were of opinion, that after Hudson had received a pardon, sentence might be passed upon Hempstead. O. B. Feb. Sessions, 1817. On a charge against two of jointly receiving, it is necessary to prove a joint receipt; and a receipt by one in the absence of the other, and subsequent delivery to the latter, is insufficient, successive receivers being separate receivers. *Messingham's Case*, 1 Ry. & M. 257.

(1) [*Pennsylvania* v. *Myers*, Addison's Rep. 320. *The State* v. *Jenkins*, 2 Tyler, 379.]

[1] Eng. Com. Law Reps. xxi. 443.

obvious reason, that the difficulty of accounting for the possession is increased by the length of time which has elapsed, during which the goods may have passed through many hands. The rule is, that *recent possession* raises a reasonable presumption against the prisoner (*g*). Where a letter *containing two bank-notes, was put into the post-office on the 17th of *615
April, proof that a person employed in the post-office had the notes in his possession on the 21st of April was held to be sufficient to warrant a conviction under the stat. 7 G. 3, c. 50, for secreting the letter (*h*). Unless the Possession.
possession be recent, it is necessary to give strict proof of the identity of the goods, which is not so requisite where the possession is *very recent;* as where a man comes out of a barn with corn concealed upon his person (*i*); or where he is in possession of sugar which he cannot account for, just after he has left the dock, where a quantity of similar sugar is deposited (*k*). The having property of this nature in possession, without being able to account for it, is in some instances made a substantive offence, by local Acts made for the protection of property much exposed, and which it is difficult to identify.

In other cases mere evidence of the possession of property by the prisoner, for which he cannot account, without evidence to *identify* it with that proved to have been stolen, is insufficient (*l*). And a prisoner ought not to be convicted of stealing the goods of a person unknown, upon such evidence, without proof that a felony has actually been committed (*m*). The fact of possession is capable of being confirmed or weakened by circumstances, particularly those of his concealment of the goods; the opportunity which the prisoner had to commit the crime; his vicinity to the place; his conduct when the charge was made; false or improbable representations to account for the possession; his readiness or unwillingness to meet the charge.

Under an indictment on the stat. 7 & 8 G. 4, c. 29, s. 47 (*n*), the prosecu- Embezzle-
tor must prove (*o*), 1st, That the defendant was his *servant* or *clerk* (*p*); ment.

(*g*) East's P. C. 657. It is also to be carefully observed, that the mere finding of stolen goods in the house of the prisoner, where there are other inmates of the house capable of stealing the property, is insufficient evidence to prove a *possession* by the prisoner. Possession of stolen property three months after it had been lost, was held not such a recent possession as to put a prisoner upon showing how he came by it. *R.* v. *C. Adams*,[1] 3 C. & P. 600. In *Cockin's Case*, 2 Lewin's C. C. 235, in the case of a possession twenty days after the theft, the evidence was left to the jury. See the observations on such evidence by Sir G. Lewin, *Ib.*

(*h*) Ibid.
(*i*) Ibid.
(*k*) Ibid.
(*l*) East's P. C. 657; 2 Hale's P. C. 290.
(*m*) 2 Hale's P. C. 290; 4 Comm. 352.

(*n*) Which enacts, that if any clerk or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security for or in the name, or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same, &c.

(*o*) See Ld. Ellenborough's observations, *R.* v. *Johnson*, 3 M. & S. 548.

(*p*) See *R.* v. *Squire*,[2] 2 Starkie's C. 349. The statute is not confined to clerks and servants in trade. A person employed as clerk by the overseers of Leeds was held to be within the statute. 2 Starkie's C. 349. The statute applies to female as well as to male servants. *R.* v. *Smith*, by the Judges, 3 Burn's J. by Chetw. 89. If a traveller be employed by different persons to receive money, he is the servant of each. *R.* v. *Leach*,[3] 3 Starkie's C. 70. And if a clerk be employed by *A.* and *B.*, who are partners in trade, and he embezzles the money of *A.* he is within the statute. Ib. Note, that these cases were decided under the stat. 39 Geo. 3, c. 85. See the late stat. 7 & 8 Geo. 4, c. 20, s. 46. Where the prisoner was employed on the single occasion only, and requested to receive money, held that he was not to be considered as coming within the description of the 7 & 8 Geo. 4, c. 29, s. 49, as a clerk or servant, or person employed for the purpose of, or in the capacity of a clerk or servant. *Nettleton's Case*, 1 Ry. & M. 259. The clerk of a chapelry, employed to collect sacrament money, feloniously abstracted part, and the indictment charged him in different counts as servant to the minister, churchwardens, and poor of the township; held that he could not be considered the servant of any of the persons so alleged. *Burton's Case*, 1 Ry. & M. 237.

[1]Eng. Com. Law Reps. xiv. 474. [2]*Id.* iii. 378. [3]*Id.* xiv. 165.

2dly, That he *received* the goods or money specified; 3dly, On account of his master; 4thly, That he *embezzled* them.

The goods or money specified.—This proof requires, it seems, the same particularity as upon an indictment for larceny. Upon a charge of em-
616 bezzling so many pounds, it is not sufficient to prove an embezzling of the same number of bank-notes to the same amount (*q*). Upon a charge of embezzling the sum of 1*l.* 11*s.* it was held to be insufficient to prove that so much was paid, the party who paid it being unable to state in what way it was paid (*r*).

3dly, On account of his master (*s*).—It is not sufficient under this statute to prove a delivery to the servant by the master himself (*t*); but it is sufficient if he receive the money from a customer, although it was given by the master to the customer in order to try the servant's honesty (*u*).

4thly, *The embezzlement.*—It is not sufficient, in support of a charge of this nature, to prove a general deficiency to the amount stated, upon a balance of account, without fixing upon some particular sum of money which has been received by the prisoner, and evidence to show that he has embezzled it. Evidence of this nature generally consists in showing that the prisoner omitted to make the usual entry of the receipt of the money in the book or account in which it ought to have been entered (*x*); in his using artifice and practices to prevent a discovery of the deficiency, or his denial of the receipt of the particular sum (*y*).

By the late st. 7 & 8 G. 4, c. 29, s. 48, three distinct acts of embezzlement (*z*), committed against the same master, may be included in the same indictment, provided they have been committed within the space of six calendar months from the first to the last of such acts. The embezzlement may be alleged to be of *money*, without specifying any particular species of coin or valuable security, and such allegation shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned.

Where a prisoner, having received money in Surrey, denied the receipt of it the same day to his master in Middlesex, and there was no evidence

(*q*) *R.* v. *Lindsey*, 3 Burn, by Chetw. 189. *R.* v. *Furneaux*, Ibid. But an indictment was held to be good, which alleged a receiving of 9*l.* 18*s.* 9*d.* without showing how the same was made up. *R.* v. *Crighton*, Summer Ass. 1803, by all the Judges. 3 Burn, by Chetw. 190. But see the provisions of the late stat. 7 & 8 G. 4, c. 29, s. 48.

(*r*) *R.* v. *Furneaux*, O. B. Sept. 1818, cor. the Recorder, and afterwards by the Judges. Russ. & Ry. C. C. L. 335.

(*s*) Where the servant of the owner of a stallion was instructed not to receive less than a certain sum for each mare; held, that his receiving less sums and converting them to his own use, was not an embezzlement, not being received by him by virtue of his employment. *R.* v. *Snowley*,[1] 4 C. & P. 300. *Qu.*

(*t*) *Peck's Case*, cor. Parke, J. Staffordshire Summer Ass. 1817.

(*u*) *R.* v. *Whittingham*, 2 Leach, 912, *Headge's Case*, Leach, 1033. See *Bull's Case*, cited in *Bazeley's Case*, 2 Leach, 841. *R.* v. *Foot*, Bridg. Summer Ass. 1818, cor. Graham, B. and afterwards by the Judges.

(*x*) See *R.* v. *Squire*,[2] 2 Starkie's C. 349. Where the party had charged himself with the receipt of the money in the books weekly, but had neglected to pay it over, it was held to be no felony. *R.* v. *Hodgson*,[3] 3 C. & P. 423.

(*y*) *R.* v. *Hobson*, East's P. C. Add. xxiv. 2 Russ. 1238. *Taylor's Case*, 3 B. & P. 596. 2 Leach, 974.

(*z*) Where the indictment contained three counts for acts of embezzlement within six months, the Court held, upon motion by the prisoner, that he ought to be furnished with a particular of the charges, but that the proper course was to apply to the prosecutor, and that if he refused, the Court, upon affidavits, would grant an order, and put off the trial. *R.* v. *Hodgson*,[3] 3 C. & P. 423.

[1] Eng. Com. Law Reps. xix. 436. [2] *Id.* iii. 378. [3] *Id.* xiv. 377.

*to show an embezzlement in Surrey; the Judges held that the offence was committed in the county of Middlesex (*a*). Where the prisoner received money in the county of Salop, and denied the receipt in the county of Stafford, it was held to be evidence to show that the original receipt was with intent to embezzle, and that the prisoner was properly tried in the county of Salop (*b*). An indictment upon the st. 52 Geo. 3, c. 63, alleged that the defendant was directed to invest money absolutely and unconditionally, but it appeared that the direction was only to invest in case of any accident happening to the party; the variance was held to be fatal (*c*).

Where the indictment alleged against an accessory to a felony, that the principal felon was *unknown*, proof that the principal was known, and that he had given evidence before the grand jury, was held to defeat the indictment (*d*); and where the prisoner was indicted for a misdemeanor in receiving stolen goods, and it appeared that the principal had been convicted at the same assizes, the Court directed an acquittal (*e*). The buying goods at an undervalue affords some presumption that the buyer knew that they were stolen (*f*), and this is stronger or weaker in proportion to the inferiority of price (1). Accessories.

LEET.

A PRESENTMENT in a leet is not traversable, because all the suitors are presumed to be present and to concur. See Com. Dig. tit. *Leet.*

LIBEL AND SLANDER.

THE evidence is either, I. In a civil action; or, II. A criminal prosecution. In the case of a civil action are to be considered,

1*st*, *The proof of publication*, p. 617.
2*dly*, *Of the prefatory averments and innuendos*, p. 626.
3*dly*, *Of malice*, p. 629.
4*thly*, *Of damage*, p. 636.
5*thly*, *Evidence in defence*, p. 638.—*Mitigation*, *&c.* p. 641.—*Justification*, p. 643.

First, as to the fact of publication (A).—Where the action is for words spoken, evidence of the speaking before any third person will be sufficient, although the declaration allege them to have been spoken before *A. B.* and others (*g*). Proof of publication.

Where a witness having heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence,

(*a*) *Taylor's Case*, 3 B. & P. 596. The prisoner in that case returned into the county of Middlesex soon after receiving the money, and probably had possession of the money in Middlesex, and *qu.* whether it is not necessary that the prisoner should have had possession of the money or goods in the county in which he is indicted, as in case of a common larceny.

(*b*) *R.* v. *Hobson*, East's P. C. Add. xxiv. [*State* v. *Groff*, 1 Murphey, 270.]

(*c*) *R.* v. *White*,[1] 4 C. & P. 46.

(*d*) *R.* v. *Walker*, cor. Le Blanc, Gloucester Summer Ass. 1812. 3 Camp. 264. But see the cases of *Bush* and of *Robinson*, Russ. & Ry. C. C. 272; and the stat. 7 & 8 G. 4, c. 29, s. 54, *supra*, 7. [*State* v. *Goode*, 1 Hawks. 463.]

(*e*) Lancaster Lent Assizes, 1813, cor. Thompson, B., Crim. Pl. Prec. 123.

(*f*) 1 Hale, 619.

(*g*) B. N. P. 5.

(1) [Where a person suffered a trunk containing stolen goods to be put on board a vessel in which he had taken his passage, as part of his baggage, it was held that he was well convicted of receiving stolen goods. *The State* v. *Scovel*, 1 Rep. Con. Ct. 274.]

(A) (See *Gorden* v. *Spencer*, 2 Blackf. 286. *Faris* v. *Starke*, 9 Dana, 128. If words which would otherwise be libellous are contained in a remonstrance which a citizen has a right to present to a public authority, malice must be proved by the plaintiff. *Flitcraft* v. *Jenks*, 3 Whart. 158.)

[1] Eng. Com. Law Reps. xix. 268.

if he swear that the words contained in it are the very words (*h*), and if the words have not been written immediately, the witness may refer to his minutes to refresh his memory (*i*). It is not sufficient for the witness to
*618 *swear that the defendant uttered those words or words to the like effect, for the Court must know the very words, in order to judge of their effect (*k*).

If the words have been spoken, or libel has been published, in a foreign language, or in characters not understood by those who read or see them, there is no publication, since there is no communication prejudicial to the plaintiff (A); and if the words have been spoken, or the libel has been addressed to the plaintiff only, without further publication, no action is maintainable, since no temporal damage can have accrued from the defendant's act (*l*); but such a publication of a libel would be sufficient to sustain an indictment, on the ground of its tendency to produce a breach of the peace.

Variance. The general rule seems to be, that some of the words must be proved, as they are laid in the declaration (*m*). The rule as to the proof of words spoken is not so strict as in the case of libel, where the whole must be proved as laid, for it is considered to be one entire thing, and a variance as to any part destroys the identity of the whole (*n*). The same strictness (perhaps on the ground of convenience) does not apply in actions for words; for if some of those, being actionable, be proved, an omission to prove the remainder of the words laid in context with them, or a variance from the latter, will not be material, provided the words proved do not (*o*) differ in sense from those

(*h*) Ibid. *supra*, Vol. I., and Index, tit. WITNESS.

(*i*) Per Holt, C. J. *Sandwell* v. *Sandwell*, Holt, R. 295.

(*k*) Fost. 200. *Hussey* v. *Cooke*, Hob. 294; 1 Hale, 111, 115, 323; Kel. 14; 2 Haw. c. 46. *R.* v. *Barmston*, 2 C. & P. 414. *Harrison* v. *Bevington*,[1] 8 C. & P. 713.

(*l*) 1 Wil. Saun. 132, n. 2; 2 Esp. C. 226. [*Lyle* v. *Clason*, 1 Caines's R. 581.] And even in the case of an indictment for a libel confined to reflections upon the professional character of the prosecutor, there being no allegation of an intention to provoke him to commit a breach of the peace is insufficient, unless there be a publication to a third person. *R.* v. *Wegener*,[2] 2 Starkie's C. 245; vide *infra*, 629, note (*e*).

(*m*) 2 East, 434; 8 East, 150. (*n*) *Infra*, 626, and *infra*, tit. VARIANCE.

(*o*) The plaintiff declared that the defendant said of him, "He is a maintainer of thieves, and a strong thief." The jury found the whole to have been said, except the word *strong*, and it was adjudged for the plaintiff (*Burgis's Case*, Dyer, 75). In *Sir J. Sydenham's Case*, Cro. Jac. 407, an action was brought for the words, "If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the King too; and he is a maintainer of papistry and rebellious persons." The jury found that he spoke the words, "*I think in my conscience*, if Sir John Sydenham might," &c. finding all the remaining words verbatim. This case underwent much discussion. Three of the Justices of the King's Bench held that the plaintiff was entitled to judgment, since the additional words proved were not words of extenuation, or alteration of the sense of the former words, but rather enforced them; and upon a writ of error brought, the judgment was affirmed by the opinion of Tanfield, C. B., Warburton, Bromley and Hulton, against that of Hobart, C. J. of C. B., Winch and Denman: and see 12 Vin. Ab. 68, and *infra*, note (*s*). Where the words laid in the declaration were, "I will do my best to transport him, as he has been working for me for some time, and has been robbing me all the while;" the proof being "he has worked for me some time, and has been continually robbing me;" held to be no variance; held, also, that the words being spoken to an officer who had a warrant to search the plaintiff's house for goods suspected to have been stolen from the defendant, was not a privileged communication. *Doncaster* v. *Hewson*,[3] 2 M. & R. 176. In an action for words spoken of the plaintiff, a fruit-broker, representing him, with a view to injure the sale of plaintiff's fruit, to have falsely represented that he (the plaintiff) then had three or four vessels in the river coming up with fruit; the evidence was that the defendant alleged the plaintiff to have given out that there were three or four vessels, &c.; held to be a fatal variance, it being very different whether the plaintiff were represented as having spoken of his own knowledge, or merely on report. *Wood* v. *Adams*,[4] 6 Bing. 481, and 4 C. & P. 268. If the words alleged were not proved to be actionable *per se*, whilst the others were not so, the plaintiff is still entitled to full costs, although the damages be under 40s. *Kelly* v. *Partington*,[5] 5 B. & Ad. 649.

(A) (In slander where the words are spoken in a foreign language, the proper mode of declaring is to state the words in the foreign language, and render the signification of them in English, although they were understood by those who heard them. *Wormouth* v. *Cramer*, 3 Wend. 394.)

[1]Eng. Com. Law Reps. xxxiv. 594. [2]*Id.* iii. 335. [3]*Id.* xvii. 297. [4]*Id.* xix. 143. [5]*Id.* xxvii. 144.

alleged, considering the whole context; and the rule is the same where the plaintiff declares of fewer words than were spoken (*p*). It is, however, a very *general rule that where the words constitute one entire charge, the whole must be proved (*q*). And provided the sense be kept entire, it seems that even partial grammatical variances in the construction of sentences will not be material (A) (1). But proof of words spoken interrogatively will not support an allegation of words spoken affirmatively (*r*). Evidence of the words "You are a broken-down justice" (2), does not support an indictment for speaking of a magistrate the words, "He is a broken-down justice (*s*)." Words alleged to have been spoken affirmatively are not proved by evidence of words spoken interrogatively (*t*). So words alleged as having *619

(*p*) See the preceding note (*d*). [*Genet* v. *Mitchell*, 7 Johns. 120.] Where the words were laid to be "'Ware hawk, *you must take care of yourself there*, mind what you are about;" and the words in italics were not proved, it was held to be no variance, the sense not being altered. *Orpwood* v. *Barkes*,[1] 4 Bing. 174. And see *Doncaster* v. *Hewson*,[2] 2 M. & R. 176.

(*q*) *Flower* v. *Pedley*, 2 Esp. C. 491. Cor. Eyre, C. J.; and see above, p. 618, note (*o*); and below, as to variance in case of libel, p. 626; and Vol. I. tit. VARIANCE.

(*r*) 2 East, 434; 8 T. R. 150; 4 T. R. App. 217.

(*s*) *R.* v. *Berry*, 4 T. R. 217. But see *Blisset* v. *Johnson*, Cro. Eliz. 503. In the former of these cases, Lord Kenyon held at Nisi Prius, that it was sufficient to prove the *substance* of the words stated, and the defendant was found guilty; but the point was reserved; and on a motion being made to enter an acquittal, Buller, J., said that there was a case in Strange in support of his Lordship's opinion, but that it had been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant. In the case of *Lady Ratcliffe* v. *Shubly* (Cro. Eliz. 224), the words laid in the declaration were, "She is as very a thief as any which robbeth by the highway side." The words proved were, "She is a *worse thief*," &c. Wray, C. J., was of opinion, that as very a thief, and a worse thief, were all one; but Gawdy and Fenner, justices, ruled, that the words did not agree with the declaration. Where these words were alleged to have been spoken by the defendant, "Harrison is a scoundrel; if I would have found him an oven for nothing, and given him after the rate of 20*l.* per cent. upon the amount of the charges for work and materials, he would have passed my account." The first witness proved the words, "Harrison is a scoundrel; and if I had *allowed* 20*l.* per cent. he would have passed my account." The second witness proved the words, "Harrison is a scoundrel; and if I had *deducted* 20*l.* per cent. he would have passed my account." Lord Ellenborough held that words to be actionable should be unequivocally so, and be proved as laid; and that the proof did not support the declaration. (*Harrison* v. *Stratton*, 4 Esp. C. 218). It was held that the words, as laid in the declaration, "*this is* my (the defendant's) umbrella, and he (the plaintiff) stole it from my back door," were not supported by evidence of the words, "*it is* my umbrella," &c. for the words alleged import a conversation concerning a thing present; those proved import a conversation concerning a thing absent. *Walters* v. *Mace*, 2 B. & A. 756. So if *A.* say to *B.* and *C.*, you have committed a felony, although they have separate actions, each must allege the words to have been spoken of both.

(*t*) *Barnes* v. *Holloway*, 8 T. R. 150. So the words "*This* is my umbrella, he stole it from the back-door," are not proved by evidence of the words "*It* is my umbrella, &c." *Walters* v. *Mace*, 2 B. & A. 756. See further, Vol. I. tit. VARIANCE. *M'Pherson* v. *Daniells*,[3] 10 B. & C. 274. *Bell* v. *Byrne*, 13 East. 554.

(A) (*Fox* v. *Vanderbeck*, 5 Cow. 513. *Freeland* v. *Lanfear*, 2 Martin, U. S. 480. *Trimble* v. *Moore*, 2 Law. R. 597. *Wheeler* v. *Robb*, 1 Blackf. 330. *Horton* v. *Reanis*, 2 Mur. 380. *Moore* v. *Bond*, 4 Blackf. 458. Where the words laid are, "you have conspired with others to cheat," and the words proved are, "I *believe* you have conspired with others," the variance is not fatal. *Beehler* v. *Steever*, 2 Whart. 313.)

(1) [It is sufficient to prove the substance of the words—but the sense as well as the manner of speaking them must be the same as averred. *Miller* v. *Miller*, 3 Johns. 74. *Kennedy* v. *Lowry*, 1 Binney, 393. *Brown* v. *Lamberton*, 2 ib. 34. *Hersh* v. *Ringwalt*, 3 Yeates, 508. *Grubbs* v. *Kyzer*, 2 M'Cord, 305.

A declaration in slander, charging that the defendant spoke of the plaintiff, "*in substance*, the following false, scandalous and defamatory words"—is good. *Kennedy* v. *Lowry*, ubi sup. So a declaration, laying the charge in the alternative, viz. that the defendant spoke certain words (which are set forth) "or words of the same import," is good after verdict. *Bell* v. *Bugg*, 4 Munf. 260.

If the words laid are, that the plaintiff stole the goods of *A*, proof of the defendant's saying that the plaintiff stole the goods of *B.*, will not support the declaration. *Johnson* v. *Tait*, 6 Binney, 121. A declaration alleging that the defendant said "there was a collusion between *A.*, *B.*, *C.*, and *D.*, to make *E.* swear a false oath," &c. is not supported by proof of his having said "there was a collusion between *A.*, *B.*, and *C.*, to make *E.* swear, &c. *ibid.* Where the declaration alleged the words to have been spoken of and concerning the evidence given by the plaintiff on a complaint made by him before a justice of the peace, on the 20th of March, and the proof was that the complaint was made on the 8th of March, the variance was held to be immaterial. *M'Kinly* v. *Rob*, 20 Johns. 351. S. P. *Chapman* v. *Smith*, 10 Johns. 78.]

(2) [*Wolfe* v. *Rodefer*, 1 Har. & J. 409. *Miller* v. *Miller*, 8 Johns. 74 *Acc.* *Huffman* v. *Shumate*, 4 Bibb, 515. *Tracy* v. *Harkins*, Com. Pleas, 1 Binney, 395, *n. Contra.*]

[1] Eng. Com. Law Reps. xiii. 424. [2] *Id.* xvii. 297. [3] *Id.* xxi. 69.

been spoken in English, are not proved by evidence of the speaking of words of the same meaning in another language (*u*).

It is sufficient, even where special damage is the gist of the action, to prove some of the words as alleged, and that the special damage resulted from them (*x*); but if all the words as laid constitute but one entire charge, the whole must be proved. The declaration stated, that the defendant said of the plaintiff, "He is selling coals at one shilling a bushel, to pocket the money, and become a bankrupt to cheat his creditors." Upon the trial the words "and become a bankrupt," were not proved, and the plaintiff was nonsuited (*y*).

Publication of the libel.

In case of a libel, before any evidence can be given of its contents, *primâ facie* evidence must be given of a publication by the defendant (A). Evi-

*620 dence *of a publication is either of a publication *generally*, or of a publication in some *particular* county or place, and it is either *direct* or *indirect*.

The publication may be *directly* proved, by evidence that the defendant with his own hand (*z*) distributed copies of the libel, or exposed its contents, or painted an ignominious sign over the door of another, or took part in a procession, carrying a representation of the plaintiff in effigy, for the purpose of exposing him to contempt and ridicule, or maliciously read or sung the contents of the libel in the presence of others; all of these facts are direct proofs of the averment that the defendant published the alleged libel (*a*).

But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel, and fix him with its publication. The most usual and important piece of evidence for this purpose consists in proving that the libel *published* is in the *hand-writing* of the defendant; when the plaintiff has proved this, he has, if the county be not material, made out such a *primâ facie* case as entitles him to have the contents read in evidence (*b*).

It was observed by a great authority (*c*), that "when a libel is produced, written in a man's own hand, he is taken in the *mainer*, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him."

And even the *possession* of a libel which has been *published* is, it is said, evidence to prove a publication by the possessor (*d*).

The writing (*e*) or even printing (*f*) a libel, does not, however, in any case, amount to a publication, but is mere evidence from which it may be inferred; whether there has been any publication is usually a question of

(*u*) *Zenobio* v. *Axtell*, 6 T. R. 162.
(*x*) Holt's R. 139.
(*y*) *Flower* v. *Pedley*, 2 Esp. C. 491.
(*z*) *R.* v. *Almon*, Burr. 2689. *Seven Bishops' Case*, 4 St. Tr. 338.
(*a*) 5 Rep. 125. 9 Rep. 59. b.
(*b*) Burr. 2689.
(*c*) Per Holt, C. J., *R.* v. *Beere*, Lord Raym. 417; 1 Vent. 31; 2 Salk. 40. *Mullet* v. *Hulton*, 4 Esp. 248. 9 Rep. 59, b.
(*d*) It has been said, that until publication, the possession of a libel is no more than the possession of a man's thoughts. See *Entick* v. *Carrington*, 11 St Tr. 321. But where the libel has been published, then the possession is evidence that the defendant was the publisher. *R.* v. *Beere*, 1 Vent. 31. The possession of a libel in the defendant's house or shop is evidence of a printing and publishing there, 12 Vin. Ab. 220; 4 Read, St. Law. 155; Dig. L. L. 22. If a libel be stolen, that is no publication (*Barrow* v. *Lewellyn*, Hob. 62): but if a single copy reach a single person in consequence of an *intent* to publish, it is sufficient. Ibid.
(*e*) *Lamb's Case*, 9 Rep. 59; 15 Vin. Ab. 91; Mod. 813.
(*f*) *Baldwin* v. *Elphinstone*, Bl. R. 1037, where the printing of a libel in a newspaper was intended by the the Court to be a publication.

(A) (*Wuistel* v. *Holman*, 2 Hall. 172.)

fact, falling within the province of the jury to decide (*g*); and though proof that the libel is in the hand-writing of the party goes far in fixing him with the publication, he is still at liberty to rebut, if he can, the strong presumption thus raised against him, by reconciling the fact with his own innocence.

The sending a letter to a third person is a sufficient publication (*h*) (A).

Where the libel was contained in a letter sent by the defendant to the plaintiff, proof that the defendant knew that letters sent to the plaintiff were usually opened by his clerks, was held to be sufficient evidence to go to a jury, of the defendant's intention that the letter should be read by a third person, so as to amount to a publication (*i*).

*A consent by the master to the act of the servant in printing a libel, is *primâ facie* evidence of a publication by the master (*k*). *621

An allegation that the defendant published the libel is satisfied by proof that it was published by his agent (*l*), if an authority from the principal to the agent can be proved. And although an authority to commit an unlawful act will not in general be presumed, yet it seems to be otherwise in the case of booksellers and others, where the book or libel is purchased from an agent in the usual course of trade (*m*) (1).

The publication of a newspaper is sufficiently proved by a witness who states it to have been published in the usual way, without producing a copy which has actually been published (*n*).

Where the libel (a song) from which the publication took place was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost, it was held to be sufficient (*o*) (B).

The sale by an agent in a shop in the usual course of business is *primâ facie* evidence of a publication with the knowledge and privity of the owner; and although it be not conclusive evidence, yet it throws upon him the necessity of rebutting the presumption by evidence to the contrary (*p*). By an agent.

(*g*) *Baldwin* v. *Elphinstone*, Bl. R. 1037; *R.* v. *Burdett*,[1] 4 B. & A. 95.
(*h*) Rast. Ent. tit. *Actions sur le Case*, 3, a.; Lord Raym. 341, 417, 486.
(*i*) *Delacroix* v. *Thevenot*,[2] 2 Starkie's C. 63.
(*k*) *R.* v. *Harris*, 2 St. Tr. 1039. See Lord Camden's observations in *Entick* v. *Carrington*, 11 St. Tr. 322.
(*l*) *Supra*, tit. AGENT; and Hale, P. C. 613.
(*m*) Bac. Ab. tit. *Libel*, 458. *R.* v. *Gutch & others*,[3] 1 M. & M. 433. The sale of each copy is a distinct publication. *R.* v. *Carlisle*,[4] 1 Chitty, 451.
(*n*) *R.* v. *Pearce*, Peake's C. 75; and the copy need not bear a stamp; Ibid.
(*o*) *Johnson* v. *Hudson*,[5] 7 Ad. & Ell. 233, n.
(*p*) Bac. Ab. tit. *Libel*, 458; and *R.* v. *Almon*, 5 Burr. 2689. *R.* v. *Dodd*, 1724. 2 Sess. C. 33. Dig. L. L. 27. And Wood's Ins. 445, 2 Sess. C. 33. 12 Vin. Ab. 229. *Plunkett* v. *Cobbett*, 5 Esp. C. 136. Haw. P. C. c. 73, s. 10, Barnard, K. B. 308.

(A) (In an action on the case for a libel contained in an anonymous letter sent through the post-office to a person out of the jurisdiction of the court; proof that the letter was deposited in the post-office and duly despatched, and the production of the letter by the plaintiff, are sufficient proof of the publication without the oath of the person to whom it was addressed. *Callan* v. *Gaylard*, 3 Watts, 321. It seems, that where a libel is seen but by a few persons, neither of whom understand it as conveying an injurious imputation upon the plaintiff, such fact may be given in evidence to rebut the presumption of its publication as a libel. *Maynard* v. *Beardsley*, 4 Wend. 336. S. C. 7 Wend. 560. See also *Gould* v. *Weed*, 12 Wend. 12.)

(B) (The publication of a libel cannot be established by a comparison of one paper which is not proved to have been published with another published, but not produced on the trial, nor its absence accounted for; *Simpson* v. *Wiley*, 4 Porter, 215; and evidence of a general impression that the defendants are the editors of a paper, in which a libel is charged to be published, is not testimony that they are joint partners and editors thereof. Ibid.)

(1) [An action for a libel lies against the proprietor of a gazette edited by another, though the publication was made without the knowledge of such proprietor. *Andres* v. *Wells*, 7 Johns. 260. But if a printing press and newspaper establishment be assigned to a person merely as security for a debt, and the press remain in the sole possession and management of the assignor, the ownership of the person holding the security or lien is not such as will render him liable to an action as a proprietor. *Ibid.*]

[1]Eng. Com. Law Reps. vi. 358. [2]*Id.* iii. 245. [3]*Id.* xxii. 352. [4]*Id.* xviii. 135. [5]*Id.* xxxiv. 84.

even although the principal lives at a distance from his shop (*q*). But the defendant may rebut the presumption, by evidence that the libel was sold contrary to his orders, or clandestinely; that by reason of sickness he was ignorant of the fact; or that he was absent under circumstances which do not import fraud (*r*). The imprisonment of the defendant at the time of publication is evidence in exculpation, but not conclusive; it may be rebutted by proof of the access of agents (*s*).

Where in an action for a libel it appeared that the libel was written in the hand of the daughter of the defendant (a minor), who usually wrote his letters of business, but no evidence was given of any authority to write the letter in question, or of any recognition of the letter by him, it was held that there was no evidence to go to the jury of a publication by the defendant, since this was not an act within the scope of the defendant's authority (*t*).

If one procure another to publish a libel, the procurer is guilty of a publication, wherever it takes place, and the actual publisher, like any other *particeps criminis*, is competent to prove his employment by the defendant and the consequent publication (*u*). And if a letter be sent by the post,
*622 it is *a publication by the defendant in any county to which the letter is in consequence sent (*v*).

A statement in a newspaper in consequence of a communication of the contents by the defendant to a reporter, for the purpose of publication, is a publication by the defendant, notwithstanding some immaterial variations; but the newspaper cannot be read without proof of the written statement delivered by the reporter (the witness) to the editor (*x*).

Where the defendant has admitted that he is the author of a particular book, errors excepted, it is incumbent upon him to prove that the errors excepted are material (*y*).

In the case of libel, as well as in all others, whether civil or criminal, presumptive evidence must be resorted to in failure of direct and positive testimony; and the same reasonable inferences and presumptions are to be made so by the juries as in all other instances (*z*).

Publication in a particular county.

In criminal cases it is always, and in civil cases it is in some instances, necessary to prove a publication within the particular county. It seems that wherever the publication of a libel has once been authorized by the defendant, he is guilty of a publication in every county where the libel shall afterwards be in consequence published (*a*). Where the writer of a libel sent it by post, directed to *A. B.* in the county *B.*, and it was in consequence sent into the county *B.*, and from thence sent by the post to *A. B.*

(*q*) *R.* v. *Dodd*, 2 Sess. C. 33. Dig. L. L. 27; for the law presumes that the master is acquainted with what his servant does in the course of his business. And see *R.* v. *Nutt*, Barnard, K. B. 308. Fitzg. 47. Dig. L. L. 27, where it was so held, although the defendant lived a mile from her shop, and had been bed-ridden for a long time. In Com. Dig. tit. *Libel*, B. 1, it is said that the sale of a libel in the defendant's shop, by his servant or agent there, for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale. (*r*) See 1 Haw. c. 73. *R.* v. *Woodfall*, Ibid. sec. 10.

(*s*) *R.* v. *Woodfall*, 1 Haw. c. 73, s. 10. (*t*) *Harding* v. *Greening*, 1 Moore, 477.

(*u*) *R.* v. *Johnson*, 7 East, 65. *R.* v. *Dodd*, 2 Sess. C. 33. Bac. Ab. tit. *Libel*, 497. Wood's Ins. 445.

(*v*) *R.* v. *Watson*, 1 Camp. 215. The defendant was indicted in Middlesex, the letter had been sent by the post into Berkshire, and had been sent from thence to the prosecutor in Middlesex.

(*x*) *Adams* v. *Kelly*,[1] R. & M. 157. (*y*) *R.* v. *Hall*, Str. 416. *Macleod* v. *Wakeley*,[2] 3 C. & P. 311.

(*z*) See *R.* v. *Johnson*, 7 East, 65; *infra*, note (*a*).

(*a*) B. N. P. 6, *R.* v. *Johnson*, 7 East, 65. If *A.* send a libel to London to be printed and published, it is his act in London, if the publication be there. Vide *infra*, *R.* v. *Watson*. In *R.* v. *Johnson*, *C.*, in the county of Middlesex, received a letter in the hand-writing of the defendant, offering to supply political matter for publication by *C.* in a public journal, and two letters were afterwards received by *C.*, also in the defendant's hand-writing. It was held that these letters might be read in evidence; and that as they indicated that the writer had sent them for publication there, and they had in fact been published, this was evidence of a publication, by the procurement of the defendant, in Middlesex.

[1]Eng. Com. Law Reps. xxi. 403. [2]*Id.* xiv. 322.

in the county of *M.*, where *A. B.* received it, and read it, it was held to be a publication in the county of *M.* (*b*) (1).

If the libel be dated of a particular place, the date is evidence that it was written there (*c*). It has been said, that the post-mark upon a letter is not *primâ facie* evidence to prove that a letter has been put into the post-office at the place denoted by the post-mark (*d*); it seems, however, from a later authority, that the post-mark is a fact admissible in evidence, when corroborated by other circumstances (*e*).

*A general confession that the defendant was the *writer* of a libel does not amount to an admission that he *published* it, still less is it a confession that he published in any particular county (*f*) (2). *623

A late case upon this subject excited much interest, and exercised great talent and profound learning. The points were shortly as follow: the information charged the defendant with composing, writing, and publishing a libel in Leicestershire; *A.* stated that he received the libel, which was in the hand-writing of the defendant, from *B.* on the 24th of August (*g*); it was contained in an envelope, which had been destroyed, but which, to the best of the witness's recollection, was addresed to *B.* who was the professional friend of the defendant; there was no trace of any seal, either on the envelope or paper. The paper was dated Kirby Park, Aug. the 22d, Kirby Park (the defendant's seat) being situate in Leicestershire, 100 miles from London, not far from the boundary between the counties of Leicester and Rutland. The defendant was seen in the county of Leicester, near Kirby Park, on the 22d and on the 23d of August, and there was no evidence of his having left the county of Leicester till after the publication (*h*) of the paper, which took place on the 25th; the only words either on the paper or envelope, besides the libel, were "forward this to *A.*" (the witness). The

(*b*) *R.* v. *Watson*, 1 Camp. 215. *R.* v. *Girdwood*, East's P. C. 1116, 1120. The sending a letter by post from the county *A.* to the county *B.*, is a publication in *A.* *R.* v. *Williams*, 2 Camp. 646, per Ld. Ellenborough, C. J., and see the opinion of Abbot, C. J. and Best, J. in *R.* v. *Burdett*,[1] 4 B. & A. 717; and see tit. VENUE.

(*c*) *R.* v. *Burdett*,[1] 1 Camp. 95.

(*d*) *R.* v. *Watson*, 1 Camp. 215. But the defendant was found guilty of another publication.

(*e*) *R.* v. *Johnson*, 7 East, 65; note, that in this case the post-mark seems to have been perfectly immaterial; but upon principle there seems to be little doubt that a post-mark, upon a letter in the hand-writing of a defendant, and received through the medium of the post, is evidence, as a circumstance arising in the usual course and routine of business. The post-mark is evidence to show that the letter was in the office whose mark it bears, at the date of the mark. *R.* v. *Plumer*, Russ. & Ry. C. C. L. 164. In the case of *Fletcher & others, assignees of Parry* v. *Braddyll*, cor. Holroyd, J. Lanc. Summ. Ass. 1822, a letter of one of the bankrupts was offered in evidence to prove an act of bankruptcy; it was objected that proof ought to be given of the existence of the letter previous to the bankruptcy, and Holroyd, J. admitted the post-mark on the letter as *prima facie* evidence to prove the existence of the letter at that time. The post-mistress of Lancaster was called to prove that the letter was stamped with the Wakefield post-office stamp.

(*f*) *The Seven Bishops' Case*, St. Tr. 4 Jac. 2, where the defendants, in Middlesex, admitted their signatures to a petition which had been prepared and signed in Surrey; but it was held that this was not evidence of a publication of that which was termed (but grossly misnamed) a libel in the county of Middlesex. And see the observations upon this case by Ld. Ellenborough, C. J. and Lawrence, J. in *R.* v. *Johnson*, 7 East, 65; and *R.* v. *Burdett*,[1] 4 B. & A. See also *Macleod* v. *Wakeley*,[2] 3 C. & P. 311.

(*g*) *A.* did not state where he received it, but it was assumed, and no doubt it was the fact, that he received it in Middlesex.

(*h*) *i. e.* in the public newspapers.

(1) [A libel was published in a newspaper printed in another state, but which usually circulated in a county in the state of *Massachusetts*, and the number containing the libel was actually received and circulated in such county. *Held*, that this was competent and conclusive evidence of a publication within such county. *Comm.* v. *Blanding*, 3 Pick. Rep. 304.]

(2) [An affidavit of the defendant (who had been chairman of a public meeting at which the libel in question had been signed by him and ordered by the meeting to be published) and of another person, which the defendant in his own affidavit referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits and referred to in them,—were held sufficient evidence of publication. *Lewis* v. *Few*, 5 Johns. 1.]

[1]Eng. Com. Law Reps. vi. 431. [2]*Id.* xiv. 322.

paper was addressed to the electors of Westminster; and *A.* had no reason for supposing that the defendant intended that it should be published, except that it was so addressed. *A.* having been required to give up the author, the defendant wrote a letter, admitting that he was the author. No evidence was given on the part of the defendant. It was objected at the trial, and afterwards in the court of King's Bench, after the conviction of the defendant, on a motion for a new trial, that there was no evidence of a *publication* in *Leicestershire*. The learned Judge left it to the jury to say, whether there had been a publication in Leicestershire, by an open delivery of the libel. The question, and the principles relating to it, were discussed on the motion for a new trial, with all the aid which talent, learning, experience and unwearied diligence could supply. The ultimate, although it seems not the unanimous, decision of the Court was, that the evidence was sufficient to warrant the conviction (*i*).

Some proofs are to be noticed which apply particularly to the proprietors *624 *and publishers of newspapers. Upon an indictment for a libel, published In a newspaper. in a newspaper called The World, proof that the paper was sold at the defendant's office, and that he *as proprietor* had given a bond to the Stamp-office, as required by the stat. 29 Geo. 3, c. 10, s. 10, for securing the duties on advertisements, and that he had from time to time applied to the Stamp-office respecting the duties, was held to be strong evidence to prove a publication by him (*k*) (1).

Where the affidavit made by the printer and proprietor of a newspaper (according to the statute 38 Geo. 3, c. 78) (*l*), stated the place where it was

(*i*) *R.* v. *Sir Francis Burdett*, bart.,[1] 3 B. & A. 717; 4 B. & A. 95. The Judges delivered their opinion *seriatim*.—Best, J. was of opinion that there was presumptive evidence of an actual publication in Leicestershire, and that the sending the libel by the post from that county amounted to a publication. *R.* v. *Watson*, 1 Camp. 215. *R.* v. *Williams*, 2 Camp. 505, Codex, Lib. 9, tit. 36: and see *Girdwood's Case*, East's P. C. 1116, 1120.)—Holroyd, J. was of opinion, that the composing and writing a libel in the county of *L.* and afterwards publishing it, although the publication was not within the county of *L.*, was an offence sufficiently charged as a substantive offence in the information, and which gave jurisdiction to a jury of the county of *L.* (see *R.* v. *Beere*, 2 Salk. 417. Carth. 409. Holt's R. 422. *R.* v. *Knell*, Barnard, K. B. 305. *R.* v. *Carter*, Dig. L. L. 124); and that the composing and writing, with the intent afterwards to publish, also amounted to a misdemeanor, and that a jury of the county of *L.* might inquire as to the publishing in another county, in order to prove the defendant's intention in composing and writing in the county of *L.* And that in the case of an aggregate charge, part of which, being in itself a substantive misdemeanor, is committed within a particular county, the jury may inquire into the remainder, although done elsewhere; that there was reasonable evidence of a publication in *L.*; and that a *delivery* of a libel within the county, although it be sealed, is a publication in law.—Bayley, J. was of opinion that there was not sufficient evidence to support a presumption that there had been an open delivery of the libel in *L.*, considering that positive proof might have been given by calling *B.* as a witness. He gave no opinion on the question, whether a close delivery amounted to a publication. He held, that the whole *corpus delicti* must be proved within one county; and that there was no distinction in this respect between felonies and misdemeanors. He gave no opinion on the question, whether the composing a writing, with intent to publish, constituted an offence. Abbott, C. J., intimated his opinion, that mere delivery constituted a publication He held that the facts warranted the conclusion, that the paper had been delivered by the defendant in *L.*, to *B.*, in the state in which it had been delivered by the latter to *A.* That even supposing the libel to have been delivered by the defendant in a different county, yet as the whole was a misdemeanor compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of *L.*, where one of those acts had been done.

(*k*) *R.* v. *Popham*, 4 T. R. 126.

(*l*) By sect. 1, no person shall print or publish any newspaper, until certain affidavits, &c. shall have been delivered to the commissioners of stamps, &c.—By sect. 2, these must contain a true description of the

(1) [Where the printer testified that he had been in the defendant's office, where a certain paper was printed, and saw it printed there, and that he believed the paper produced by the plaintiff was printed with the types used in the defendant's office; this was held to be *prima facie* evidence of the publication by the defendant. *Southwick* v. *Stevens*, 10 Johns. 442. It is sufficient proof of a person's being the printer of a newspaper in which a libel is published, for such paper to go to the jury, that the papers were deposited in a hole behind the door of a public library, and that his common clerk received payment therefor. *Respublica v. Davies*, 3 Yeates, 128.]

[1] Eng. Com. Law Reps. vi. 431.

*printed in London, and the newspaper given in evidence stated at the foot of it that it was printed at No. 3, Warwick-lane, London, and it was also

printer(*), publisher and proprietors, or of two of them, and of their places of abode; of their shares in the paper, and the house in which it is intended to be printed, and of its title.—By sect. 9, all such affidavits and affirmations, or copies thereof, certified to be true copies according to the Act, shall, in all proceedings, civil and criminal(†), touching any newspaper or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations as are hereby required to be therein set forth, against every person who shall have signed and sworn or affirmed such affidavits or affirmations; and shall also be received and admitted in like manner, as sufficient evidence of the truth of all such matters, against all and every person who shall not have signed or sworn or affirmed the same, but who shall be therein mentioned to be a proprietor, printer or publisher of such newspaper or other paper, unless the contrary shall be satisfactorily proved. The section then contains an exception in favour of such as have before the publication of the paper in question, delivered in to the commissioners an affidavit, stating that they have ceased to be the printers, &c. of such paper.—By the 10th section, in some part of every newspaper, &c. shall be printed the names, additions, and places of abode(‡) of the printers, publishers, &c., and the place where the same is printed.—By sect. 11, it shall not be necessary after any such affidavit, &c. or a certified copy thereof, shall have been produced in evidence as aforesaid, against the persons who signed and made such affidavit, or are therein named, according to this Act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same manner as the newspaper or other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing, shall be the same as the name or names of the printer and publisher, or printers and publishers, and the place of printing, mentioned in such affidavit or affirmation, for the plaintiff, informant or prosecutor, or person seeking to recover any of the penalties given by this Act, to prove that the newspaper or paper to which such trial relates, was purchased at any house, shop or office belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves, or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.—By sec. 13, it is enacted, that a certified copy of such affidavit or affirmation shall be delivered by the commissioners to the person requiring it, upon payment of one shilling.—By sect. 14, in order to prevent the inconvenience which might result from requiring the personal attendance of the commissioners, it is enacted that a certified copy of any affidavit or affirmation, proved to be signed by the officer who has the custody of the original, shall be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof; and that such copies, so produced and certified, shall also be received as evidence that the affidavit or affirmation, of which they purport to be copies, have been sworn or affirmed according to this Act; and shall have the same effect for the purposes of evidence as the originals would have had in case they had been produced and proved to have been duly so certified, sworn and affirmed, by the person appearing by such copy to have sworn or affirmed the same as aforesaid.—By the 17th section it is enacted, that every printer or publisher of any newspaper or other such paper, shall, within six days, deliver to the commissioners, or their officer, one of the papers (§) so published, signed by the printer or publisher in his hand-writing, with his name and place of abode; and that the same shall be kept by the commissioners or their officer, under a penalty, in case of neglect by such printer or publisher, of 100*l.*; and that upon application by any person to the commissioners or their officer, to have such paper produced in evidence in any proceeding, whether civil or criminal, such com-

(*) One who lets out types and men to print a newspaper, is not a printer within the stat. 38 Geo. 3, c. 78; the party who hires the men, and superintends the printing, is the party responsible to the Stamp-office. *Bagster* v. *Robinson*,[1] 9 Bing. 77.

(†) The provisions of the statute are applicable in the case of a motion for a criminal information. *R.* v. *Dennison*,[2] 4 B. & Ad. 698; and *R.* v. *Franceys*,[3] 2 Ad. & Ell. 49.

(‡) The affidavit was, "situate Union-street, Castle-street;" the newspaper was, Union buildings, John-street; the variance, on motion for criminal information, was held to be fatal. Note.—The Court said they would notice the newspaper filed with the affidavits, although not expressly identified by or annexed to any affidavit. *R.* v. *Dennison*,[2] 4 B. & Ad. 698; *R.* v. *Franceys*,[3] 2 Ad. & Ell. 49.

(§) Such a delivery amounts to a publication in respect of which the party may be indicted, if the matter be libellous. *R.* v. *Amphlitt*,[4] 4 B. & C. 35. But the rule does not extend to one who is not the printer or publisher. *Adams* v. *Kelly*,[5] 1 Ry. & M. 157. Where the identical paper was produced by the distributor of stamps, marked with various charges corresponding with the sum paid by the defendant of the distributor; held that it was evidence to go to the jury of a publication by the defendant; held also, that it was libellous to print and publish a ludicrous story of the plaintiff, exposing him to ridicule, notwithstanding it appeared that the plaintiff himself had told it of himself; and that evidence of the plaintiff having been exposed to public laughter at a vestry was evidence as identifying the subject of the libel, and proving the consequences of the publication. *Cook* v. *Ward*,[6] 6 Bing. 409. Where the plaintiff produced a certified copy of the affidavit lodged at the Stamp-office, and a newspaper containing the libel, corresponding with the paper described in the affidavit, it was held to be sufficient evidence of publication. *Moyne* v. *Fletcher*,[7] 9 B. & C. 382. And see *R.* v. *Leigh Hunt*, Ib. *in notis*, 385.

[1]Eng. Com. Law Reps. xxiii. 270. [2]*Id.* xxiv. 143. [3]*Id.* xxix. 27. [4]*Id.* x. 275. [5]*Id.* v. 429. [6]*Id.* xix. 117. [7]*Id.* xvii. 401.

proved that the defendant's printing-house was there; it was held to be sufficient evidence of a publication in London (*m*) (A).

The observations which have been made as to variances between the
*626 allegation *and proof of words, apply still more forcibly to the case of a libel, which must be set out in the pleadings *secundum tenorem* or *in hæc verba*, or by equivalent words (*m*) (1) (a).

Variance. It is no variance, although the libel read in evidence contain matter in addition to that which is set out on the record, provided the additional part does not by its context alter the sense of that which is set out (*n*). But if the additional matter causes the libel proved to vary in sense from that alleged, or if by a selection of passages, and setting them out as one continuous libel, the sense be altered, the variance will be fatal (*o*).

With respect to the alteration of one or more letters of a word, the rule

missioners or officer shall, at the expense of the applicant, at any time within two years from the publication, either cause the same to be produced in the court, and at the time when the same is required to be produced, or shall deliver the same to the applicant, on his giving reasonable security, at his own expense, for returning the same; and that in case such commissioners or their officer cannot, by reason of a previous application, comply with the terms of a subsequent one, they shall comply with such subsequent one as soon afterwards as they shall be able so to do. The above statute has been repealed, and provisions of a similar nature have been substituted by the 6 & 7 W. 4, c. 76, s. 8. See APPENDIX.

(*m*) *R.* v. *Hart & White*, 10 East, 94.

(*m*) See *Dr. Sacheverell's Case*, 8 St. Tr. 557; 2 Salk. 417., *R.* v. *Beare*, 1 Ld. Raym. 414; Holt's R. 348. 350; Starkie's Crim. Pl. 2d edit. 124; Starkie's Law of Libel, 314, 2d. edit.; and see the late st. 9 G. 4, c. 15; *infra*, tit. VARIANCE.

(*n*) See *Sir J. Sydenham's Case*, *supra*, 618; and *Tabart* v. *Tipper*, 1 Camp. 350. One count of a declaration for a libel stated the words as follow: "My sarcastic friend, by leaving out the repetition or chorus of Mr. T.'s poem, greatly injured the *tout ensemble*," &c. The words proved in evidence were, "My sarcastic friend ΜΩΡΟΣ by leaving out," &c., and Lord Ellenborough held that the variance was material. See also tit. VARIANCE; and Appendix; and *Cartwright* v. *Wright*,[1] 5 B. & A. 615. In an action for a libel contained in a letter addressed "to the treasurer of the N. E. Company," and slandering the plaintiff in his employment as surveyor of the company, held that it was not necessary to allege with extreme precision the description of the company, nor to prove the plaintiff's employment by deed, the libel being alleged of the plaintiff in that employment; the letter going on, after stating the libellous matter, to say, that the writer had never disclosed the matter, nor ever would, except to the person he addressed and his friend, which was not set out in the declaration; it was held, that although the defendant might avail himself of the whole of the letter to repel malice, yet the omission of such part in no way qualifying the meaning of the libellous part set out, was not a ground of variance. *Rutherford* v. *Evans*,[2] 6 Bing. 451.

(*o*) 1 Camp. C. 350. Where a declaration alleged a publication by the defendant, omitting a reference, from which on reading the libel it appeared to be a quotation, the variance was held to be fatal. *Cartwright* v. *Wright*,[1] 5 B. & A. 615. So where the libel as alleged imputed to an engineer "mismanagement or ignorance," and the words proved were, "ignorance or inattention." *Brooks* v. *Blanshard*, 1 C. & M. 779; 3 Tyr. 844. As to variances in allegations of intention, see tit. VARIANCE, and the observations of Buller, J. in *Peppin* v. *Solomon*, 5 T. R. 497.

(A) (It is competent for the plaintiff to prove by parol evidence that the defendant had a printing office, and that the paper in which the libel appeared was printed there, and that the paper produced was of the type of that office; and that it was printed in the name of the defendant. *Southwick* v. *Stevens*, 10 John. R. 444.)

(1) [In a declaration for a libel, if the plaintiff declares *quæ sequitur in his verbis, scilicet*, the minutest variance between the libel offered in evidence and the declaration is fatal. *Semb. Harris* v. *Lawrence & al.* 1 Tyler, 156. *Olin* v. *Chipman*, 2 ib. 148. So in an indictment, if the *tenor* is undertaken to be recited, and the recital is variant in a word, or letter, so as thereby to create a different word. *The State* v. *Coffey*, 2 Taylor, 272. Where an indictment for a libel charged the defendant with publishing that *A.* was "worse *that* the lowest vagabonds," &c., and the words proved were "worse *than* the lowest vagabonds"—a new trial was granted to the defendant. *Walsh* v. *The State*, 2 M'Cord, 248. But is not a ground to *arrest judgment*, that the declaration professed to set out a libel in *hæc verba*, and that there was an immaterial variance. *Calhoun* v. *M'Meers*, 1 Nott & M'Cord, 422.]

(2) [Where the declaration, in action for a libel, charges the publication, without purporting to set forth in *hæc verba*, proof of the publication of a libel, containing part of the libellous matter charged, is sufficient. *Metcalfe* v. *Williams*, 3 Litiell's Rep. 389.]

(a) Where the defendant published imputations against the plaintiff as envoy of Chili, and the plaintiff having avowed in his declaration that he was such, the averment was held to be sufficiently proved. *Yrisarri* v. *Clement*. Eng. Com. Law Reps. xiii. 36.

[1] Eng. Com. Law Reps. vii. 358. [2] *Id.* xix. 128.

seems to be now settled, that if the sense be altered by the changing of one word into another the variance will be fatal, but not otherwises (*p*).

2dly. Where the plaintiff or prosecutor has fairly launched his case, by proof of the words or libel, he is next, in the usual order of proof, to establish in evidence the prefatory averments (*q*) and innuendos which are alleged in *the declaration or indictment, and which are essential to his case. If the publication affects the plaintiff in a particular character, it must be proved that the character belonged to him, or that he filled the office or situation at the time of the publication complained of. It has already been seen that a man's special character is usually established by evidence of his having acted in that capacity, for then a *presumption in fact* arises that he *legally* acted in that capacity (*r*). And where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation, trade or business, is of course the only evidence which the fact admits of. Proof of averments, &c. *627

The evidence of character, in actions brought by physicians (*s*), attornies (*t*), &c. has already been adverted to (*u*). Notwithstanding the doubts which have prevailed upon the subject, the better opinion seems to be, that evidence of the plaintiff's *having acted* in the particular character in which the words affect him, is *primâ facie* evidence of his title to it (*v*). Where, however, there is any reason to apprehend that evidence will be offered on the other side to disprove the fact, the plaintiff ought to be prepared with the best evidence to establish it. If the declaration allege a diploma or appointment, it must be proved, although the special allegation was unnecessary (*x*).

In general, if the slander or libel assume that the plaintiff possesses the character, or fills the situation or office in which he is defamed, it operates by way of admission (*y*), and is *primâ facie* evidence of the fact. Accord-

(*p*) According to the distinction taken in *The Queen* v. *Drake*, Salk. 660; 3 Salk. 224; as where the word *not* was inserted for *nor*. If the sense be not altered, the variance is immaterial, even upon an indictment for perjury. As where the assignment for perjury alleged that the defendant had sworn in the affidavit on which the perjury was assigned, that he *understood* and believed, whereas the words in the affidavit were "*understood* and believed;" and upon motion for a new trial, Lord Mansfield, after observing upon the great length of nicety to which the cases had been carried, particularly the case in *Hutton*, where *Indicari* had been written for *Indictari*, said that the case had been shaken by the doctrine laid down in Hawkins. 2 Haw. c. 46, s. 190. And that the true distinction had been taken in *The Queen* v. *Drake*, *R.* v. *Beech*, Leach, C. C. L. 158. *R.* v. *May*, Leach, 227. Starkie's Crim. Pl. tit. VARIANCE. Starkie's L. Libel, 2 edit. vol. 1, p. 377. *Infra*, tit. PERJURY—VARIANCE. *R.* v. *Mary Ann Taylor*, 1 Camp. 404.

(*q*) The Insolvent Act requiring that the petition shall be *subscribed* by the prisoner, and filed, and a certified copy admitted as legal evidence, held that it must be presumed to have been regularly done, and that such copy therefore was sufficient proof of an allegation in a declaration for a libel, that a petition *subscribed* by the plaintiff, as such prisoner, had been duly filed, &c. *Gould* v. *Hulme*,[1] 3 C. & P. 625. Where the words convey a substantive imputation of a crime, introductory averments are unnecessary. See *Starkie on Slander and Libel*, V. 1, p. 383. *Curtis* v. *Curtis*,[2] 10 Bing. 477. *Slowman* v. *Dutton*,[3] 10 Bing. 402. A declaration for a libel, headed "an honest lawyer," alleged that the plaintiff had been reprimanded by one of the masters of the Court for sharp practice, with introductory averments that the plaintiff had carried on the business of an attorney, and been engaged as such in a certain cause, and that sharp practice in such profession was considered to be disreputable to the attorney practising the same; held, that such matter was libellous, and that the averment that the libel was ironical, coupled with the innuendo that the term "honest lawyer" was used in a libellous sense, was sufficient. *Boydell* v. *Jones*, 4 M. & W. 446; and 7 Dowl. 210.

(*r*) *Supra*, 307, and the cases there cited.

(*s*) Words imputing adultery to a physician are not actionable, unless shown to be connected with professional character. *Ayre* v. *Craven*,[4] 2 Ad. & Ell. 2. And see *Lumby* v. *Allday*, 1 C. & J. 301; 1 Tyr. 217.

(*t*) See tit. ATTORNIES.—CHARACTER. (*u*) *Supra*, tit. CHARACTER.

(*v*) But see *Collins* v. *Carnegie*,[5] 1 Ad. & Ell. 695.

(*x*) *Supra*, 218. And see in general as to proof of special character, *Moises* v. *Thornton*, 8 T. R. 303; *Collins* v. *Carnegie*,[5] 1 Ad. & Ell. 695; *Jones* v. *Stevens*, 11 Price, 251; *Sparling* v. *Heddon*, 9 Bing. 11; *R.* v. *Crossley*, 2 Esp. C. 526; *Whittington* v. *Gludwin*,[6] 2 C. & P. 146.

(*y*) *Berryman* v. *Wise*, 4 T. R. 366. And see *Smith* v. *Taylor*, 1 N. R. 196. So where the libel itself showed that certain acts of outrage had been committed, it is evidence to support an averment of the fact

[1]Eng. Com. Law Reps. xiv. 491. [2]*Id.* xxv. 206. [3]*Id.* xxv. 182. [4]*Id.* xxix. 11. [5]*Id.* xxviii. 180. [6]*Id.* xii. 64.

ing *to the general rule, all averments which are material, that is, which are connected with the charge, must be proved, but those which are immaterial need not be proved (*z*). An information alleged that the King had issued a particular proclamation, and also averred, that on occasion of that proclamation divers addresses had been presented to his Majesty by divers of his subjects; the information charged the defendant with a publication with intent to bring the said proclamation into contempt, but did not refer to the addresses; it was held to be essential to prove the fact that such a proclamation was issued (*a*), but it seems that it was unnecessary to prove that any addresses had been presented (*b*).

So in general where the declaration or indictment avers the existence of particular facts, and that the publication was of and concerning those facts, their existence, if material to the actionable or criminal quality of the publication, must be proved. In an action for libel on a constable, alleged in both counts of the declaration to have been published concerning his conduct in the apprehension of persons stealing a dead body, it was averred in the first count what that conduct had been, and it was alleged that he had carried the dead body to Surgeons Hall; the Court held that it was necessary, under both counts, to prove this introductory allegation (*c*) (1).

in the introductory part of the record. See the observations of Bayley, J., 4 M. & S. 548. Where in an action for a libel against the plaintiff, a medical practitioner, of and concerning him in his said practice, no evidence was offered of the plaintiff being of any regular degree, the libel stating him to be a quack, and that certain persons had the misfortune to come within his doctrinal prescriptions; held, that if the jury considered that the libel spoke of him as a medical practitioner, the libel was not withdrawn from their consideration, although they might not give the same damages as to a person proved to be a regular practitioner; held also, that subsequent publications, although the subject of action, were admissible in evidence to show the motives of the defendant. *Long* v. *Chubb*,[1] 5 C. & P. 55. The declaration alleged that the plaintiff was an auctioneer and appraiser, and had been employed by the defendant as an appraiser, to value certain goods; and that intending to injure him in his business of an auctioneer, the defendant spoke of him and of his conduct as to such valuation, "He is a damned rascal, he has cheated me out of 100*l.* on the valuation;" the words themselves were held sufficiently to show that the slander was of and concerning the plaintiff in the way of his trade, and sufficient after verdict. *Bryant* v. *Loxton*,[2] 11 Moore, 344. See further, *Figgins* v. *Cogswell*, 3 M. & S. 360; *Hall* v. *Smith*, 1 M. & S. 187; *Rutherford* v. *Evans*,[3] 6 Bing. 451; *Yrisarri* v. *Clement*,[4] 3 Bing. 432.

(*z*) *Infra*, tit. VARIANCE. *R.* v. *Holt*, 5 T. R. 436. Action on the case for exhibiting an inscription tending to defame the plaintiff as the keeper of a brothel, a prefatory allegation that he carried on business as a retailer of wines need not be proved, there being no colloquim of the trade. *Jefferies* v. *Duncombe*, 11 East, 226. In general, where the words or libel are laid to be published of and concerning several different facts, a variance from one or more, if it does not alter the nature of the criminal or actionable quality of the words or libel, is not material. *Lewis* v. *Walter*,[5] 3 B. & C. 138, n. *May* v. *Brown*,[6] 3 B. & C. 113. *Infra*, tit. VARIANCE. Where the plaintiff had a clear right to sell the whole of a certain interest, which he derived from the defendant, but his right to sell part only was doubtful; and he alleged that he put up his said interest to sell, and that the defendant published, &c. of and concerning his said interest; it was held that the allegation was not supported by proof that he put up an underlease of part of the term only; for a grant of an underlease is not a sale of anything; and therefore the proof did not sustain the averment *pro tanto*. *Millman* v. *Pratt*,[7] 2 B. & C. 486.

(*a*) *R.* v. *Holt*, 5 T. R. 436.

(*b*) Per Buller, J., Ibid. 446. As if the slander or libel state the plaintiff to be an attorney or physician.

(*c*) *Teesdale* v. *Clement*,[8] 1 Chitty, R. 603. The Court intimated that the plaintiff needed not to have burthened himself with the proof. Abbott, C. J.,[6] 3 B & C. 124, stated that the ground of decision in that case was, that the fact was material. The plaintiff had in truth made it material by the form of his declaration. Where the introductory averments are immaterial they need not be proved. See *Cox* v. *Thomason*, 2 C. & J. 391. See Vol. I. tit. VARIANCE; *Heriot* v. *Stuart*, 1 Esp. C. 437; *Sellers* v. *Till*,[9] 4 B. & C. 656; *Shepherd* v. *Bliss*,[10] 2 Starkie's C. 510. An innuendo which enlarges the meaning of the terms used is bad on demurrer. *Gompertz* v. *Levi*, 1 P. & D. 214.

(1) [On an indictment for a libel on *C. J.*, describing her as the *only* daughter of the widow *R.*, the innuendo averred the identity of the prosecutrix and the daughter of the widow *R.*; it was held that it was not necessary to prove the prosecutrix to be her *only* daughter. *The State* v. *Perrin*, 1 Const. Rep. 446. Matters stated as inducement, in a declaration for a libel, may be proved by *parol*. *Southwich* v. *Stevens*, 10 Johns. 443.]

[1]Eng. Com. Law Reps. xxiv. 209. [2]*Id.* xxii. 413. [3]*Id.* xix. 128. [4]*Id.* xiii. 36. [5]*Id.* x. 36. [6]*Id.* x. 24. [7]*Id.* ix. 156. [8]*Id.* xviii. 173. [9]*Id.* x. 434. [10]*Id.* iii. 453.

The colloquium, and other averments, which connect the words or libel with the plaintiff or subject-matter before stated, must next be proved. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who state their opinion and judgment as to the *intention* of the defendant to apply his words or libel to the parties or circumstances as alleged (1) (A.) It seems to be sufficient if the witness in the first instance state his general belief and opinion as to the defendant's meaning, without disclosing his reasons, leaving it to the defendant if he think proper to inquire as to the grounds and reasons which support that conclusion. The truth of an innuendo is a question of fact for the jury (*d*); *and, in general, if the meaning of the term be ambiguous, it is for the jury to say in what sense they were used. Thus if the defendant call the plaintiff a thief, and it be doubtful under the circumstances whether the term was meant to be applied in its felonious sense, it is for the jury to decide (*e*). Colloquium and innuendos. *629

(*d*) Per Lord Ellenborough, C. J., in *Roberts* v. *Cambden*, 9 East, 96. Sir W. Blackstone, 2 W. Bl. 962; and Gould, J., in *Oldham* v. *Peake*, 2 W. Bl. 959; Cowp. 278. *Pennfold* v. *Westcott*, 2 N. R. 335.

(*e*) *Penfold* v. *Westcott*, 2 N. R. 335. It has been said that the understanding of the hearers is the rule to go by. Sel. N. P. 1252. *M. S. Case*, 1 Viner, 507; where it is laid down that the question is only what was understood by the hearers. In *Fleetwood* v. *Curley*, Hob. 268, Lord Hobart says, the slander and damage consist in the apprehension of the hearers. In Gilbert's Cas. Law and Equity, the rule laid down is, that the words shall be taken in the sense in which the hearers understand them. No doubt the understanding of the hearers is a good test for ascertaining the meaning, where the hearers understand them in an actionable sense, but it is not conclusive the other way; for where the words are actionable in respect of extrinsic facts, as for instance, where they are spoken of the plaintiff in his character of an attorney, it is not essential to show that the hearers knew the fact at the time of speaking, for they may know it afterwards, and communicate the words to those who know it. P. C. *Fleetwood* v. *Curley*, Hob. 267. Where the libel consisted of an insertion in a circular letter, sent by the secretary of a society for the protection of trade, stating "that a bill drawn on and accepted by the plaintiff was made payable at a banker's where he had no account;" held, that as it stated a specific fact which required no explanation, a witness could not be asked what he understood by finding a person's name in such a paper; but the Judge permitted the question, whether such statement had any other meaning beyond that which was expressed on the face of it. *Humphreys* v. *Miller*,[1] 4 C. & P. 7. A letter threatening to accuse the party of an infamous crime, but not naming it, was held to be within the 4 Geo. 4, c. 54, and that declarations of the prisoner as to what he meant are admissible. *Tucker's Case*,[2] 1 Ry. & M. 134. Where the libel purported to be the report of a proceeding in the Insolvent Court, and imputed to the insolvent's landlord (the plaintiff) that he colluded with the insolvent in putting in a fictitious distress; held, that the Judge ought not to have left it as a question to the jury, whether the defendant *intended* to injure the plaintiff, but that if he thought the tendency of the publication injurious to the plaintiff, to have told them it was actionable, and that the plaintiff was entitled to a verdict. The law presumes a party to have intended to produce the injury which his act is calculated to effect. *Haire* v. *Wilson*,[3] 9 B. & C. 643. And see *Ward* v. *Smith*,[4] 6 Bing. 749. Where the direction of the Judge to the jury was substantially, whether the tendency of the libel was injurious to the plaintiff, and that they were to collect the intention of the defendant from the libel itself, the Court refused a new trial. *Fisher* v. *Clement*,[4] 10 B. & C. 472. The question where the language of an alleged libel is

(1) [The plaintiff cannot prove by witnesses that from reading the libel they believe he was intended therein. *Van Vetchten* v. *Hopkins*, 5 Johns. 211.

From the nature of an innuendo, it cannot be the subject of proof by witnesses. *Aliter*, of an averment and colloquium, which introduce into the pleading extrinsic matter, that is the proper subject of proof. Ibid.

By a default and interlocutory judgment, the fact of publication and the truth of the innuendos are admitted—and the defendant cannot, before the jury of inquiry, call their attention to other paragraphs contained in the same publication in order to show a different meaning of the words complained of, than that set up by the plaintiff. *Tillotson* v. *Cheetham*, 3 Johns. 56. See *The State* v. *Neese*, 2 Taylor, 270. *Caldwell* v. *Abbey*, Hardin, 530. *Davis* v. *Davis*, 1 Nott & M'Cord, 290. *Hoyle* v. *Young*, 1 Wash. 152. *Cave* v. *Shelor & ux.*, 2 Munf. 193. *Burtch* v. *Nickerson*, 17 Johns. 271. *Lindsey* v. *Smith*, 7 Ib. 359. *M'Claughry* v. *Wetmore*, 6 Ib. 82. *Vaughan* v. *Havens*, Ib. 109. *Van Vetchten* v. *Hopkins*, ubi sup. *Chaddock* v. *Briggs*, 13 Mass. Rep. 248. *Shaffer* v. *Kintzer*, 1 Binney, 543. *Rice* v. *Mitchell*, 2 Dallas, 58. *Parker* v. *Spangler & al.* 2 Binney, 60. *M'Clurg* v. *Ross*, 5 Ib. 218. *Fowle* v. *Robbins*, 12 Mass. Rep. 498, as to the doctrine of innuendo and colloquium.]

(A) (A witness cannot state whom or what he was induced by current rumour or the conversations of others, to think the defendant meant when he used the words. *Allinsworth* v. *Coleman*, 5 Dana, 315. And see *Becket* v. *Sterrett*, 4 Blackf. 499.)

[1]Eng. Com. Law Reps. xix. 250. [2]*Id.* xvii. 465. [3]*Id.* xix. 222. [4]*Id.* xxi. 117.

Wherever a specific meaning is given to the terms of a libel or oral slander by connecting it with previous matter, the whole must be proved as being essential to the nature and identity of the charge (*f*). Where the innuendo does not refer to any preceding averment, but unnecessarily introduces new matter, it may be rejected (*g*).

Evidence of malice.

In an action for oral slander or libel, the proof of malice either results from the slander itself, or is matter of extrinsic evidence (A). Where the slander or libel stands unexplained by any collateral evidence which indicates the intention of the party, and no light is derived from the occasion and circumstances attending the publication, by which the mind of the author can be read, the Court and jury necessarily derive their inference from the words themselves, reading and understanding them, according to

*630 *their plain import and meaning, in their usual and ordinary sense. If the natural tendency and import of the expressions used be to vilify, defame and injure, then, according to every principle of reason and justice, the plaintiff must be taken to have acted maliciously, that is, with a view to effect those consequences to which the means which he has used naturally and obviously tend (*h*) (1).

Where, therefore, there is no doubt as to the illegal quality of the words or writing published, and no circumstances appear which in point of law, entitle the speaker or writer to any privilege in making the communication, his malice is a mere inference of law from the act of publication, and no extrinsic proof of malice is necessary (*i*) (B).

ambiguous, is not as to the intention of the publisher, but the tendency of the matter published to injure the plaintiff. Ib. Lord Ellenborough, in the case of *Dubost* v. *Beresford*, 2 Camp. 512, held that the declarations of spectators admitted to see a libellous picture were evidence to show the intention to represent the parties libelled. The word rob is actionable unless it appear to have been used in a sense not actionable. *Tomlinson* v. *Brittlebank*,[1] 4 B. & Ad. 630.

(*f*) *Supra*, Vol. I. tit. Variance, and see *May* v. *Brown*,[2] 3 B. & C. 128. *Sellers* v. *Till*,[3] 4 B. & C. 656. *Harvey* v. *French*, 1 C. & M. 11. *Williams* v. *Stott*, 1 C. & M. 687.

(*g*) See *Roberts* v. *Camden*, 9 East, 93. *Day* v. *Robinson*,[4] 1 A. & E. 558. *Harvey* v. *French*, 1 C. & M. 11. *Williams* v. *Gardner*, 1 M. & W. 245.

(*h*) *Supra*, tit. Intention. [*Erwin* v. *Sumrow*, 1 Hawks, 472. *Jackson* v. *Stetim*, 15 Mass. R. 48.] Ld. Kenyon's observations in *R.* v. *Lord Abingdon*, Esp. C. 228. In *R.* v. *Creevey*, 1 M. & S. 273, which was an indictment against a member of parliament, for publishing in a newspaper a speech which he had delivered in the House of Commons, it was objected that the malice ought to be proved by extrinsic evidence; but Le Blanc, J. informed the jury, that where a publication is defamatory, the law infers malice, unless anything can be drawn from the circumstances attending the publication to rebut that inference; and added, that in point of law, the circumstance of its being a publication of a speech delivered by a member of the House of Commons did not rebut it. Vide *supra*, tit. Intention; and *infra*, tit. Malice. See also, *R.* v. *Harvey*,[5] 2 B. & C. 257. *Macpherson* v. *Daniels*,[6] 10 B. & C. 272. In 6 East, Lord Ellenborough observed, that in *Bromage* v. *Prosser*,[7] 4 B. & C. 247, it was held that where the occasion of speaking the words affords a *prima facie* justification, there malice in fact must be proved; but that where the act is in itself injurious, and is not privileged by any legal occasion, malice is a mere inference of law from the act itself. The Court are the judges of libel or no libel. *Levi* v. *Milne*,[8] 4 Bingh. 195. See Starkie on Libel, 2d edit. Preliminary Discourse, vol. 1, c. 8—13; vol. 2, c. 12, and the 6th Report of the Criminal Law Commissioners. In case for libel on a shipowner, alleging that his vessel was not seaworthy, and was hired by Jews, and intended to take in convicts; it was held to be a libel in his business, and entitling him to recover damages, without proof of malice, or allegation of special damage. *Ingram* v. *Lawson*, 6 Bing. N. C. 212.

(*i*) Where the plaintiff brought an action against the defendant, for saying that he had heard that the plaintiff was hanged for stealing a horse, and upon the evidence it appeared that the words were spoken in

(A) (The deliberate publication of a calumny, when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice. *Bodwell* v. *Osgood*, 3 Pick. 379. If the defendant plead the truth of the words in justification, such plea will be sufficient evidence that they were uttered deliberately and maliciously. *Alderman* v. *French*, 18 Mass. R. 1.)

(B) (Where the words are not actionable in themselves, but become so by extrinsic circumstances, these must be averred and proved. *Bullock* v. *Koon*, 9 Cow. 30.)

(1) {The malicious intent charged in an indictment for a libel, where the truth of the facts contained in the libel is not admitted in evidence, is an inference of law. *Comm.* v. *Blanding*, 3 Pick. Rep. 304.}

[1]Eng. Com. Law Reps. xxiv. 128. [2]*Id.* x. 24. [3]*Id.* x. 434. [4]*Id.* xxviii. 151. [5]*Id.* ix. 77. [6]*Id.* xxi. 69. [7]*Id.* x. 321. [8]*Id.* xiii. 396.

But where it appears that the words were spoken or libel published on an occasion and under circumstances which the law regards as privileged, that is, as it seems, where they were spoken or published in the *bonâ fide* discharge of some legal or moral duty to society, or even in the fair and honest prosecution of the rights of the party himself, or the protection of his interests, the plaintiff will fail, unless he can establish the malicious intention by means of the words or libel, or by sufficient extrinsic evidence, and show that the defendant used the occasion as a mere colour and pretext for venting his malice (*k*) (A). In some instances, indeed, which will be afterwards noticed, where the publication occurs in the performance of a legal duty, which the defendant is *bound* to perform, the occasion of publication is not merely *evidence* to rebut the inference of *malice, but is an absolute bar to the action; as, where the party was acting in the capacity of a Judge, or witness, or party in the cause (*l*). And in such cases the malice of the party is immaterial. In other cases, where the publication arises in the course of discharging any duty, the performance of which is required by the ordinary exigencies of society, although the party was under no absolute legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *primâ facie* justification. *631

Thus where a party having *probable cause* lays claim to land, and a loss results to the real owner, it is a question for the jury whether the defendant acted *bonâ fide;* and the want of probable cause for making the claim, unless it be such as induces the jury, under the circumstances, to infer that the defendant acted out of malice (*m*), will not entitle the plaintiff to recover (1). Where a master gives the character of a servant, malice will not be presumed, but must be expressly proved (*n*); and that whether the master be or be not asked for a character (*o*). In such cases, proof that

grief and sorrow for the news, the plaintiff was nonsuited, because the words were not spoken maliciously. Lev. 82; cited by Twysden, J., as a case which he had heard tried before Hobart, J., and all the Court agreed that the plaintiff had been properly nonsuited. See 1 Vin. Ab. 540. It may, however, well be doubted whether at the present day the mere absence of a malicious and injurious intention, without any justifying occasion recognized by the law, would furnish a legal defence for the use of words in themselves defamatory and illegal. If a man were falsely to say, though in sorrow, that a trader had become bankrupt, and a loss were occasioned by the assertion, it ought, in point of natural justice, to be compensated by the party who, through ignorance or carelessness, and without any legal cause, occasioned the loss; and the case stands on the same footing, though no actual loss can be proved, but where the law presumes one, and constitutes the communication a substantive injury.

(*k*) The jury may infer express malice, from the terms of the libel itself. *Wright* v. *Woodgate*, 2 C. M. & M. 573.

(*l*) *Infra*, 638. So where the defendant pleads that the allegations are true. See Starkie's Law of Libel, 229, 2d edit.; or where the defendant pleads that he has merely repeated the words of another, and that he has given up the author. Ibid. 329.

(*m*) *Pitt* v. *Donovan*, 1 M. & S. 639. *Smith* v. *Spooner*, cor. Lord Ellenborough, 1811. Starkie on Libel, 287, 2d edit. Where the owner of a house had prevented the plaintiff, his lessee for years, from disposing of the remainder of his term, by falsely asserting that he had no title, it was left to the jury to say whether there was malice or not. See *Gerard* v. *Dickenson*, 4 Rep. 18; and the cases cited, Starkie on Libel, Vol. I. p. 287, 2d edit. *Smith* v. *Spooner*, 3 Taunt. 246.

(*n*) *Hargreave* v. *Le Breton*, 4 Burr. 2425. *Weatherstone* v. *Hawkins*, 1 T. R. 110; Burr. 2425. *Edmondson* v. *Stephenson*, B. N. P. 8. [3 Pick. R. 315.] If, as laid down in *Weatherstone* v. *Hawkins*, 1 T. R., it be incumbent on the plaintiff to prove the *falsity* as *well* as malice of the charge, it seems that, provided malice be shown, general evidence of good conduct would be sufficient *prima facie* evidence to establish the falsity where the charge is specific, for in such a case, where the imputation is in fact unfounded, it is impossible that the plaintiff should be prepared with particular evidence. And see *Pattison* v. *Jones*,[1] 8 B. & C. 578. *Child* v. *Affleck*,[2] 9 B. & C. 403. To prove such express malice evidence that the character was false is admissible. *Rogers* v. *Clifton*, 3 B. & P. 587. *Pattison* v. *Jones*,[1] 8 B. & C. 578. *King* v. *Waring*, 5 Esp. C. 13.

(*o*) *Rogers* v. *Sir Gervase Clifton*, 3 B. & P. 587. But the fact that the master volunteered the giving of

(A) (See *Faris* v. *Starke*, 9 Dana, 130.)

(1) [In an action for slandering the plaintiff's title to property, by a letter written by the defendant, if it

[1]Eng. Com. Law Reps. xvii. 405. [2]*Id.* xvii. 405.

the master sought occasions of speaking ill of the servant, without any application to him for a character, and that the representation was made in heat and passion, after a quarrel between them, and above all, that the master *wilfully* misrepresented the servant's character contrary to his better knowledge, are important manifestations of malice in support of the action (*p*). Again, where a communication, imputing misconduct to the plaintiff, is made confidentially by a person *interested*, or to a person *interested*, no action is maintainable, provided it was made *bonâ fide* with a
*632 view to the interests of those concerned (*q*); and *although in such case the expressions used are stronger than the exigency of the case warranted, it is a question for the jury whether they were used with an intention to defame, or with good faith to communicate facts, in the knowledge of which the party had an interest (*r*). Where an advertisement was published in a newspaper the tendency of which was to throw upon the plaintiff a suspicion that he had been guilty of bigamy; yet as it appeared that this had been done at the instance of the plaintiff's wife, it was left to the jury, under the circumstances, to say whether it had been done *bonâ fide* on behalf of the wife, in order to ascertain a fact in which she was materially interested (*s*). So where the alleged slander was contained in a

the character, is a circumstance to be taken into consideration in estimating the defendant's motives. See the observations of the Court in *Pattison* v. *Jones*,[1] 8 B. & C. 578; *Child* v. *Affleck*,[2] 9 B. & C. 403.

(*p*) Ibid. And see *Lowry* v. *Aikenhead*, cited 3 B. & P. 587. If the plaintiff, knowing what character the master will give, procure it to be given for the purpose of founding an action upon it, he will not, it is said, be entitled to recover.

(*q*) *M'Dougall* v. *Claridge*, 1 Camp. 267. Where the defendant wrote a letter to his bankers, charging the plaintiff, a solicitor, with misconduct in the management of their concerns, it appeared that the letter was written confidentially, and that the defendant was himself interested in those affairs, and Lord Ellenborough nonsuited the plaintiff, and referred to the case of *Cleaver* v. *Sarraude*, where it appeared that the letter had been written confidentially by the defendant to the Bishop of Durham, to inform him of malpractices on the part of the plaintiff as the Bishop's steward, and the learned Judge nonsuited the plaintiff. So where the plaintiff, a dissenting minister, went with a friend to the defendant, who in answer to questions put to him, stated that his wife had been cautioned against the plaintiff as a drunkard, &c. *Warr* v. *Jolly*,[3] 6 C. & P. 497. Where, in an action of slander against the defendant, a surveyor employed by a committee to investigate the truth of reports against the plaintiff, as having executed improperly contract work for them, which the defendant alleged, on such inquiry, to be the case; held, that such a report was not a privileged communication, it being found by the jury that the reports originated with the defendant, and were false. *Smith* v. *Matthews*, 2 M. & M. 151. And see Starkie on Libel, Vol. I. c. xiii. 2d ed.

(*r*) *Dunmore* v. *Bigg*, 1 Camp. 269, where the defendant having supplied beer to the plaintiff, for which Leigh was surety, went to Leigh and complained of the plaintiff's conduct in terms of great opprobrium, there being a sum then due for beer, and Lord Ellenborough, considering that the defendant had been betrayed by his passion into unwarrantable expressions, left the question of malice to the jury. A letter addressed to the judge, being an irregular and improper proceeding, cannot be considered as falling within the rule as to privileged communications. *Gould* v. *Hulme*,[4] 3 C. & P. 625. Where the libel, professing to be a report of proceedings in a court of justice, did not profess to state facts as deposed to by witnesses, but only as stated by the counsel for the prosecution; held that it could not be justified as a privileged publication; and that the Judge properly rejected evidence of publications by others to the same effect. *Saunders* v. *Mills*,[5] 6 Bing. 213.

(*s*) *Delany* v. *Jones*, 4 Esp. C. 191. Where the alleged libel was contained in a handbill offering a reward for the recovery of bills, and stated that the plaintiff was believed to have embezzled them; held, that if it was done with the view solely to protect persons liable on the bills, or for the conviction of the offender, it was a good defence; and that in order to show the *bona fides* of the defendant, evidence of his having preferred a charge of the same nature against the plaintiff was admissible. *Finden* v. *Westlake*,[6] 1 M. & M. 461. See *Lay* v. *Lawson*,[7] 4 Ad. & Ell. 795, and the remarks there made on *Delany* v. *Jones*. So in the case of an advertisement for the discovery of the plaintiff, an absconding debtor, at the instance of a party who had sued out a *capias* in order to enable the sheriff to take him. *Lay* v. *Lawson*,[7] 4 Ad. & Ell. 795; and see *Finden* v. *Westlake*,[6] M. & M. 462. If, however, the publication be more extensive than is

appear that a loss to the plaintiff, in a sale of the property, was occasioned by such letter, the defendant ought to make reparation, though the jury believe that he designed no injury. *Ross* v. *Pines*, 3 Call, 568. *Sed vide* 4 Burr. 2422. Yelv. 89, *note*, and cases above, note (*a*).]

[1] Eng. Com. Law Reps. xv. 303. [2] *Id.* xvii. 405. [3] *Id.* xxv. 508. [4] *Id.* xiv. 490. [5] *Id.* xix. 60. [6] *Id.* xxii. 356. [7] *Id.* xxxi. 182.

communication made by the defendant, a sergeant in a volunteer corps, of which the plaintiff was also a member, to the committee by which the affairs of the corps were conducted, that the plaintiff was an improper person to remain a member of the corps (*t*) (A). So where the words are delivered by way of admonition or advice (*u*) (1), or spoken in confidence and friendship (*x*). *Upon similar principles, fair criticisms upon the merits of literary works are not actionable. *633

If a commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, or follow the plaintiff into private and domestic life, for purposes personally slanderous, and unconnected with the work whose merits he professes to discuss, he exercises, it has been said by authority, a fair and legitimate right (*y*); but it is a question for the jury, whether the defendant has not made false assertions in point of fact, for injurious purposes, or exceeded the bounds of fair and legitimate criticism for the purpose of personal slander (*z*). Where the ground of complaint

necessary for the purpose of procuring the desired information, it will be actionable. *Brown* v. *Crome*,[1] 2 Starkie's C. 297, subject, however, to the observations, *supra*.

(*t*) *Barbaud* v. *Hookham*, 5 Esp. C. 109. [See *Mr. Day's note* to this case.]

(*u*) *M'Dougall* v. *Claridge*, 1 Camp. 267; *Dunmore* v. *Bigg*, 1 Camp. 269; *Herver* v. *Dawson*, B. N. P. 8; *Twogood* v. *Spyring*, 1 C. M. & R. 181; 4 Tyr. 582, C. C.; and see *Brooks* v. *Blanchard*, 1 C. & M. 779. See the remarkable case, Cro. J. 90, cited by Lord Coke, where a clergyman, in his sermon, recited a story out of Fox's Martyrology, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted on him, and died by the hand of God; whereas in truth he never was so plagued, and was himself present at that sermon; and he brought his action on the case; and Wray, J. delivered the law to the jury, that it being delivered but as a story, and not with any malice, or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty. This case seems, however, to have been decided on a principle, the generality of which is now questionable, viz. that there was no malice in fact. It seems to be now settled that malice in law will support the action in the absence of circumstances which constituted a privileged occasion, or in a case of unnecessary publicity. In the case cited, it may be questionable whether the publicity of the communication did not exclude a defence on the score of privilege. A letter to a father advising him to have better regard to his children, though it use scandalous words, yet, if written *bona fide*, is not libellous. 2 Brownl. 150; *secus* if published in a newspaper, although the pretence should be reformation. *R.* v. *Knight*, Bac. Ab. Libel, A. 2.

(*x*) *Herver* v. *Dawson*, B. N. P. 8. An action was brought against a man for warning his friiend respecting the circumstances of the plaintiff; and Pratt, C. J., directed the jury, that if they were of opinion that the words were not spoken out of malice, but in confidence and friendship, and by way of warning, they should find the defendant not guilty; which they did. [S. P. Per Jackson, J. *Jackson* v. *Stetson*, 15 Mass. R. 58.]

(*y*) By Ld. Ellenborough, C. J., in *Carr* v. *Hood*, 1 Camp. 355; *Tabart* v. *Tipper*, Camp 350. And see *Soane* v. *Knight*, 2 M. & M. 74. *Thompson* v. *Churchill*, 2 M. & M. 187. *Macleod* v. *Wakley*,[2] 3 C. & P. 311. *Fraser* v. *Berkeley*,[3] 7 C. & P. 621. Whatever is fair, and can be reasonably said of the works of authors, or of themselves as connected with their works, is not actionable, unless it appear that under the pretext of criticising the works, the party takes the opportunity of attacking the character of the author. Whatever is published by the defendant at any time before the trial may be admitted in order to show his motives; but an admission of his being the publisher of the periodical work cannot be extended beyond the date of such admission. *M'Leod* v. *Wakley*,[1] 3 C. & P. 311. The defendant published of a painting publicly exhibited, that it was a mere daub, with other strong terms of censure; held that it was a question for the jury, whether this was a fair and temperate criticism, or only the vehicle of personal malignity towards the plaintiff. *Thompson* v. *Shackell*,[4] 1 M. & M. 187.

(*z*) Ibid.

(A) (A complaint made to a church by one member against another in the regular course of church-discipline, is excusable, if there be probable cause for making it. *Remington* v. *Congden & al.* 2 Pick. 310. Where a member of a church submitted to an investigation by the church of charges prepared against him, in a written complaint, by persons not members, and the church decided that the complaint was substantiated by the evidence, it was held that in an action for a libel, against the persons making the complaint, on account of the matter contained in it, the decision of the church was evidence of probable cause of making the charges, and sufficient to rebut the presumption of malice, and that the action could not be maintained without proving express malice on the part of the defendants. *Ibid.*)

(1) [If words actionable in themselves are spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie; and the jury are to decide whether there be malice or not. *Jarvis* v. *Hathaway*, 3 Johns. 180.]

[1]Eng. Com. Law Reps. iii. 353. [2]*Id.* xiv. 322. [3]*Id.* xxxii. 658. [4]*Id.* xxii. 286.

was, that the defendant had charged the plaintiff with the publication of books of an improper and immoral tendency, Lord Ellenborough informed the jury that it was certainly libellous gravely to impute to a bookseller a publication to which he was a stranger, as the evident tendency of the imputation was to hurt him in his business (*a*). Where an action was brought for publishing in a newspaper a paragraph, stating that the songs at a place of public entertainment were not of the plaintiff's composition, as they professed to be, and that the performance was despicable, Lord Kenyon said, "the editor of a public newspaper may fairly and candidly comment on any place, or species, of public entertainment, but it must be done fairly, and without malice, or view to injure or prejudice the proprietor in the eyes of the public; if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust and malevolent, or exceeding the bounds of fair opinion, it is a libel, and actionable" (*b*).

*634 *It seems to be a general rule, embracing all the cases above referred to, where the occasion affords presumptive *primâ facie* evidence to rebut the inference of malice, that if it can be shown that the object of the party was malignant, and that the occasion was laid hold of as a mere colour and excuse for gratifying his private malice with impunity, the action is maintainable (A).

It is no answer to the action to show that the words were spoken carelessly, wantonly, or in jest; it has been well observed, that the mischief to the reputation of the party grieved is nowise lessened by the merriment of him who makes so light of it (*c*). A wanton disregard of the feelings and interests of others is perfectly consistent with malice, in every sense of the word; and a man does not the less intend to injure another, and therefore his act is not the less malicious, because his primary object is to derive some private gratification or emolument to himself (*d*). It is, however,

(*a*) *Tabart* v. *Tipper*, 1 Camp. 350. In that case the counsel for the defendant were permitted to inquire, upon cross-examination, whether the defendant had not published particular books; but *qu* (1).

(*b*) *Dibdin* v. *Bostock*, 1 Esp. C. 29. So it is not libellous to comment fairly upon a petition relating to matter of general interest, which has been presented to Parliament and published. *Dunne* v. *Anderson*,[1] 3 Bing. 88; R. & M. 287.

(*c*) Haw. P. C. c. 73.

(*d*) See the observations, tit. INTENTION. If a person were to write a libel, which was published through carelessness or accident, and damage were to result to the party reflected on, it seems that an action might be supported.

(A) (Where a slanderous charge is made, which the unlearned would understand as imputing a crime, the action of slander lies, although in the nature of things such crime could not be committed. *Kennedy* v. *Gifford*, 19 Wend. 296. Where the words contain an imputation of murder, the plaintiff may be entitled to recover, although the defendant should prove that the person alleged to be dead is still alive, if those in whose presence the words were spoken had well grounded reasons to believe that he was then dead. *Jugart* v. *Carter*, 1 Dev. & Bat. 8. [In slander for charging the plaintiff with perjury in a judicial proceeding, the defendant, under the general issue, though not permitted to prove the falsity of the words sworn by the plaintiff, was allowed to interrogate a witness as to *what* the plaintiff swore—in mitigation of damages. *Grant* v. *Hover*, 6 Munf. 13. In *Kirtley* v. *Deck*, 3 Hen. & Mun. 388, it was held in an action for charging the plaintiff with perjury in a court of record, that the defendant, on a plea of justification, could not give parol evidence of what the plaintiff swore to, without producing a copy of the record of that trial, to show that the testimony given by the plaintiff was material to the matter in question. See *Crookshank* v. *Gray & ux.* 20 Johns. 344.])

(1) [See Vol. I. p. 289, *note* (1), that in Massachusetts, a special plea in justification may be used by the plaintiff as conclusive evidence of the speaking of words complained of—and that if the defendant fail to establish such plea, the plea itself is evidence that the words were spoken maliciously. See also Vol. I. p. 436, *note* (1).] {See evidence of the defendant's procuring depositions, &c. to prove the truth of his charges, and afterwards declining to plead a justification, may be properly referred to a jury on the question of malice, but not on the question of damages. *Bodwell* v. *Osgood*, 3 Pick. Rep. 379.}

[1]Eng. Com. Law Reps. xi. 43.

also to be observed, that a mere excess beyond what was strictly and absolutely necessary, such as the making a statement privileged *per se* in the presence of a third person, does not of itself deprive the communication of its privileged character, and that in such a case it is still a question for the jury whether such communication was made *bonâ fide* or of malice (*e*).

It is also to be observed generally, that although the occasion may protect the party in a publication to a certain extent, such as the circumstances and urgency of the case will fairly warrant, yet that any extraordinary and unnecessary publication, although not considered as resulting from a purely malignant intention, is still to be regarded as proceeding from a careless inattention to the interests and welfare of others, which is culpable in the eye of the law (*f*).

In an action by a servant against a former master for giving a false character, the plaintiff, in order to establish the *malicious intention*, may prove the falsity of the representation made by the defendant (*g*). It has been said, that where the defendant has made a charge against the plaintiff of dishonesty and misconduct, the defendant may adduce general evidence of good conduct, even antecedently to the service, general character being in some respects in issue (*h*). In an action by a servant.

*For the purpose of proving malice in a case where the intention is ambiguous, and proof of malice in fact is essential, it seems that any acts or words used by the defendant, tending (*i*) to prove a malicious and malignant intention towards the plaintiff, are admissible in evidence; although the words so given in evidence be in themselves actionable, and be not specified *635

(*e*) *Twogood* v. *Spyring*, 1 C. M. & R. 181; 4 Tyr. 482. *Brooks* v. *Blanchard*, 1 C. & M. 779; 3 Tyr. 844.

(*f*) Vid. *infra*, 639; and see *Brown* v. *Croome*, 2 Starkie's C. 297, where Lord Ellenborough held that an advertisement, addressed by an interested party to the creditors of a bankrupt, but reflecting strongly on the character of the bankrupt, would not be justifiable, if the legal object could have been effected by means less injurious. Where a party spread false reports prejudicial to a tradesman, and being called by the employers of the latter to examine the matters complained of, repeated the false statement, it was held that the communication was not privileged. *Smith* v. *Matthews*, 1 Mo. & R. 151. And although in a letter of confidence to an agent, on business in respect of property in which the plaintiff and defendant are jointly interested, a communication as to the plaintiff's conduct in respect of that property is privileged, it is otherwise as to mere foreign matters in respect of his conduct to his mother and aunt. *Warren* v. *Warren*, 1 C. M. & R. 250.

(*g*) *Rogers* v. *Clifton*, 3 B. & P. 587. The master there described the servant as a bad-tempered, lazy, impertinent fellow, and the plaintiff proved (without objection) that whilst he was in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. See also *Pattison* v. *Jones*,[1] 8 B. & C. 578.

(*h*) *King* v. *Waring & ux.* 5 Esp. C. 13; but see above, 307. It has been held, that a servant in an action of this nature must prove the character to have been given *maliciously* as well as *falsely* (*Weatherstone* v. *Hawkins*, 1 T. R. 110); the reason seems to be, that the knowledge of the servant's misconduct may often be confined to the master himself, and being unable to prove it by his own testimony, if the general presumption arising from his not justifying were to operate against him, and it were to be inferred that his representation was false, he would be left without defence. In order to prevent this inconvenience, the law does not permit the presumption so to operate, but requires proof of malice *aliunde*. No stronger proof of malice can be given than by evidence that the master *knew* that the character which he gave was false. Any evidence therefore which tends to such proof seems to be admissible and material evidence, but proof of a general character at an antecedent period is very remote from this object. In the case of *Stuart* v. *Lovell*,[2] 2 Starkie's C. 93, Lord Ellenborough, C. J. refused to permit the plaintiff in an action for a libel, under the plea of the general issue, to go into evidence to disprove the charges contained in the libel. In a case before Abbott, L. C. J. (cited[3] 4 B. & A. 132), the prosecutor was admitted to give evidence of the falsity of the charge, under the particular circumstances of the case, the supposed libel containing little more than a narrative of certain facts supposed to have taken place in one of the West India islands. In such a case it is competent to the defendant, under the general issue, to prove the truth of the facts.

(*i*) In *Kelly* v. *Partington*,[4] 4 B. & A. 700, very slight proof of express malice held to be sufficient to go to a jury. The master had been remonstrated with after having charged the plaintiff, formerly his maid-servant, with theft, and stated to him that she might (in consequence of the charge), have gone upon the town, to which he answered, "What is that to us?"

[1]Eng. Com. Law Reps. xv. 303. [2]*Id.* iii. 261. [3]*Id.* vi. 358. [4]*Id.* xxiv. 144.

in the declaration (*k*), and although they were spoken subsequently to the words declared upon (*l*) (A). So where a libel was published in a weekly political paper, evidence was admitted of the previous sale of other papers, with the same title, at the same office, in order to show that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal (*m*). In an action for a malicious prosecution of an indictment for perjury, evidence was admitted of an advertisement published by the defendant pending the libel, although an information had been granted for publishing that advertisement (*n*) (1).

In an action for words imputing perjury, the plaintiff was allowed to prove, that subsequently to the speaking of the words, the defendant preferred an indictment against him (*o*). Where, however, other words not specified in the declaration, are given in evidence to prove malice, the defendant is at liberty to prove the truth of the words, for he had no opportunity of justifying (2). But it has been held, that other libels published by the defendant of the plaintiff, are not admissible in evidence to prove
*636 malice, unless they *refer to the libel set out in the declaration (*p*); and in

(*k*) *Lee* v. *Huson*, Peake's C. 166. *R.* v. *Pearce*, Ibid. 75. *Mead* v. *Daubigny*, Ibid. 125. *Warne* v. *Chadwell*, 2 Starkie's C. 457. *Stuart* v. *Lovell*,[1] 2 Starkie's C. 93; Starkie's L. L. vol. 2, p. 58. But where other words than those laid in the declaration are given in evidence, their truth may be proved by the defendant; for then truth could not be pleaded. *Warne* v. *Chadwell*,[2] 2 Starkie's C. 93.

(*l*) *Russel* v. *Macquister*, 1 Camp. C. 49. And see *Macleod* v. *Wakley*,[3] 3 C. & P. 312. *Tate* v. *Humphrey*, 2 Camp. 73. *Lee* v. *Huson*, Peake's C. 166. *Chubb* v. *Westley*,[4] 6 C. & P. 436. And previous slander, in respect of which damages have been recovered, may be given in evidence. *Defries* v. *Davies*,[5] 7 C. & P. 162. The insertion of the same libel in substance, in other newspapers, is evidence of malice, although there are counts in the declaration to meet such other publications; and a demurrer to some of the pleas does not prevent the defendant from proving the truth of the libel. *Delegal* v. *Highley*, 8 C. & P. 444.

(*m*) *Plunkett* v. *Cobbett*, 5 Esp. C. 136.

(*n*) *Chambers* v. *Robinson*, Str. 691.

(*o*) *Tate* v. *Humphreys*, 2 Camp. 73, n. cor. Graham, B.; and afterwards by the Court.

(*p*) By Sir J. Mansfield, C. J. in *Finnerty* v. *Tipper*, 2 Camp. 72; who observes, "you might as well give evidence of one highway robbery on the trial of another."

(A) (The words, whether actionable or not, may be given in evidence as showing a malicious intent. *Brittain* v. *Allen*, 2 Dev. 120. *Wilson* v. *Apple*, 3 Ohio R. 270. *Smalley* v. *Anderson*, 4 Monr. 368. *Kendrick* v. *Kemp*, 6 Mart. N. S. 501. *Smith* v. *Wynan*, 16 Shepley, 13. *Throgmorton* v. *Davis*, 4 Blackf. 174. *Barton* v. *Brands*, 3 Green, 248. [*Wallis* v. *Mease*, 3 Binney, 550. *Eccles* v. *Shackleford*, 1 Littell's Rep. 35. Also actionable words spoken after the suit brought. *Wallis* v. *Mease*, *supra*. *Kean* v. *M'Laughlin*, 2 Serg. & R. 469. *Shock* v. *M'Chesney*, 2 Yeates, 473. So the plaintiff may give in evidence the speaking by the defendant of the same words, after the suit brought. *Miller* v. *Kerr*, 2 M'Cord, 285. {*McAlmont* v. *Clement*, 14 Serg. & R. 359.} *Contra*, Kirby, 151. *Holmes* v. *Brown*.] Words spoken more than two years before suit brought, may be given in evidence to show malice. *Inman* v. *Foster*, 8 Wend. 602. In an action for a libel, a previous publication by the plaintiff cannot be given in evidence by the defendant, unless the publication complained of as libellous is manifestly an answer to, or commentary upon the previous publication. *Maynard* v. *Beardsley*, 4 Wend. 336. S. C. 7 Wend. 560. [In *Thomas* v. *Crosswell*, 7 Johns. 264, Mr. Justice Spencer says, it is improper to suffer distinct libellous matter, subsequent to that charged in the declaration, to be given in evidence, to show the intent with which the matter charged was published. And in Tennessee, evidence of words spoken after suit brought is not admissible. *Secus*, as to words spoken before, though not declared on. *Howell* v. *Cheatham*, Cooke's Rep. 248.] See also *Bodwell* v. *Osgood*, 3 Pick. 376. And where the defendant, after the commencement of the action, took sundry depositions for the purpose of proving the truth of the words charged in the declaration, and afterwards declined pleading their truth in justification, it was held that evidence of such proceedings was properly submitted to the consideration of the jury on the question of malice. Ibid.)

(1) [In an action against a printer for publishing of the plaintiff, that while he was a member of a convention to form a constitution for the state, he avowed scandalous opinions (which were set forth in the libel)—it was held that an account of the debates of the convention reported by the defendant, in which the words in question did not appear, was evidence to show that the publication, on which the action was brought, was malicious. *Stow* v. *Converse*, 3 Conn. Rep. 325.] {See the case upon the new trial, 4 Conn. Rep. 18.}

(2) [*Eccles* v. *Shackleford*, 1 Littell's Rep. 38.]

[1]Eng. Com. Law Reps. iii. 261. [2]*Id.* iii. 430. [3]*Id.* xiv. 322. [4]*Id.* xxv. 474. [5]*Id.* xxxii. 460.

such cases the jury are not to consider the effect of such evidence in their measure of damages, but merely as a circumstance to prove malice (*q*). And as such evidence is merely to be used as evidence of the *quo animo*, it seems that where there is no doubt as to the intention, it ought not to be resorted to (*r*).

4thly. The general rule is, that no evidence of special damage is admissible unless it be averred in the declaration (A); whether special damage be the gist of the action, or be used as matter of aggravation, the words being in themselves actionable (*s*). But it has been said, that greater certainty is requisite where the special damage is the gist of the action, than where it is merely laid by way of aggravation (*t*). Damages.

Where the damage consists in loss of marriage, the plaintiff cannot, without specifying the individual with whom the marriage would otherwise have been contracted, give evidence of the loss (*u*). So if he allege loss of marriage with *M. N.* he cannot give in evidence loss of marriage with any other person (*x*).

In an action for slander, by which the plaintiff has lost his customers (B), he cannot give in evidence the loss of any whose names are not specified in the declaration (*y*) (1). But where it is alleged as special damage that the plaintiff was prevented from selling his estate, and that the bidding was prevented by the act of the defendant, the fact may be proved, although the names of particular bidders are not specified, for the loss is the preventing of the sale (*z*), and proof that persons would have purchased is evidence of such prevention.

The persons who are alleged in the declaration to have discontinued their

(*q*) Ibid.

(*r*) See *Stuart* v. *Lovell*,[1] 2 Starkie's C. 93. In strictness, however, such evidence, if tendered, ought to be admitted in all cases where the intention is in the least equivocal, and proof of malice is essential, for it is impossible either for the party or the Court to pronounce *à priori*, whether, independently of the proposed evidence, the jury will be satisfied on the point of malice. It has been said, that *subsequent* words of the same import with the slander are not admissible where the words declared on are unambiguous. *Pearce* v. *Ormsby*, Mo. & R. 455. *Symmons* v. *Blake*, Mo. & R. 477.

(*s*) B. N. P. 7; 1 Will. Saund. 243, n. 5. It was formerly held, that where special damage was the gist of the action, such special damage might be given in evidence, although the particular instances were not specified; otherwise, where the words were actionable. Str. 666. Where the words are actionable *per se*, evidence of special damage is unnecessary. *Tripp* v. *Thomas*,[2] 3 B. & C. 427.

(*t*) Per Cur. in *Wetherell* v. *Clerkson*, 12 Mod. 597; 2 Lutw. 1295. See *Clarke* v. *Periam*, 2 Atk. 33.

(*u*) 1 Sid. 396; 1 Vent. 4. *Hunt* v. *Jones*, Cro. J. 499; 12 Mod. 597. *Barnes* v. *Prudlen*, 1 Roll. Ab. 58.

(*x*) Lord Raym. 1007. (*y*) 8 T. R. 130.

(*z*) See *Smead* v. *Badley*, Cro. J. 397; Sir W. Jones, 196.

(A) (In an action of slander no evidence can be given of any loss or injury sustained by the plaintiff, unless the same be specially stated in the declaration, and this whether the special damage be the gist of the action, or whether the words be actionable, *per se*. *Shipman* v. *Burrows*, 1 Hall, 399. Where therefore, under the allegation, that in consequence of the speaking of the slanderous words, certain insurance companies in the city of New York refused to insure any vessel by him commanded, the plaintiff was permitted to prove that the New York Insurance Company refused to make such insurance, the evidence was held to have been unproperly admitted. *Ibid.* For words which are not actionable *per se*, the plaintiff cannot recover, unless he shows special damage as the consequence of the words. *Harcourt* v. *Harrison*, 1 H. 474. [*Hersh* v. *Ringwalt*, 3 Yeates, 508. *Bostwick* v. *Nickleson*, Kirby, 65. *Bostwick* v. *Hawley*, ib. 290, *acc.* And where the words are not of themselves actionable, the proof of damage must be confined to the particular damage alleged in the declaration: Evidence of a general loss of reputation, by reason of the slander, is inadmissible. *Herrick* v. *Lapham*, 10 Johns. 281].)

(B) (See *Bostwick* v. *Nicholson*, Kirby, 65. *Bostwick* v. *Hamley*, Kirby, 290.)

(1) [And in an action for slanderous words charging a baker with using adulterated flour, if the declaration allege as special damage, that several persons (naming them) discontinued to take his bread, such persons must be called to prove why they ceased any longer to take it; the person who was the salesman not being permitted to state the reason given by the customers for refusing to purchase any longer. *Tilk* v. *Parsons*, 2 Car. & P. 201.]

[1]Eng. Com. Law Reps. iii. 261. [2]*Id.* x. 139.

dealings with the plaintiff ought to be called to prove the fact (*a*); and their mere declarations of the fact are not receivable in evidence (*b*).

Where the plaintiff alleged that he had been employed from time to time to preach to a congregation of Dissenters, and that by reason of the words, the persons frequenting the chapel had wholly refused to permit him to preach there, and had discontinued to give him the gains and profits which they otherwise would have given, the Court, after a verdict for the plaintiff, on motion in arrest of judgment, held that the allegation of damage was sufficient, for he could not have stated the names of all his congregation (*c*).

*637 *In such a case, therefore, it should seem that general evidence of the loss of emolument would be admissible.

A plaintiff under an allegation of general injury, may show a general diminution of business; but if he seeks specific damages he must give specific evidence (*d*).

Where the special damage was alleged to be the loss of the profits of several performances at a place of public amusement, it was held that the witnesses might be examined generally as to the diminution in the receipts; but that they could not be asked whether particular persons had not given up their boxes (*e*).

The jury are not bound to confine the damages to those sustained between the publication and the action (*f*).

In case for libel on the plaintiff in the way of his trade, imputing insolvency, and in other counts alleging special damage by the stopping of the partnership in which the plaintiff was engaged; held, that the plaintiff was entitled to maintain the action alone, as the words were not necessarily injurious to the firm, in which case only a joint action could be maintained (*g*).

That the damage followed from the act.

The plaintiff must also prove that the damage was the consequence of the defendant's act (*h*) (A).

The connection between the wrong done by the defendant, and the loss to the plaintiff, is matter of evidence. It is nevertheless a rule of law that the damage must be the natural and immediate consequence of the wrongful act. The defendant asserted that the plaintiff had cut his master's cordage, upon which the master had discharged the plaintiff from his service, although he was under an engagement to employ him for a term; but the Court held that the discharge was not a ground of action, since it was not the natural consequence of the words spoken (*i*). The damage must be attributable *wholly* to the words (*k*).

(*a*) 1 Saund. 243, d. (*b*) *Tilk* v. *Parsons*,[1] 2 C. & P. 201; 1 Esp. C. 50.
(*c*) *Hartley* v. *Herring*, 8 T. R. 130. See Starkie on Libel, vol. 1, p. 440, 2d ed.
(*d*) *Delegal* v. *Highley*,[2] 8 C. & P. 444. (*e*) *Ashley* v. *Harrison*, 1 Esp. C. 48.
(*f*) 6 Bing. N. C.; 9 C. & P. 326. (*g*) *Harrison* v. *Bevington*,[3] 8 C. & P. 713.
(*h*) But words are not actionable, although special damage may have ensued, unless the words be disparaging. *Kelly* v. *Partington*, 5 B. & A. 645; 3 N. & M. 116.
(*i*) *Vicars* v. *Wilcocks*, 8 East, 1. And see *Morris* v. *Langdale*, 2 B. & P. 284, where it was doubted, whether the occasioning a third person to break his contract with the plaintiff was a sufficient special damage, since the plaintiff might obtain a satisfaction by action for the breach of contract; but *qu.* whether in actions for words, by means of which the plaintiff has lost a marriage, it would be a bar to the action to show that a promise of marriage had been made; and *qu.* whether it be not a sufficient damage that the plaintiff, by the defendant's wrongful act, has had a benefit in possession wrested from him, and converted into a bare right to be enforced by action.
(*k*) The declaration alleged, that by reason of the defendant's false and slanderous words, one *J. B.* refused

(A) (Proof that the plaintiff was refused civil treatment at a public house, in consequence of slanderous words, it seems is sufficient to support an averment of special damage. *Olmstead* v. *Miller*, 1 Wend. R. 506; *Fox* v. *Vanderbeck*, 5 Cow. 513. And evidence that the plaintiff has been deprived of the hospitality of her friends, is sufficient to support the allegation of special damage. *Williams* v. *Hall*, 19 Wend. R. 305.)

[1]Eng. Com. Law Reps. xii. 89. [2]*Id.* xxxiv. 472. [3]*Id.* xxxiv. 594.

Where the reason which a party assigned for not employing the plaintiff was founded *partly* on the defendant's words, and partly on the circumstance that he had been previously discharged by another master; it was held that no action was maintainable (*l*).

Where the defendant libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged, as special damage, that his oratorios had in consequence been more thinly attended, it was held by the Judge at the trial that the injury was too *638 remote (*m*), and that it did not appear but that the refusal to perform arose from caprice or indolence.

The plaintiff having once recovered damages, cannot afterwards recover any ulterior compensation for any loss resulting from the same words (*n*).

By the rules H. T. 4 W. 4, in actions on the case "not guilty" shall operate only as a denial of the breach of duty or wrongful act charged, and not of facts in the inducement. In an action of slander of a plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged. All matters in confession or avoidance, shall be pleaded as in *assumpsit*.

5thly. The defendant may, under the general issue, give in evidence any matter which tends to disprove either the speaking of the words, or the publication of the libel (1); or to bar the action or rebut the evidence of malice (*o*) (A), or of special damage. He may prove under this issue, in bar of the action, that the publication was made by the defendant as a member of Parliament, in the course of his duty as such (*p*) (2), or as a

Proof in defence.

to trust the plaintiff; and the evidence was, that the words were spoken to one *E. B.*, who of his own accord repeated the words to *J. B.* without any authority from the defendant; held that a nonsuit was proper. *Ward* v. *Weeks*,[1] 7 Bing. 211. And see *M'Pherson* v. *Daniels*,[2] 10 B. & C. 263, overruling the 4th resolution in *Lord Northampton's Case*, 12 Co. 134.

(*l*) 8 East, 1. (*m*) Lord Kenyon, *Ashley* v. *Harrison*, 1 Esp. C. 48.

(*n*) B. N. P. 7.

(*o*) The defendant may, in general, show under the general issue that the communication was privileged by the occasion. *Lillie* v. *Price*, 5 A. & B. 645. *Stockdale* v. *Hansard*,[3] 7 C. & P. 731. *Pattison* v. *Jones*,[4] 8 B. & C. 578. *Blake* v. *Pilford*, 1 Mo. & R. 198. *Fairman* v. *Ives*,[5] 5 B. & A. 644.

(*p*) See 4 Hen. 8, c. 8, and the declaration of the Bill of Rights, 1 Will. & Mary, stat. 2, c. 2; 1 Bl. C. 164. But the privilege does not extend to a publication out of Parliament. *R.* v. *Ld. Abingdon*, 1 Esp. C. 226. *R.* v. *Creevey*, 1 M. & S. 273.

(A) (See *Gill* v. *Bright*, 6 Munr. 130. *Pegram* v. *Styron*, 1 Bailey, 595. The defendant may show that the design was to impute only a breach of trust and no felony. *Brite* v. *Gill*, 2 Munr. 66.)

(1) [The defendant may show that the words, though in themselves actionable, were explained by a reference to a particular known transaction, not amounting to the charge which the words would otherwise import, and thus not furnishing a ground of action. *Van Rensselaer* v. *Dole*, 1 Johns. Cas. 279. S. P. *Edie* v. *Brooks*, Sup. Ct. of Pennsylvania, May 1814. Wharton's Digest, 555, 566. *Shecut* v. *Dowell*, 1 Const. Rep. 35. *Thomson* v. *Bernard*, 1 Camp. 48.]

(2) [A member of either house of the legislature is not answerable for words uttered in the execution of his official duty, although they are spoken maliciously. And the privilege of free deliberation, speech, and debate, secured to members of the legislature by the constitution of Massachusetts, exempts them from legal liability for everything said or done by them in the exercise of the functions of their office, whether the exercise be regular according to the rules of the branch of which they are members, or irregular and against such rules. So this privilege protects all words officially spoken without the walls of the house to which a member belongs—either in a convention of the two houses, or in a committee, while executing the commission of the house then in session; and the house is in session, notwithstanding occasional adjournments for short intervals. But a member of the legislature is answerable for defamatory words uttered maliciously, and not in discharging the functions of his office, though uttered within the walls of the house of which he is a member. And he cannot be in the exercise of his official functions, as a member of a body, unless that

[1]Eng. Com. Law Reps. xx. 104. [2]*Id.* xxi. 69. [3]*Id.* xxxii. 707. [4]*Id.* xv. 303. [5]*Id.* vii. 220.

Judge (*q*), juror, witness (*r*), or party, in the course of a judicial proceeding (*s*) (A), whether civil or criminal (*t*), even although the Court wanted jurisdiction (*u*), and, as it seems also, where the process was improper (*x*); or upon an application made in the usual course to a magistrate or peace officer (*y*); or in the course of offering a petition to the King (*z*), or Parliament (*a*), or to a committee of the House of Commons appointed by the Commons to hear and examine grievances (*b*); or Secretary at War (*c*) (B),

(*q*) *Jekyll* v *Sir John Moore*, 2 N. R. 341. *R.* v. *Skinner*, Lofft, 55.

(*r*) 2 Ins. 228; 2 Roll. R. 198; Pal. 144; 1 Vin. Ab. 387; Cro. Eliz. 230. *Brodie's Case*, Palm. 144. *Harding* v. *Bulman*, 1 Brownl. 2.

(*s*) *Astley* v. *Young*, 2 Burr. 807; Cro. Jac. 432. The rule extends to the case of *scandalum magnatum*. See *Beauchamp* v. *Sir R. Croft*, Dyer, 285. And see in Starkie on Libel and Slander; and *Weston* v. *Dobniet*, Cro. J. 432. [*Hardin* v. *Comstock*, 2 Marsh. (Ken.) R. 481.] *Ram* v. *Lamley*, Hutt. 113.

(*t*) 3 Bl. Com. 126; 10 Mod. 210, 219, 220; Str. 691. The remedy is by an action on the case for a malicious prosecution, or perhaps by indictment, where the jurisdiction of the Court has been abused by a malicious prosecution. Haw. P. C. c. 73, s. 8; 1 Will. Saund. 132.

(*u*) *Buckley* v. *Wood*, 4 Co. 14.

(*x*) 1 Vin. Ab. 389; 2 Lutw. 1571; *contra*, *Buckley* v. *Wood*, 4 Co. 14.

(*y*) *Ram* v. *Lamley*, Hutt. 113. See also *Barbaud* v. *Hookham*, 5 Esp. C. 109; *Johnson* v. *Evans*, 3 Esp. C. 32.

(*z*) *Hare* v. *Meller*, 3 Lev. 169; see also 4 Rep. 14.

(*a*) See the resolution of the House of Commons in *Kemp* v. *Gee*, 9 Feb. 8 Will. 3, in which it was declared, that all petitions to the House of Commons were lawful, or at least punishable by themselves only.

(*b*) *Lake* v. *King*, 1 Saund. 131; Lev. 241; 1 Mod. 58: Sid. 414.

(*c*) The defendant wrote a letter to the Secretary at War, with intent to prevail upon him to grant his authority to compel the plaintiff, an officer in the army, to pay the defendant a debt due to him, and not for the purpose of slander; and although the letter contained expressions derogatory of the plaintiff's character, yet it was held that the defendant might go into evidence, under the plea of the general issue, to prove the truth of the facts which he had stated, in order to show that he had acted *bona fide*. *Fairman* v. *Ives*,[1] 5 B. & A. 642; and see *R.* v. *Baillie*, Bac. Ab. tit. Libel, A. 2.

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body be in session. *Coffin* v. *Coffin*, 4 Mass. Rep. 1. {See 3 Pick. Rep. 314, 315.} It is, however, no justification of a charge against a town officer of misconduct in his office, that it was made in open town meeting, by an inhabitent of the town, while animadverting on such officer's conduct relative to a subject then before the town, in which the defendant was interested as a qualified voter. *Dodds* v. *Henry*, 9 Mass. Rep. 262.]

(A) (Words charging a witness with perjury, uttered by a party or his counsel, in the course of a trial, may or may not be actionable, accordingly as they were or were not spoken maliciously; were or were not pertinent to the issue; as there was or was not colour for making the imputation; or as they were or were not spoken with a design to slander the witness, &c. *Ring* v. *Wheeler*, 7 Cow. R. 725. The privilege of a party is the same on such an occasion as that of counsel. And if either of them speak slanderous words of a witness or party, impertinently and without proper cause, an action of slander lies. Ib. See also *Torrey* v. *Field*, 10 Ves. R. 353. [Great allowance is to be made for what a man says when attending the trial of his own cause. He has a right to the utmost freedom in communicating his sentiments to his counsel, or the court; but he may not make this privilege a cover for malicious slander. *Vigours* v. *Palmer*, 1 Browne's Rep. 40. *Swearingen* v. *Birch*, 4 Yeates, 322.

Where a party in court said to a witness, who had just finished his testimony, "you have sworn to a manifest lie;" the words were held actionable in Pennsylvania. *Kean* v. *M'Laughlin*, 2 Serg. & Rawle, 469. So in New York, to say to a witness, while giving his testimony to a material point in a cause, "that is false," is actionable, if spoken maliciously. *Mower* v. *Watson*, 11 Ves. R. 536. *M'Claughry* v. *Wetmore*, 6 Johns. 82. But in New Jersey, if a party in the progress of the trial, and in open court, speaking of the testimony of a witness, say "it is a lie and I can prove it," it is not actionable. *Badgley* v. *Hedges*, 1 Penn. Rep. 233. See *Steele* v. *Southwick*, 9 Johns. 214.

If a party, in the course of his argument say that he will prove the testimony of the other to be false, he will not be liable, although he fail in the proof. *Kean* v. *M'Laughlin*, ubi sup.

If an attorney introduce slanderous matter into the pleadings of a cause, without the direction of his client, the latter is not responsible. *Hardin* v. *Cumstock*, 2 Marsh. 481.

Words spoken of the plaintiff by the defendant, before a Presbytery of the Presbyterian Church, in the course of his defence against charges for which he had been cited there by the plaintiff, are not actionable, if he do not designedly and maliciously wander from the point, for the purpose of slander. *M'Millan* v. *Birch*, 1 Binney, 178. See Mr. Howe's *note* to *Fowler & ux.* v. *Homer*, 3 Camp. 296].)

(B) (A memorial presented to a board of excise, remonstrating against the granting of a license to a particular individual to keep a tavern, charging him with stirring up justices' suits, with the view of having the causes tried at his tavern, is a privileged communication; and no action lies as for the publication of a libel, unless express malice be proved. *Vandergee* v. *M'Gregor*, 12 Wend. R. 545. The circulation of the memorial, for the purpose of obtaining signatures therein, is within the privilege. *Ib.* Where words which might otherwise be libellous are contained in a remonstrance which a citizen has a right to present to a public au-

[1] Eng. Com. Law Reps. vii. 220.

or other person or authority supposed to have the *means of granting redress for any real or supposed grievances (*d*) (A). But the defence would fail if it appeared that the mode or extent of the publication was not warranted by the usual course of proceeding in such cases.

In the case of *Lake* v. *King*, the main question was not whether the exhibiting the petition to Parliament was lawful, or not, but whether the defendant was warranted in printing his petition, and delivering copies to members of a committee of the House of Commons; and it was decided for the defendant, on the ground that such a publication was according to the order and course of proceeding in Parliament (*e*). It follows, that had he practised a mode of publication unwarranted by the usual course of proceeding, or by the necessity of the case, this defence would not have availed him (*f*).

(*d*) As to the postmaster-general, *Woodward* v. *Lander*,[1] 6 C. & P. 548; and see *Blake* v. *Pilfold*, 1 M. & R. 198; and see *Flint* v. *Pike*,[2] 4 B. & C. 484; 1 B. & A. 245, n.

(*e*) 1 Lev. 241; 1 Mod. 58; Sid. 414; of which, it was said, the Court would take notice.

(*f*) Ibid.; and see *Browne* v. *Croome*,[3] 2 Starkie's C. 297.

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thority, malice must be proved by the plaintiff, and unless it be proved the action is not maintainable, although the allegations are shown to be false. *Flitcraft* v. *Jenks*, 3 Whart. 158. Privileged communications are *prima facie* excusable from the cause or occasion of the speaking or writing; but even in the cause of such communications an action will lie, if the party making the communication knows the charge to be false, and adopts that mode of gratifying his ill-will or malice. In such case, however, actual malice must be shown, and the question will be submitted to a jury; in ordinary slander, the question of malice is never submitted to a jury, except as to the amount of damages. *King & Verplanck* v. *Root*, 4 Wend. R. 113; but a publication by the editors of a newspaper affecting the character of a candidate for public office, is not a privileged communication relieving the publishers from the necessity of proving the truth of the charges made in order to shelter themselves from damages, and casting the *onus probandi* upon the party slandered of showing actual malice or a knowledge of the falsity of the charge. *Ibid.* So evidence may be given that the libel was posted in public places by persons unknown: the presumption of law being, that such person acted at the solicitation, and by the procurement of the defendant. *Rice* v. *Withers*, 9 Wend. R. 138.

[No action will lie for words contained in a petition for redress of grievances, whether the subject-matter of the petition be true or false, simply on its being preferred to either branch of the legislature, or disclosed to any of its members. *Harris* v. *Huntington & al.* 2 Tyler, 129. Hence charges alleged against the plaintiff, and addressed to the legislature of Vermont, for the purpose of preventing his reappointment to the office of justice of the peace, were held to be actionable, and judgment was arrested. Ibid. 1 Tyler, 164. So where false charges were preferred to the council of appointment, in New York, against a public officer, praying for his removal from office, it was held that no action would lie, *unless* the petition were proved to be malicious and groundless, and presented merely to injure the plaintiff's character—and as it seems, no actions would lie, whether the statement in the petition were true or false, or the motives innocent or malicious. *Thorn* v. *Blanchard*, 5 Johns. 508, in the Court of Errors, reversing the judgment of the Supreme Court against the opinion of the Chancellor. In Pennsylvania, however, accusations preferred to the governor against the character of public officers, are held to partake of the nature of judicial proceedings, and are actionable, if they originate in malice and are without probable cause—of which the jury are to judge. *Gray* v. *Pentland*, 2 Serg. & Rawle, 22. *Same parties*, 4 ib. 420. [And the rule has been held applicable, in Massachusetts, to the case of a letter from an inhabitant of a school district to the school committee accusing the schoolmistress of a want of chastity, the school committee having competent authority to redress the grievance complained of. *Bodwell* v. *Osgood*, 3 Pick. Rep. 379.] And the burden of proving malice and want of probable cause is on the plaintiff, as in an action for malicious prosecution. 4 Serg. & Rawle, *ubi sup.*

It is no justification, that the defendant signed a libellous address as chairman of a public meeting of citizens convened for the purpose of deciding on a proper candidate for the office of governor, at an approaching election, and that it was published by order of such meeting—although the plaintiff was a candidate whose election the address was intended to thwart. *Lewis* v. *Few*, 5 Johns. 1.]

On an indictment or information for a libel on public officers or candidates for office, the truth of any matter tending to show that the person libelled is unfit for the office, is a justification, and may be given in evidence as such, under the general issue. In other cases, the truth is no justification, but may be received in mitigation of the fine, nor is it necessary or proper to plead it. If the libel complained of is contained in a petition to the legislature, the truth may be given in evidence in justification. *Commonwealth* v. *Morris*, 1 Virg. Cas. 106. Words spoken of a candidate for office whereby he loses his election, are not actionable, unless the words were actionable in themselves. *Brenner* v. *Weakley*, 2 Tenn. R. 99. And words to be actionable, if uttered against official persons, must relate to past conduct, implying criminality or moral turpitude, and not to the prospect of future misconduct in office. *Hogg* v. *Dorrah*, 2 Porter, 212.)

(A) (See *Goodenan* v. *Tappan*, 1 Ohio R. 60.)

[1]Eng. Com. Law Reps. xxv. 53. [2]*Id.* x. 380. [3]*Id.* iii. 353.

So it is a bar to the action that the words suggesting particular facts, though false, were spoken by the defendant in the course of his duty as an advocate, provided they were *pertinent to the subject*, and were *suggested by the client* (*g*). And it will, it seems, be presumed till the contrary appear, that the fact was suggested in the brief (*h*). And no comment by the advocate upon the facts proved in evidence, or epithets used in commenting upon those facts, if the observations relate to the cause, will be actionable (*i*).

Where the alleged libel consists in a faithful report of a judicial proceeding, and the occasion, in point of law, amounts to a justification, doubt has been entertained whether it would be evidence under the general issue (*k*). But it is by no means a general rule, that even a correct report of parliamentary (*l*) or judicial proceedings (*m*) will furnish a legal defence to an action or indictment (1).

An *ex parte* statement of a criminal proceeding before a magistrate (*n*)
*640 *or coroner (*o*) cannot be justified, for such publications tend to deprive the accused of the benefit of a fair and impartial trial. So the publication of such an account will not be justifiable, if it contain matter of a scandalous, blasphemous, or indecent nature (*p*).

In general, in all cases where the real intention of the defendant is the test of civil liability, that is, as it seems, in all cases where the defendant made the communication upon a fair and honest occasion, with a view to benefit himself or others, but where the circumstances are not such as to furnish an absolute bar, independently of the question of malice, the defence not only may, but must, be given in evidence under the general issue; to plead the defence specially, would be to remove the question of actual malice from the consideration of the jury.

The defendant may therefore prove under the general issue, that the words were spoken or written for the purpose of admonition or advice (A),

(*g*) *Brook* v. *Sir Henry Montague*, Cro. J. 90. *Hodgson* v. *Scarlett*, 1 B. & A. 232.

(*h*) *Wood* v. *Gunston*, Styles, 462.

(*i*) *Hodgson* v. *Scarlett*, 1 B. & A. 232. As to mere words of opinion, see Com. Dig. Action on the case for Defamation, F. 13.

(*k*) *Currie* v. *Walter*, 1 B. & P. 525, where such evidence was admitted under the general issue; but after a verdict for the defendant, it was objected, on motion, that such evidence had been improperly received under that issue; but the case stood over, and no judgment was ever given. In the subsequent cases of *Astley* v. *Yonge*, 2 Burr. 807, and *Styles* v. *Nokes*, 7 East, 493, the defence was pleaded specially. So also in *Lewis* v. *Clement*,[1] 3 B. & A. 702. See also *Lewis* v. *Walter*,[2] 4 B. & A. 613. *R.* v. *Wright*, 8 T. R. 298. *R.* v. *Fisher*, 2 Camp. 563. *Styles* v. *Nokes*, 7 East, 504. *Roberts* v. *Brown*,[3] 10 Bing. 523. It should seem that the defence, where available, is admissible under the general issue, as either excluding altogether the right to maintain the action, or as negativing malice by showing a privileged occasion.

(*l*) *R.* v. *Creevey*, 1 M. & S. 273.

(*m*) See the observations of Ld. Ellenborough, C. J. and Grose, J. in *Styles* v. *Nokes*, 7 East, 493; and *R.* v. *Creevey*, 1 M. & S. 273. See *R.* v. *Lofield*, 2 Barnard, K. B. 128; and *qu.* whether the defendant can justify the publication of a judicial proceeding, which is defamatory, of one who is not a party to the suit, nor present at the inquiry. *Lewis* v. *Clement*,[1] 3 B. & A. 702.

(*n*) *R.* v. *Lee*, 5 Esp. C. 123. *R.* v. *Fisher*, 2 Camp. 563. Where a newspaper professed to give a statement of proceedings before a magistrate, it was held that the insertion of libellous remarks purporting to have been made by persons present, could not be justified. *Delegal* v. *Highley*,[4] 8 C. & P. 444.

(*o*) *R.* v. *Fleet*, 1 B. & A. 379. Or before a royal commissioner, *Charlton* v. *Walton*,[5] 6 C. & P. 385.

(*p*) *R.* v. *Mary Carlile*,[6] 3 B. & A. 167.

(1) [A correct publication of the proceedings of a court of justice is not an indictable offence, unless it is intended to serve as a vehicle to convey slanderous charges, and to gratify a malicious purpose; in which case it is libellous and indictable. *The State* v. *Lehre*, 2 Const. 809. But if the publisher discolour or garble the proceedings, or add comments and insinuations of his own, in order to asperse the character of the party concerned, it is libellous and actionable. *Thomas* v. *Croswell*, 7 Johns. 964. *Common* v. *Blanding*, 3 Pick. 304. See *Clark* v. *Binney*, 2 Pick. 113.]

(A) (See *Faris* v. *Starke*, 9 Dan. 130.)

[1]Eng. Com. Law Reps. v. 427. [2]*Id.* vi. 535. [3]*Id.* xxv. 635. [4]*Id.* xxxiv. 472. [5]*Id.* xxv. 450. [6]*Id.* v. 252.

or in giving the character of a servant (*q*), in order to bring an offender to justice (*r*), or by way of criticism on a literary work (*s*).

The defendant may also prove, by way of defence, under the general issue, that the publication was procured by the contrivance of the plaintiff, for the purposes of the action (*t*), for the latter cannot complain of that as an injury which he has willingly occasioned. The truth of the publication is not admissible in evidence under the general issue in bar of the action, even to disprove malice (*u*) (A); proof that the plaintiff has been in the habit of libelling the defendant is no bar to the action, but is, it has been said, evidence in mitigation of damages (*x*) (B). It seems, however, that the defendant cannot, even in mitigation, prove that the plaintiff has published libels upon him, unless they constituted the provocation for publishing the principal libel (*y*). General evidence that the plaintiff has been in the habit of libelling the defendant is, it seems, almost inadmissible (*z*).

The defendant may also prove accord and satisfaction under this issue. The plaintiff had agreed to waive his right of action, in consideration that *defendant would destroy certain documents, which the defendant accordingly did, and evidence of this was held to be admissible as an accord and satisfaction under the general issue (*a*). *641

Although, in the ordinary action for slander, the defendant cannot, under

(*q*) *Edmonson* v. *Stevenson*, B. N. P. 8. *Weatherstone* v. *Hawkins*, 1 T. R. 110. *Rogers* v. *Clifton*, 3 B. & P. 587. *King* v. *Waring and ux.* 5 Esp. C. 13. *Childs* v. *Affleck*,[1] 9 B. & C. 403. Ld. Alvanley, in *Rogers* v. *Clifton*, 3 B. & P. 592, says, "I do not mean to intimate that if a servant were strongly suspected of having committed a felony while in his master's service, he is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." And see the observations of Bayley, J. in *Pattison* v. *Jones*,[2] 8 B. & C. 578.

(*r*) *Johnson* v. *Evans*, 3 Esp. C. 32.

(*s*) *Carr* v. *Hood*, 1 Camp. C. 354. *Tabart* v. *Tipper*, 1 Camp. C. 350. *Dunne* v. *Anderson*,[3] 3 Bing. 88. *Soane* v. *Knight*,[4] 1 M. & M. 64. *Thompson* v. *Shackell*,[5] Ib. 187.

(*t*) *King* v. *Waring & ux.* 5 Esp. C. 13. See *Weatherstone* v. *Hawkins*, 1 T. R. 110, where the letter was written on the application of the plaintiff's brother-in-law, and the writ was sued out the day after the letter was written, and the Court held that the action was not maintainable, the plaintiff having been entrapped into writing it. See also *Smith* v. *Wood*, 3 Camp. 323, where the defendant showed to the witness, at the request of the latter, a caricature of the plaintiff, and it was held that this was not sufficient to support the action; *tam. qu.* for it does not appear that the witness had been sent by the plaintiff.

(*u*) *Underwood* v. *Parkes*, Str. 1200.

(*x*) *Finnerty* v. *Tipper*, 2 Camp. 76. See *Pasquin's Case*, Ibid. and *Tabart* v. *Tipper*, 1 Camp. 355.

(*y*) *May* v. *Brown*,[6] 3 B. & C. 113. *Watts* v. *Fraser*,[7] 7 A. & E. 223; having come to his knowledge before the libel in question. Ib.

(*z*) *Finnerty* v. *Tipper*, 2 Camp. 76. *Wakley* v. *Johnson*,[8] 1 Ry. & M. 422. *Turpley* v. *Blakey*, 2 Bing. N. C. 473. But see *May* v. *Brown*,[6] 3 B. & C. 113.

(*a*) *Lane* v. *Applegate*,[9] 1 Starkie's C. 97.

(A) (*Territory* v. *Urgent*, 1 Mart. R. 103.)

(B) (It is not admissible to prove in a mitigation of damages that previous to speaking the words the plaintiff was in the habit of abusing and vilifying the defendant; *Goodbrend* v. *Ledbetter*, 1 Dev. & B. 12 [M'Alexander]; nor that it was known in the neighbourhood that there had been a quarrel between the parties. *Swann* v. *Ram*, 3 Blackf. 298. If the plaintiff has provoked the defendant by injurious acts or disparaging epithets that might be some palliative, but the mere fact that the plaintiff was the defendant's enemy, would *prima facie* have rather an opposite tendency, and the defendant may give evidence of that fact. *Craig* v. *Cutlet*, 5 Dana, 323. The defendant may mitigate damages by showing the plaintiff a common libeller, but it must be done in the same way that a general reputation is proved. *Maynard* v. *Beardsley*, 7 Wend. R. 560.

[In an action for a libel, the defendant may give in evidence a former publication by the plaintiff, to which the libel was an answer, to explain the subject-matter, occasion and intent of the defendant's publication, and in mitigation of damages. But such prior publication by the plaintiff, though a libel on the defendant, does not amount to a justification. *Hotchkiss* v. *Lathrop*, 1 Johns. 286. S. P. *Thompson* v. *Boyd*, 1 Rep. Con. Ct. 80.])

[1]Eng. Com. Law Reps. xvii. 405. [2]*Id.* xv. 303. [3]*Id.* xi. 43. [4]*Id.* xxii. 255. [5]*Id.* xxii. 287. [6]*Id.* x. 24. [7]*Id.* xxxiv. 82. [8]*Id.* xxi. 480. [9]*Id.* ii. 312.

the general issue, give evidence of the truth of the defamatory charge (*b*) (A), it is otherwise in special actions, where malice and the want of probable cause are of the essence of the action. For there to adduce such evidence is but to rebut that which is essential to the maintenance of the action. Thus in an action for slander of title, where the slander consists in alleging that the plaintiff had encroached on his landlord's land, the defendant may prove that encroachments have in fact been made (*c*).

In mitigation. The defendant may under the general issue prove in mitigation of damages, that the plaintiff at the time of the publication laboured under a general suspicion of having been guilty of the charge imputed by the words (*d*) (B). For it is material to know what character the plaintiff possessed, in order to ascertain the injury which has been sustained (*e*).

(*b*) In the case of *Stockley* v. *Clement*,[1] 4 Bing. 162, where the alleged libel was contained in a public advertisement, relating to a forged bill of exchange, the defendant was allowed to go into evidence of the fact stated under the general issue; but in that case the Court held that it was no libel on the plaintiff. In an action for a libel against an officer of a court of justice, imputing negligence, the defendant cannot under the general issue prove negligence, in order to negative the general allegation of performance of duty. *Dance* v. *Robson*,[2] 1 M. & M. 295. But in an action for a libel on the plaintiff in the way of his trade as a manufacturer of bitters, which trade it was averred he carried on in an honest and lawful manner; it was held that, under the general issue the defendant might give in evidence that the plaintiff, under the pretence of manufacturing bitters, made and sold a composition of a very different description, not by way of justification of the libel, but as to the truth of the plaintiff's allegation as to his trade. *Manning* v. *Clements*,[3] 7 Bing. 362, and 5 M. & P. 211.

(*c*) *Watson* v. *Reynolds*,[4] 1 M. & M. 1; and see *Hargreave* v. *Le Breton*, 4 Burr. 2422. *Smith* v. *Spooner*, 3 Taunt. 246. *Pitt* v. *Donovan*, 1 M. & S. 639. Starkie's L. L. vol. 2, p. 103, 2d edit. In the case of *Pattison* v. *Jones*,[5] 8 B. & C. 578, which was an action by a servant against a master, for defamation, in professing to give a character, Lord Tenterden, C. J., received evidence on the part of the defendant to show the truth of the statement contained in the alleged libel, of drunkenness, &c.; but is said to have expressed doubts whether such evidence was admissible under the general issue, and left the matter to the jury, on the question whether the communication had been made *bona fide*.

(*d*) *Earl of Leicester* v. *Walter*, 2 Camp. 251, cor. Mansfield, C. J. —— v. *Moor*, 1 M. & S. 284. Note, that in these cases there were general allegations of the plaintiff's previous good character, and of the loss of character sustained by reason of the words; and the words were actionable *per se*.

(*e*) *Supra*, note (*d*); and *Williams* v. *Callender*, Holt's C. 307; *Rodriguez* v. *Tadmire*, 2 Esp. C. 720; where, on an action for a malicious prosecution, Lord Kenyon allowed the defendant's counsel to ask whether the plaintiff was not a man of general bad character. And see the observation of Wood, B. in *Newsam* v. *Carr*,[6] 2 Starkie's C. 70. And see *Ellershaw* v. *Robinson*, Lanc. Sp. Ass. 1824, Starkie's L. Libel, 90, 2d edition; which was an action for words imputing adultery to the plaintiff, a widow, Holroyd, J., held that it would be competent to the defendant to go into general evidence to impeach the plaintiff's general character for chastity. See also *Eamer* v. *Merle*, cited in *The Earl of Leicester* v. *Walter*, 2 Camp, C. 254. —— v. *Moor*, 1 M. & S. 284. It is not, however, competent to the defendant, in such cases, to do more than give *general* evidence of bad character; he cannot inquire as to particular facts. *Waithman* v. *Weaver*,[7] 1 D. & R. 10. *Rodriguez* v. *Tadmire*, 2 Esp. C. 720. But in the case of *Jones* v. *Stevens*, 11 Price, 235, which was an action for a libel on the conduct of the plaintiff as an attorney, where the defendant pleaded the general issue, and several pleas of justification, which alleged in general terms that the plaintiff had conducted himself in a disreputable and unprofessional manner: it was held that a witness could not be asked whether the plaintiff was of general bad character and repute in his profession. It is said to have been held by Chambre, J., (*Snowden* v. *Smith*, Devon Lent Assizes, 1811) that where a justification was pleaded, such general evidence was not admissible. But the ground of distinction is not very clear; and in the case of *Mawby* v. *Barber*, Lincoln Summer Assizes, 1826, Lord Tenterden, C. J., admitted such evidence, as being the safer course, although a justification was pleaded. Vide *supra*, note (*e*). Such evidence was also received by Lord Denman, C. J., after consulting Parke, B., in the case of *Moore* v. *Oastler*, York Sp. Ass. 1836, where the defendant was allowed to give such general evidence, but not to go into particulars; and by Coltman, J., in the case of *Hardy* v. *Alexander*, Liv. Summ. Ass. 1837. See Roscoe on Ev. 398.

(A) (*Root* v. *King*, 7 Car. 613. *Kennedy* v. *Dean*, 6 Porter, 90. *Arrington* v. *Jones*, 9 Porter, 139. *Bodwell* v. *Swan*, 3 Pick. 376. *Bailey* v. *Hyde*, 3 Conn. R. 463.)

(B) (The general rule of law is, that general reports of the truth of the matters charged cannot be given in evidence in mitigation of damages unless they be such as to have affected the general character of the plaintiff. *Inman* v. *Foster*, 8 Wend. 602. *Mapes* v. *Weeks*, 4 Id. 659. *Treat* v. *Browning*, 4 Conn. R. 408. *Lewis* v. *Niles*, 1 Root, 346. *Kennedy* v. *Gifford*, 19 Wend. 296. *Kendrick* v. *Kemp*, 6 Mart. N. S. 501. *Long* v. *Brougher*, 5 Watts, 439. *Matson* v. *Buck*, 5 Cow. 499. *Kellogg* v. *Carey*, 3 Penn. R. 102. *Smith* v. *Buckecker*, 4 Rawle, 195. *Alderman* v. *French*, 1 Pick. 1. {*Bodwell* v. *Swan*, 3 Pick. 376.} *Wolcott*

[1] Eng. Com. Law Reps. xiii. 390. [2] *Id.* xxii. 311. [3] *Id.* xx. 161. [4] *Id.* xxii. 231. [5] *Id.* xv. 303. [6] *Id.* iii. 249. [7] *Id.* xiv. 412.

*It has been said that any evidence short of such as would be a complete defence to the action, had a justification been pleaded, is admissible, in mitigation of damages (*f*); and accordingly in an action for a libel, charging the plaintiff with being concerned with one Knowles in procuring money from the friends of a capital convict, under the pretence of being able to procure a pardon, through the medium of the Duke of Portland, evidence was admitted, under the plea of the general issue, of an admission by the plaintiff that he had received money for conveying a letter to the Duke (1).

(*f*) *Knobell* v. *Fuller*, sittings after Trin. T. 1797, per Eyre, C. J.; and the case of *Curry* v. *Walter* was referred to, in which it was said that his lordship had received similar evidence; but it seems that in that case the evidence was received in bar of the action, and to show that the defendant had merely published a report of proceedings in a court of justice.

v. *Hall*, 6 Mass. Rep. 514. *Aliter*, in New Jersey. 1 Penn. Rep. 169, *Cook* v. *Barkley*—one judge dissenting. And see *Nelson* v. *Evans*, 1 Dev. 9. *Henson* v. *Veatch*, 1 Blackf. 369. Evidence of the general character of the plaintiff, or of the opinions of others as to the truth of the charge, is inadmissible, if in the publication the defendants state what they publish as facts within their own knowledge, without reference to the opinions of others. *King et al.* v. *Root*, 4 Wend. 113. Proof of any other than the crime charged cannot be given in evidence either in bar of the action or in mitigation of damages. *Ridley* v. *Perry*, 16 Shepley, 21. A witness cannot be asked if he has heard anything derogatory of the plaintiff. *Freeman* v. *Price*, 2 Bailey, 115. Where the witnesses for the plaintiff, and one of the defendant's witnesses, swore that the words charged assistance in burning a gaol, and murdering a man in it, and the defendant's other witnesses, present at the same time, swore the charge was of simply aiding an escape, held that evidence of the plaintiff being generally suspected of the latter was inadmissible either as corroborating the witnesses who swore to the words or in mitigation of damages. *Cole* v. *Perry*, 8 Cow. 214. It is not competent for a defendant in mitigation of damages in an action of slander, to give evidence of facts and circumstances which induced him to suppose the charges true at the time they were made, if such facts and circumstances tend to prove the charges, or form a link in the chain of evidence to establish a justification, and he is not allowed to give such evidence, although he expressly disavows a justification, and fully admits the falsity of the charge. *Purple* v. *Horton*, 13 Wend. 9. Nor that the people of the neighbourhood were in the habit of speaking in opprobrious language of the plaintiff. *Kendricks* v. *Kemp*, 6 Mart. N. S. 501. In an action for a libel, the publication in a newspaper of rumours cannot be justified by the fact that such rumours existed, though it may be given in evidence in mitigation of the damages. *Skinner* v. *Powers*, 1 Wend. 451. A charge of misconduct of a specified kind is not justified by proving the plaintiff guilty of misconduct of a similar character. *Ib.* In slander, under the plea of not guilty, the defendant cannot give evidence of the plaintiff's admissions several years before of his having been guilty of an offence similar to the one imputed to him by the defendant. *Long* v. *Crougher*, 5 Watts, 439. In an action for slander against husband and wife, evidence of the husband's efforts to prevent the circulation of the slander is not admissible in mitigation of damages. *Yeates* v. *Reed*, 4 Blackf. 463. In an action by husband and wife for a slander imputing a want of chastity to the wife, evidence that they lived unhappily together, or that the husband had whipped his wife, is inadmissible. *Anon.* 1 Hill, 251.

[In Kentucky, the general currency of a report is not a justification of slander; but evidence of general reputation is admissible in extenuation of malice and mitigation of damages. *Calloway* v. *Middleton*, 2 Marsh. 372.

Where the defendant, at the time of speaking the words, knows they are not true, and afterwards, with the same knowledge, pleads their truth in justification; no evidence whatever ought to be received in mitigation of damages. *Larned* v. *Buffington*, 3 Mass. Rep. 546.

In Virginia, evidence of circumstances of suspicion, not amounting to a full justification, is not admissible under the general issue, in mitigation of damages. *M'Alexander* v. *Harris*, 6 Munf. 465. (See *Cheatwood* v. *Mayo*, 5 Munf. 16, where this point was discussed but not decided.) *Secus*, in South Carolina and Connecticut; *Buford* v. *M'Luny*, 1 Nott & M'Cord, 268. *Bailey* v. *Hyde*, 3 Conn. Rep. 463].

(1) [In an action of slander for saying of the plaintiff, a deputy postmaster, that "he never sent from his office a treasury note," which had been enclosed in a letter and put into his office directed to a third person—but that "he had stolen it;" the defendant was not allowed, under the general issue, to prove, that before the speaking of the words, the plaintiff said, the "treasury note never left his office"—and that after speaking the words the plaintiff said "his brother J. S. was the author and first promulgator of the story." *Bailey* v. *Hyde*, 3 Conn. Rep. 436. In a suit for calling the plaintiff a thief, and saying that he had stolen the defendant's spar, the defendant cannot give in evidence, in mitigation of damages, the record of a former action of trespass, in which he had recovered damages against the plaintiff for maliciously taking away the spar. *Watson* v. *Churchill*, 5 Day, 256. In an action for a libel, the defendant cannot give in evidence, to reduce damages, a former recovery of damages against him, by the plaintiff, in another action for a libel which formed one of a series of numbers published in the same Gazette, and containing the libellous words charged in the declaration in the second suit. *Tillotson* v. *Cheetham*, 3 Johns. 56. Evidence of declarations by a defendant, made after suit brought, that he did not mean to charge the plaintiff with the actual fact, and that the words were spoken in the heat of passion, is not admissible under the general issue. *M'Alexander* v. *Harris*, 6 Munf. 465. Nor can the defendant show that he has been in the habit of relating the circumstances in a manner different

To admit such evidence would however be a violation of the rule established in *Underwood* v. *Parkes* (*g*), where it was agreed by all the Judges that evidence of the truth could not be admitted, either in bar of the action, or in mitigation of damages, unless it were pleaded. For if facts *tending* to prove the truth of the charge were to be admitted in mitigation of punishment, how would it be possible to draw the line, and stop short of actual conviction (*h*)?

General evidence of bad character seems to be admissible, although the defendant has justified that the imputation is true; for if the justification should fail, the question as to the quantum of damages would still remain (*i*) (A).

Where the defendant has in his libel referred to the source from which he derived the information, he may, although he has not justified, prove,

(*g*) Str. 1200; and see *Mullett* v. *Hulton*, 4 Esp. C. 248 [See *Coleman* v. *Southwick*, 9 Johns. 45.]

(*h*) See Starkie's L. L. vol. 2, p. 88, 2d ed.; and see *Mills* v. *Spencer*,[1] Holt's C. 534, where Gibbs, C. J., observed, that "general reports have been admitted in mitigation of damages, but not the specific facts." And it has since been held that a defendant is not at liberty to give evidence in mitigation of damages of any *fact* which would be evidence to prove a justification of any part of the libel; he ought to have justified as to that part. *Vessey* v. *Pike*,[2] 3 C. & P. 512.

(*i*) *Supra*, tit. CHARACTER.

in some essential respects, from that charged in the declaration—though he has first proved that such relation of the circumstances was true. *Wills* v. *Church*, 5 Serg. & Rawle, 190. Nor can he give in evidence, either in bar or in mitigation of damages, any other crime than the one charged. *Andrews* v. *Vanduzer*, 11 Johns. 38. *Sawyer* v. *Eifert*, 2 Nott & M'Cord, 511. In an action for charging the plaintiff with perjury, the defendant cannot give in evidence, for the purpose of reducing damages, that the plaintiff holds atheistical opinions, and disbelieves the existence of a future state of being. *Ross* v. *Lapham*, 14 Mass. Rep. 275.]

(A) (*Waters* v. *Jones*, 3 Porter, 442. *Vick* v. *Whitfield*, 2 Hayw. 222. *M'Nutt* v. *Young*, 8 Leigh, 542. In an action for a libel upon the plaintiff as a minister of the gospel, where the declaration avers the good character of the plaintiff, the defendant may, under the general issue, give evidence for the purpose of showing that the general character of the plaintiff is bad. *Henry* v. *Norwood*, 4 Watts, 347. [The Sup. Court of New York, in the case of *Foot* v. *Tracy*, 1 Johns. 45, were divided on the question whether in an action for a libel the defendant can give in evidence, under the general issue, the general character of the plaintiff, in mitigation of damages. It has, however, been since decided that such evidence is admissible, in an action for words spoken. *Paddock* v. *Salisbury*, 2 Cow. 811. See also *Springstein* v. *Field*, Anthon's N. P. 185. Similar decisions have been made in Connecticut, North Carolina, and South Carolina. *Brunson* v. *Lynde*, 1 Root, 354. *Seymour* v. *Merrills*, ibid. 459. *Austin* v. *Hanchet*, 2 Root, 149. *Vick* v. *Whitfield*, 2 Hayw. 222. *Bufford* v. *M'Luny* (two judges dissenting), 1 Nott & M'Cord, 268. *Sawyer* v. *Eifert*, 2 ib. 511. The same doctrine is held in Massachusetts, (*Larned* v. *Buffington*, 3 Mass. Rep. 546; *Wolvott* v. *Holl*, 6 ib. 514: *Ross* v. *Lapham*, 14 ib. 275). {*Bodwell* v. *Swan*, 3 Pick. Rep. 376.} Subject to the limitations mentioned *ante*, p. 469, note (1) where there has been an unsuccessful plea in justification. So also it seems in Kentucky. See *Calloway* v. *Middleton*. In Vermont this doctrine is rejected. *Smith* v. *Shumway*, 2 Tyler, 74, {and see as to Connecticut, *Stow* v. *Converse*, 4 Conn. Rep. 18.} See also *Jackson* v. *Stetson*, 15 Mass. R. 48. *Gilman* v. *Dowell*, 8 Wend. 573. But in an action of slander, proof of the bad character of the plaintiff, subsequent to the speaking of the words, is not admissible in evidence in mitigation of damages, although the character offered to be proved, is not of such a description that it could have been caused by a belief of the charge made by the defendant. *Douglass* v. *Tousey*, 2 Wend. 291. In slander for calling the plaintiff a whore, evidence that the plaintiff was reputed a thief, is not admissible either under the plea of justification, or under the plea of not guilty, with leave to give the special matter in evidence. *Smith* v. *Buckecker*, 4 Rawle, 295. And where the charge was felony, and the defendant neither pleaded or gave notice of justification, evidence that the charge related to a transaction in which, if the defendant was an actor, it by no means followed that he was innocent of the crime imputed to him, is inadmissible. *Laine* v. *Wells*, 7 Wend. 175. [The plaintiff may give in evidence his own rank and condition in life, for the purpose of enhancing damages. *Larned* v. *Buffington*, ubi sup. {*M'Almond* v. *M'Clelland*, 14 Serg. & R. 359}.] *Beehler* v. *Steever*, 2 Whart. 313. But he cannot give evidence of the size and strength of the defendant. Ibid. Nor [can the plaintiff give evidence of his having always sustained the reputation of an honest man, in order to rebut evidence adduced by the defendant to establish the truth of specific charges of official misconduct in the plaintiff. *Stow* v. *Converse*, 3 Conn. Rep. 325, {but he may, to repel evidence adduced by the defendant to justify a general charge of "having attempted to destroy all religious institutions," give in evidence certain subscription papers for the support of preaching, drawn up and circulated by himself, accompanied with proof of his having paid the money subscribed. *Stow* v. *Converse*, 4 Conn. Rep. 18.} Whether in an action for a libel, the plaintiff may show, for the purpose of enhancing damages, that the defendant had been indemnified for the publication?—*quære*. *Hotchkiss* v. *Lathrop*, 1 Johns. 286. *Dole* v. *Lyon*, 10 Johns. 447].)

[1]Eng. Com. Law Reps. iii. 177. [2]*Id.* xiv. 420.

under the general issue, in mitigation of damages, that he did in fact so receive the information (*k*). As where the libel refers to a newspaper as the medium of communication (*l*).

In a late case the defendant was allowed to inquire whether the witness had not read the substance of the alleged libel in a public newspaper (*m*).

The defendant is entitled to have the whole of the publication read from which the alleged libel is extracted (*n*).

*As the truth, when offered as a defence in bar of an action for slander or libel must be specially pleaded (*o*), the evidence of course must be governed by the specific allegations upon the record (A). There seems to be little, if any, difference between the evidence in proof of a specific charge thus involved in a civil proceeding, and the evidence which is essential to support an indictment for a similar charge (*p*). It may happen, indeed, that greater precision may be necessary in the former case than in the latter, and that a variance as to sums or magnitudes, which would not be fatal upon an indictment, would be so upon issue taken on a justification in slander; for there the defendant may, by the specific nature *643 Proof in justification.

(*k*) *Mullett* v. *Hulton*, 4 Esp. C. 248.

(*l*) Ibid.; and see *R.* v. *Burdett*,[1] 4 B. & A. 717. Where a libel in a newspaper purported to be a correct account of what took place on a coroner's inquest, a statement of what took place there was held to be admissible in mitigation of damages. *East* v. *Chapman*,[2] 1 M. & M. 46; [3]2 C. & P. 507. *Charleton* v. *Watson*,[4] 6 C. & P. 385. Where the defendant had published an imperfect account of a trial, which was libellous, he was allowed in mitigation under the general issue to show that he had copied the statement from another newspaper. *Saunders* v. *Mills*,[5] 6 Bing. 213. But in *Creevey* v. *Carr*,[6] 7 C. & P. 64, it was ruled that the defendant could not in mitigation of damages show that the libel had appeared in another newspaper, and that the plaintiff had recovered in an action against the proprietors; but he was allowed to show that it was copied with the omission of passages reflecting on the plaintiff.

(*m*) *Wyatt* v. *Gore*,[7] 1 Holt's C. 303; and *supra*, 641.

(*n*) *Cooke* v. *Hughes*,[8] R. & M. 112.

(*o*) *Smith* v. *Richardson*, Willes, 20; 1 Saund. 130 (*n*). *Underwood* v. *Parker*, 2 Str. 1200. This rule does not, it seems, extend to an action on the case for slander of title. *Watson* v. *Reynolds*,[9] 1 M. & M. 1. Nor does the rule operate to the exclusion of such evidence as is otherwise properly admissible under the general issue. *Manning* v. *Clement*,[10] 7 Bing. 362. *Rogers* v. *Clifton*. The rule does not apply to a special action on the case for consequential damage, as where the action is brought for slander of title. In such a case the truth is evidence under the general issue. *Watson* v. *Reynolds*,[9] 1 M. & M. 1; and see *Hargreave* v. *Le Breton*, 4 Burr. 2422. *Smith* v. *Spooner*, 3 Taunt. 246; *supra*, 641, note (*c*).

(*p*) *Cook* v. *Field*, 3 Esp. C. 133. [*Dirnells* v. *Aiken*, 2 Tyler, 75.] A plea that the plaintiff had been guilty of bigamy, requires as strong proof as on an indictment for that offence; a plea, justifying a charge of polygamy, held sustained by proof of actual marriage in two instances, and of cohabitation and reputation as to a third. *Willmett* v. *Harmer*,[11] 8 C. & P. 695.

(A) (In an action for a libel if the plaintiff give in evidence parts of the libel, not set forth in the declaration for the purpose of showing malice, the defendant may give evidence of the truth of such passages, although he has not pleaded justification. *Henry* v. *Norwood*, 4 Watts, 347. See also {*Treat* v. *Browning*, 4 Conn. Rep. 408.} [A defendant who would justify a charge made by him must justify the specific charge laid, and cannot set up a charge of the same kind but distinct as to subject-matter. *Sawyer* v. *Eifert*, 2 Nott & M'Cord, 511. *Matthews* v. *Davis*, 4 Bibb. 173. *Andrews* v. *Vanduzer*, 11 Johns. 38. {*Stow* v. *Converse*, 4 Conn. Rep. 17.} See also *Shepard* v. *Merrill*, 13 Johns. 475. *Van Ness* v. *Hamilton & al.* 19 Johns. 349. *Brooks* v. *Bemis*, 8 Johns. 455. *Biggs* v. *Denniston*, 3 Johns. Cas. 198. *Genet* v. *Mitchell*, 7 Johns. 120.] If the defendant plead the truth of the words in justification and fail to support his plea, this will have a tendency to aggravate the damages. *Clark* v. *Binney*, 2 Pick. R. 113. *Hix* v. *Drury*, 5 Pick. R. 296. The truth of the publication may be pleaded in bar of the action, but if the defence thus set up be not supported by proof the defendant will not be allowed to show that the charge was made under a mistake, but if the defendant goes to trial on the general issue only, such testimony may safely be admitted, as it only goes to reduce the damages, by rebutting all presumption of actual malice. *King* v. *Root*, 4 Wend. 113. In slander, for charging the plaintiff with perjury, a defendant to support a justification, is bound to give as conclusive proof, as would be necessary to convict the plaintiff, on an indictment for such offence. *Clark* v. *Dibble*, 16 Wend. 601. *Woodbeck* v. *Keller*, 6 Cow. 118. *Coulter* v. *Stewart*, 2 Yerger, 225. *Contra*, *Kincade* v. *Bradshaw*, 3 Hawks. 63. In an action of slander, for charging the plaintiff with perjury in a certain suit, if the defendant justify stating, that in the trial of the suit, the plaintiff "swore that a hog had not a certain mark," proof that the plaintiff had swore, "if there was a certain mark upon the hog, he did not see it," will not support the plea. *Wilson* v. *Nations*, 5 Yerger, 111.)

[1] Eng. Com. Law Reps. vi. 431. [2] *Id.* xxii. 214. [3] *Id.* xii. 238. [4] *Id.* xxv. 450. [5] *Id.* xix. 60. [6] *Id.* xxxii. 438. [7] *Id.* iii. 111. [8] *Id.* xxi. 393. [9] *Id.* xxii. 231. [10] *Id.* xx. 161. [11] *Id.* xxxiv. 589.

of the charge which he has made, with which his plea must correspond, be bound to prove it with equal precision. If the defendant fail in proving all the matters of exaggeration stated in the libel and alleged in the justification to be true, the plaintiff will be entitled to a verdict on the plea of justification (*q*), although the plea may merely allege that the matters alleged in the libel are true in substance and effect (*r*); but it is otherwise where the part not proved forms no ingredient in the libellous charge (*s*). If the justification does not cover the slander to the full extent, the plaintiff will be entitled to damages for the excess not justified (*t*).

An acquittal of the plaintiff on an indictment charging him with the same offence as is specified in the plea of justification, does not preclude the defendant from proving the truth of the charge (*u*); and, in strictness, is not evidence at all (*x*). The general good character of the plaintiff is evidence to rebut the presumption of guilt (*y*) (A).

Where the defendant justifies, alleging that he heard the words from another, and mentioned the author when he published them, the proof depends upon the form of the issue taken (*z*) (B). Upon issue taken on

(*q*) *Weaver* v. *Lloyd*,[1] 2 B. & C. 678.

(*r*) Ibid.

(*s*) *Edwards* v. *Bell*,[2] 1 Bing. 403.

(*t*) The words were, "he has robbed me to a serious amount;" justification as to the words "he has robbed me," which was proved; but the jury gave 40s. damages for the excess not justified, and the Court sustained the verdict. *Cooban* v. *Holt*, Lancaster Spr. Ass. 1825, and afterwards cor. Bayley and Holroyd, Justices. Where the statement in a newspaper, professing to give a report on an election petition, went on to comment on a party, bail for one of the petitioners, stating, "he is hired for the occasion," and the plea justified only the former part of the libel; held, that if the part left uncovered would by itself have formed a substantive ground of action, the plaintiff would be liable in damages; *aliter*, if the comment were only a necessary inference from the facts stated. *Cooper* v. *Lawson*, 1 P. & D. 15. Where the plaintiff's ship being advertised for passengers, &c., the defendant published that she was unseaworthy, and had been bought by Jews to take out convicts; held, that a plea to the whole declaration, that the ship was unseaworthy, was insufficient, as the latter allegation in the libel was calculated to deter passengers from applying. *Ingram* v. *Lawson*,[3] 5 Bing. N. C. 66; 7 Dowl. P. C. 125; 6 Sc. 775.

(*u*) *England* v. *Bourke*, 3 Esp. C. 80.

(*x*) *Supra*, Vol. I. and Index, tit. JUDGMENT.

(*y*) Vide *supra*, tit. CHARACTER.

(*z*) This defence cannot, it is said, be set up under the plea of the general issue. *Mills* v. *Spencer*,[4] Holt's C. 534; but see Starkie's L. L. vol. 1, p. 458, 2d ed.

(A) (In an action of slander, the plaintiff cannot give evidence of the fairness of his general character, until it is attacked by the defendants, and that a justification has been pleaded makes no difference in the rule. *Shipman* v. *Burrows*, 1 Hall, 399. *Inman* v. *Foster*, 8 Wend. 602. If the defendant plead the truth of the words in justification, the plaintiff may give in evidence his general good character, before it is impeached by the defendant otherwise, than by his plea of justification. *Harding* v. *Brooks*, 5 Pick. 244. [The insanity of the defendant at the time of speaking the words will be received in evidence as an excuse, where it is such that the words would produce no effect on the hearers. *Aliter*, where it is slight and not uniform. In the latter case the plaintiff is entitled to damages according to the injury. *Dickinson* v. *Barber*, 9 Mass. Rep. 225.

In *Horner* v. *Marshall's Adm'x*, 5 Munf. 466, it was held to be a sufficient ground of equity for a perpetual injunction to a judgment on slander, that at the time of speaking the words, and when the judgment was obtained, the defendant was insane, or in a state of partial mental derangement on the subject, to which those words related].)

(B) (See *Robinson* v. *Harvey*, 5 Monr. 520. *Haines* v. *Welling*, 6 and 7 Ohio R. 381. *Trabue* v. *Mays*, 3 Dana, 140.

In slander it is no evidence, nor can it be given in evidence in mitigation of damages, that the defendant at the time of speaking of the words, gave his author, and was in fact told by another what he uttered against the plaintiff. *Inman* v. *Foster*, 8 Wend. 602. See also, *Austin* v. *Hanchet*, 2 Root, 148.

[Whether a person who repeats a slander, but who at the same time names the person from whom he received it, may plead that circumstance in justification, seems to depend on the *quo animo* with which the words, with the name of the author, are repeated. They may be repeated with a malicious intent, and with mischievous effect. The public may be ignorant of the worthlessness of the original author, and may be led to attach credit to his name and slander, when both are mentioned by a person of undoubted reputation. Per Kent, C. J. 10 Johns. 449, *Dole* v. *Lyon*. S. P. Per Ld. C. J. Abbott, Holroyd and Best, Js. 4 B. & A. 611, 614, 615, *Lewis* v. *Walter*. There is no case in the English books, in which this justification has been allowed, under any circumstances, in an action for a libel; and Kent, C. J. and Ld. C. J. Abbott, and Best, J. in the cases above cited, strongly intimated that such a defence is not applicable to written slander.

[1]Eng. Com. Law Reps. ix. 217. [2]*Id.* viii. 360. [3]*Id.* xxxv. 33. [4]*Id.* iii. 177.

the *general replication *de injuriâ suâ propriâ*, the *onus* of proving the facts, that he heard the very words spoken by the third person, as alleged in the plea, and that, on repeating them he gave up his author, lies on the defendant, for the object of the plea is to show that the defendant has afforded to the plaintiff a certain cause of action against another (*a*); it would not be sufficient under this issue to prove that the third person spoke words to the same effect with those laid (*b*).

A plaintiff cannot upon the trial object to the insufficiency of a plea of justification in point of law (*c*).

II. Upon an *indictment* for publishing a libel, the prosecutor must prove, 1st, The fact of *publication*. 2dly, The introductory *averments* and the *innuendos* (*d*). 3dly, The *malice* of the defendant. Libel. Indictment.

1st. The evidence of publication has already been adverted to. In the case of an indictment, a publication to the prosecutor himself is, as has been seen, sufficient to constitute the offence, on the ground of its tendency to produce a breach of the peace, although a publication to the plaintiff alone would not support an action, since without some further publication no detriment can have resulted to the plaintiff (*e*). The defendant may be

(*a*) See *Ld. Northampton's Case*, 12 Rep. *Crawford* v. *Middleton*, 1 Lev. 82. *Maitland* v. *Goldney*, 2 East, 425. *Woolnoth* v. *Meadows*, 5 East, 463. [See *Bell* v. *Bryne*, 13 East, 554.]

(*b*) 2 East, 425. See also *M'Gregor* v. *Thwaites*,[1] 3 B. & C. 24. *Lewis* v. *Walter*,[2] 4 B. & A. 605. And it seems also, that this defence would not be available unless the defendant himself believed the words to be true, and spoke them on a justifiable occasion. *M'Pherson* v. *Daniells*,[3] 10 B. & C. 263.

(*c*) *Edmonds* v. *Walter*,[4] 3 Starkie's C. 7.

(*d*) Vide *supra*, 628.

(*e*) *Supra*, 617.

In South Carolina it is held that where a person affirms the truth of the words, he is liable, although he adds that he heard them from another; as where the defendant said of the plaintiff, "he stole a cart," but added "I heard it from J. S." *Miller* v. *Kerr*, 2 M'Cord, 285. S. P. in Connecticut. *Austin* v. *Hanchet*, 2 Root, 148. The court in S. Carolina seemed to hold that a person might justify the utterance of actionable words, if at the the time of speaking them he names the person of whom he heard them, and if in truth he did hear them—but that such justification is admissible only so far as it is evidence of the want of malice.

In *Doe* v. *Lyon*, ubi sup. the publisher of a libel was held responsible to the party libelled, though the libel was accompanied with the author's name.

In Pennsylvania it has been held, that if a libel is published innocently, and without malice, the person so republishing shall be excused, if at the time of republication he gives the true source of his information, so as to afford the injured party an opportunity of bringing his action against the real libeller. *Binns* v. *M'Corkle*, 2 Browne, 90. *Aliter*, if there be malice and an intention to injure. Ibid. (*Quære*, is he who *originally* publishes libellous matter "innocently, and without malice," liable to an action?) In the same case the rule as to oral slander is stated to be, that if the words are uttered generally, the defendant cannot justify by giving the name of the author in his plea, or at the trial; it can then only go in mitigation of damages; but if at the time he repeats the words, he gives the name of the author, so that the party may have his action against him, it is a justification. But in *Hersh* v. *Ringwalt*, 3 Yeates, 508, it is said, if the authority is mentioned at the time the words are uttered, it should be such an authority as would induce reasonable belief. In *Kennedy* v. *Gregory*, 1 Binney, 85, where the proof in an action of slander was, that the defendant, in reply to a question implicating the plaintiff, said, either "it is so," or "they say it is so;" it was held (one judge dissenting) that the defendant might give in evidence, to reduce damages, that *A. B.* told him what he related. So in *Leister* v. *Smith*, 2 Root, 24, it was held that the defendant might show, in mitigation of damages, from whom he heard the story. {But the doctrine has been denied in a late case decided in the supreme court of the state. *Treat* v. *Browning*, 4 Conn. Rep. 408.}

In an action for a libel against a printer of a newspaper, it is not a justification that the publication was made at the instance of a person whose name was given at the time, and who paid for it in the usual course of business—though it may go in mitigation of damages. *Rankle* v. *Meyer & al.* 3 Yeates, 518. So evidence of a writing purporting to be the copy of an anonymous letter, which appeared to have been sent to the preceding editor, was ruled to be admissible in mitigation of damages, to show that the defendant was not the original inventor of the charge. *Morris* v. *Duane*, 1 Binney, 90, *n.* {So the defendant may give evidence that the charge which he has published was taken from the Journal of Congress, thereby proving that he was not the author of the scandal in mitigation of damages. *Romayne* v. *Duane*, 3 Wash. C. C. Rep. 246.}

A letter stating that the writer had heard of a slanderous report, is good evidence to prove the circulation of the report, and may be read for that purpose—the hand-writing of the person being proved—but it is inadmissible to prove that the defendant propagated the report. *Schwartz* v. *Thomas*, 2 Wash. 157].)

[1]Eng. Com. Law Reps. x. 6. [2]*Id.* vi. 535. [3]*Id.* xxi. 69. [4]*Id.* xiv. 145.

found guilty of the publishing, and acquitted of the composing or printing of a libel, which both are conjunctively alleged (*f*).

Proof of malice.

3dly. Many of the observations which have been already made (*g*) apply to the proof of malice. Malice is essential to the offence (*h*); and of the existence of malice, where express malice is essential, the jury are to judge. The defendant's malice consists in his intention to effect the particular mischief; and, as in all other cases, what he intends must be inferred from what he does. If nothing appear from which the intention is to be collected, except the publication of the libel itself, unexplained by any context of circumstances, if the very terms of the document itself tend to scandalize, degrade, and injure the individual, or to excite to acts of outrage and sedition, the *intention* on the part of the defendant to effect those objects must necessarily be inferred, without the aid of any extrinsic proof (*i*).

*645 *The defendant may in his turn rebut the inference of malice by evidence; he may show that he delivered the libel as the innocent agent of another, being himself ignorant of its contents; or that it was published by an agent without his knowledge or authority (*k*); or that he delivered it by mistake (*l*); or give in evidence any circumstances which show that what he did was done in the fair and honest discharge of any duty to society, or even that he acted *bonâ fide* in the prosecution of any claim, where he supposed himself entitled to a remedy, or to possess an interest (*m*). Where the alleged libel is contained in a newspaper, the defendant has a right to have other parts of the same paper, connected with the subject-matter, read in evidence, although they are contained in a different part of the paper (*n*). The defendant may also give in evidence any matter in defence which negatives any of the material allegations contained in the indictment. It is no defence to show that the same libel had already been published by another (*o*); neither is the defendant permitted to give the truth of the libel in evidence (*p*), but he may disprove the fact of publication, or negative the material facts averred, or the truth of the innuendos; as by evidence which shows that the matter published did not relate to the party or subject-matter alleged in the indictment (*q*).

In a late instance a defendant was allowed to prove that he had stopped the sale of a libellous publication, with a view to mitigation of punishment

(*f*) *R.* v. *Hunt & another*, 2 Camp. 583. *R.* v. *Hart*, 10 East, 94. *R.* v. *Williams*, 2 Camp. 646, cor. Lawrence, J. As where the record varies from the printed libel, but agrees with the manuscript delivered by the defendant to the printer. Ibid.; and *R.* v. *Burdett*,[1] 4 B. & A. 717; and see tit. VARIANCE.

(*g*) *Supra*, 629. See the observations of Grose, J., *R.* v. *Creevey*, 1 M. & S. 280. Subsequent publications, if connected with the subject, are evidence to show *quo animo*, &c. Per Lord Ellenborough, *Stuart* v. *Lovell*,[2] 2 Starkie's C. 83; *R.* v. *Evans*, cor. Bayley, J. Lancaster.

(*h*) *R.* v. *Hart*, 1 Bl. R. 386. *R.* v. *Paine*, 5 Mod. 167.

(*i*) Vide *supra*, tit. INTENTION and LIBEL, 629; and *R.* v. *Creevey*, *supra*, 862; and 1 M. & S. 273. *R.* v. *Burdett*,[1] 4 B. & A. 95. In case of libels, where the publication is proved, the law will infer malice. Per Lord Ellenborough, in *R.* v. *Phillips*, 6 East, 370. But as malice is a material averment on the record, which cannot be established but by the aid of a jury, and malice in law cannot be inferred from a legal act, the verdict, so far as malice is concerned, must, in such a case, depend on the question whether the matter published be or be not a libel, which is of course mere matter of law.

(*k*) *R.* v. *Almon*, 5 Burr. 2686; Starkie's L. L. vol. 2, p. 29, 2d. ed. As to the *prima facie* liability of the proprietor of a newspaper, see *R.* v. *Gutch*,[3] 1 M. & M. 485.

(*l*) Per Cur. *R.* v. *Paine*, 5 Mod. 163.

(*m*) 4 Bl. Comm. 151; 5 Rep. 125; Starkie's L. L. vol. 1, p. 292, and the cases there cited.

(*n*) *R.* v. *Lambert & Perry*, 2 Camp. 398. See *R.* v. *Evans*, 3 Starkie's C. 35, Appendix.

(*o*) *R.* v. *Holt*, 5 T. R. 436.

(*p*) 4 Comm. 151. 5 Rep. 125. And see the cases cited Starkie's L. L. vol. 1, p. 229, 2d ed.

(*q*) *R.* v. *Horne*, 2 Cowp. 672, 675.

[1]Eng. Com. Law Reps. vi. 431. [2]*Id.* iii. 261. [3]*Id.* xxii. 352.

in case of conviction, and to avoid the expense of bringing the fact before the Court by affidavit (*r*).

By the stat. 32 Geo. 3, c. 60, it is declared and enacted, that upon a prosecution for libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue; and by the second section it is provided that the Court or Judge shall, according to their or his discretion, give their or his opinion to the jury on the matter in issue, *as in other criminal cases*. The effect of this statute seems to be simply that of placing the trial for a libel upon the same footing with trials for any other offence, by removing an anomaly which before existed. The statute does not require that the Court shall advance any opinion upon the case, except such as is given at the discretion of the Court in parallel cases (*s*). The offence consists of *certain *facts* done, and the *intention* with which they were done. Whether the *facts* be proved is in all cases for the consideration and decision of the jury, aided by the advice of the Court in doubtful cases, as to the weight of evidence. Effect of the statute 32 G. 3, c. 60. *646

Whether a particular publication be so far noxious in its bearing and tendencies, either *per se* or in conjunction with alleged facts, as to amount in the abstract to a *libel*, seems to be a pure question of law, just as much as it is a question of law what will constitute an obligation or forgery (*t*). If the publication in consideration of law be libellous, then it is a question of fact for the jury, whether it was *wilfully* and *maliciously* published, subject, however, to the ordinary presumption of law, that in the absence of proof to the contrary, a man intends that which is the natural consequence of the means which he employs. If collateral facts be proved in defence, it is for the Court to pronounce whether they furnish an absolute defence or a qualified one, dependent on the actual or express malice of the publisher, of the existence of which the jury are to decide. It follows that neither the jury nor the parties have a right to expect from the Court any specific and direct opinion upon the *whole* of the case, or any other than that which is ordinarily given at the discretion of the Court to the jury in parallel cases, with respect to the verdict which they ought to find in point of law, as dependent and contingent upon their conclusions in point of fact, drawn from the alleged libel itself, and all the circumstances of the case, as to the meaning, motives, and intention of the defendant (*u*).

(*r*) *R.* v. *Hone*, cor. Ld. Ellenborough, Guildhall sittings after Hil. T. 1817; but *semble*, this is entirely *ex gratia*. Vide *supra*, 642.

(*s*) See *Parmiter* v. *Coupland*, 6 M. & W. 105; where the practice is stated to be for the Court to give a legal definition of the offence of libel, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction; and that the rule is the same both in civil and criminal cases; and that the Court is not bound to give an opinion as to the nature of the publication as a matter of law. Hence it may be inferred, that the Libel Act does not, in this respect, distinguish a criminal from a civil proceeding. Where the publication and innuendos are proved or admitted, there is, in reality, no fact for the jury to try, and, if the process of applying the terms of a dry legal definition to the terms of the alleged libel be left to them, some danger of mistake is incurred. Such application is usually matter of law within the province of the Court to decide upon, the making of which, without more special direction, the jury may easily make a mistake. If they mistake in finding that to be a libel which is not a libel, the defendant being improperly convicted (malice in law having been improperly found, as an inference from a lawful act), the mistake may be rectified at some trouble and expense to the defendant, by moving in arrest of judgment, or bringing a writ of error. If the jury should err on the other side, concluding that to be no libel, which in law was a libel, the defendant, though guilty, would escape with impunity. It was also held, in the case of *Parmiter* v. *Coupland*, that it was not a misdirection to state to the jury, that in the absence of imputation of wicked or corrupt motives there was a distinction between publications as relating to public and private individuals.

(*t*) See the opinion of the Judges, Howell's St. Tr. *Archbishop of Tuam* v. *Robeson*,[1] 5 Bing. 17. *Levi* v. *Milne*,[2] 4 Bing. 195.

(*u*) See *R.* v. *Holt*, 5 T. R. 436. *R.* v. *Burdett*,[3] 4 B. & A. 95. The observations of Parke, B., in *Parmiter* v. *Coupland*, *supra*, note (*s*). Starkie on Libel, vol. 2, 354, 2d edit.

[1]Eng. Com. Law Reps. xv. 350. [2]*Id.* iii. 396. [3]*Id.* vi. 358.

LICENSE (*v*).

See TRESPASS.—LEAVE AND LICENSE.—FRAUDS, STAT. OF.

LIEN.

THE evidence to establish a right of lien is either of an *express agreement* (*x*) between the parties in the particular instance, or is *presumptive*,
*647 *being founded either upon the mode of dealing between the same parties in former instances, or on the *general usage and custom* of the particular trade.

Proof of, by express agreement.

1st. An agreement amongst the members of a particlar trade or business to insist upon a lien for their general balance, is legal, and is binding upon all those to whom notice of their terms of dealing has been communicated (*y*). In such a case it is necessary to prove that the employer had

Notice.

notice of the special terms; it is not sufficient to prove that general notice was given by advertisement in the public newspapers, or otherwise, without further showing, by reasonable evidence, that the party to be affected by it read the notice (*z*).

Presumptive evidence.

2dly. The *presumption* from former dealings rests upon the general principle, that the parties intended to deal, in the particular instance, upon the same terms on which they had dealt on former occasions, in the absence of any reason for supposing that they intended in that instance either to deal independently of any contract (*a*), or to adopt a fresh one.

Proof. General usage of trade.

3dly. By evidence of a general usage in the particular trade, collected from the dealings of other persons engaged in the same employment, of such notoriety that the inference may fairly be drawn that the parties knew the usage, and adopted it in the particular instance, intending to deal as all others did, according to the known usage of trade. It is a question for a

(*v*) A license to a lessee to aliene may be executed after a grant of the reversion. *Walker* v. *Bellamy*, Cro. Ja. 102. As to the effect of a license, see 1 Saund. 287, C. A license to aliene passes no interest; it merely removes a restraint set on a liberty, and therefore need not be shown in pleading. *Walker* v. *Bellamy*, Cro. J. 102. Any more than a warrant need not be shown; for, being executed, it is returned to the sheriff. Cro. J. 372. Otherwise of a thing which has continuance.

(*x*) The owner *agreed* that a mare should remain with the livery-stable keeper as a security for monies advanced, and for her keep, with a power of sale if not otherwise liquidated; held, that he had such a lien upon her as entitled him to maintain trover against the sheriff taking her under an execution against the owner. *Donnally* v. *Crowthers*,[1] 11 Moore, 479. A lien cannot be acquired by the voluntary and unauthorized act of the party who claims it. *Stone* v. *Lingwood*, 1 Str. 651: the defendant, being master of a ship, brought home a quantity of ivory for the defendant, the owner, and paid the duty; and it was held that he had no lien on the goods. So the finder of a dog cannot detain it against the owner for the expenses of the keep. *Benstead* v. *Buck*, 2 Bl. 1117. But in *Stone* v. *Lingwood*, it was held that the defendant, on showing the sum paid, might deduct it from the damages. In *Green* v. *Farmer*, 4 Burr. 2218, the plaintiff recovered against the defendant, a dyer, after tender of the particular lien, but the price of dyeing was deducted in damages. See as to the effect of notice given by a carrier that all goods shall be considered as subject to a lien, not only for the freight due in respect of the particular goods, but also for the balance due from the respective owners. *Wright* v. *Snell*,[2] 5 B. & A. 353; 3 B. & P. 48. Although such a notice may create a lien in respect of the balance due from the real owner, yet it does not create one in respect of the party to whom the goods are addressed, being the mere factor of the owner. *Ibid.*; and see *Oppenheim* v. *Russell*, 3 B. & P. 48; *Butler* v. *Woolcot*, 2 N. R. 64. The carrier's lien does not, as has been seen, devest the consignor's right to stop *in transitu*. *Oppenheim* v. *Russell*, 3 B. & B. 42.

(*y*) *Kirkman* v. *Shawcross*, 6 T. R. 14; and see *Oppenheim* v. *Russell*, 3 B. & P. 42. It has been doubted whether innkeepers, common carriers, &c. can, by notice, entitle themselves to a lien for the general balance. *Ibid.* But it is settled that carriers at least may do this, as they are in the constant habit of making special contracts in opposition to their common law liability. And see *Rushforth* v. *Hadfield*, 7 East, 224; 6 East, 519.

(*z*) Vide *supra*, tit. ASSUMPSIT.—CARRIERS; *infra*, tit. PARTNERS.

(*a*) *Supra*, 32. *Kirkman* v. *Shawcross*, 6 T. R. 14, 19. *Downman* v. *Matthews*, Prec. in Chan. 580. *Demrinbray* v. *Metcalfe*, 2 Vern. 691, 698.

[1]Eng. Com. Law Reps. xxii. 416. [2]*Id.* vii. 127.

jury in such cases, whether the usage has been so general that the parties must be taken to have acted upon it (*b*).

The nature and force of the evidence requisite for this purpose has been already adverted to (*c*). The custom must be proved by means of witnesses who have had actual and frequent experience of the custom (*d*).

Where the claim attempted to be established is contrary to the general law of the land, the proof is, it is said, to be watched with jealousy (*e*).

Where a carrier claimed a lien for his general balance, and many instances were proved in which the right had been insisted upon, and acquiesced in within ten or twelve years back, and one case in which the same had been *done thirty years ago, and evidence was also given that this had been *648
the *general practice* in the North (where the contract arose), for twenty or thirty years, it was left to the jury to decide whether the usage was so general as to warrant them in presuming that the party employing the carrier knew it, and intended to contract in conformity with it. The jury by their verdict negatived the right of lien, and the Court of King's Bench afterwards refused a new trial (*f*).

It seems to be a general rule, that all tradesmen have a lien on a particular chattel, in respect of the labour bestowed upon it (*g*).

Where the right to insist upon a general lien has frequently been established by evidence, the custom becomes part of the law of the land, and the courts will not afterwards permit it to be disputed (*h*) (A).

(*b*) See *Rushforth* v. *Hadfield*, 7 East, 224, and Lord Ellenborough's observations there. Where the usage of wharfingers to claim a general lien had frequently been matter of dispute, and had, in many instances, been rejected, it was held that it could not be supported. *Holderness* v. *Collinson*,[1] 7 B. & C. 212; 1 Ry. & M. 55. (*c*) *Supra*, tit. CUSTOM.

(*d*) Ibid. And see *Holderson* v. *Collinson*,[2] 7 B. & C. 214; *Bleaden* v. *Hancock*, 4 C. & P. 156.

(*e*) See *Rushforth* v. *Hadfield*, 7 East, 224. (*f*) See *Rushforth* v. *Hadfield*, 7 East, 224.

(*g*) *Naylor* v. *Mangles*, 1 Esp. C. 109. *Spears* v. *Hartley*, 3 Esp. C. 81. Although the work is to be done, and the chattel re-delivered at a specific time. *Fairman* v. *Gamble*,[3] 2 C. & P. 266. *Supra*, tit. CUSTOM. And see *Exparte Deeze*, 1 Atk. 228. A workman who bestows labour on a chattel for a stipulated sum may detain the chattel till the price be paid, although it be delivered at different times, if the work to be done under the agreement be entire. *Chase* v. *Westmore*, 5 M. & S. 180. *Secus*, as it seems, where the parties contract for a mode or time of payment inconsistent with the workman's claim to the possession. Ibid. Or where work is done under several distinct contracts. *Markes* v. *Lahee*,[4] 3 Bing. N. C. 408. A lien for work done, must be for work done at the request of the owner. *Hiscox* v. *Greenwood*, 4 Esp. C. 174.

(*h*) As to the lien of an attorney, see 12 Mod. 554. *Mitchell* v. *Oldfield*, 4 T. R. 123. *Exparte Nisbitt*, 2 Scho. & Lef. 279, 315. 15 Ves. jun. 97. 16 Ves. jun. 164. 13 Ves. jun. 161, 195. 14 Ves. jun. 271. *Alger* v. *Hefford*, 1 Taunt. 38. Doug. 104. Ld. Raym. 738. *Hoare* v. *Parker*, 2 T. R. 376. 8 Mod. 306. *Welsh* v. *Hole*, Doug. 226. *Read* v. *Dupper*, 6 T. R. 361. *Griffin* v. *Eyles*, 1 H. B. 122. *Pyne* v. *Earle*, 8 T. R. 407. *Ormerod* v. *Tate*, 1 East, 464. *Glaister* v. *Hewer*, 8 T. R. 70. 1 H. B. 23, 217. 2 N. R. 99. 1 N. R. 22. *Stevenson* v. *Blakelock*, 1 M. & S. 535. By the General Rules, Hil. 2 W. 4, No. 91, no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular in which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted. The lien of a solicitor on a fund in a court of equity, for his costs, is not affected by the bankruptcy of his client pending the suit. *Pounsey* v. *Humphreys*, 1 Coop. 142. A court of equity will not allow the lien of the solicitor to interfere with the equities between the parties; and

(A) (Possession is essential to the existence of a lien. *Lander* v. *Clark*, 1 Hall Rep. 355. A lien appears from the cases to be a personal right, and can endure no longer than the possession of the party holding it continues. *Urquhart* v. *M'Ivor*, 4 Johns. 127. But a factor may deliver the possession of goods to a third person on which he has a lien, with notice of it, and a declaration that the transfer is to such third person as agent for the factor and for his benefit. Id. Where it is agreed that the owners of a saw-mill shall have a lien for their charges in sawing logs into boards, that the boards should be removed a short distance from their premises, but that the lien shall continue until payment, and the boards are sawed and piled accordingly a short distance from the mill, the lien of the owners of the mill is as perfect as if the boards were in their millyard; the possession of the owner of the boards is their possession. *Wheeler et al.* v. *M'Farland*, 10 Wend. 318. Where a large quantity of any particular kind of merchandize is stored in a warehouse, and portions of it are, from time to time, delivered out without the storage thereon being paid, the warehouseman has a lien upon the portion left for the storage of the whole. *Schmidt & Webb* v. *Blood & Green*, 9 Wend. 268.

[1]Eng. Com. Law Reps. xiv. 30. [2]*Id.* xix. 317. [3]*Id.* xii. 124. [4]*Id.* xxxii. 181.

*As the right of lien may be created, so may it be devested or determined by contract, either expressly or by implication, or by an abuse of the sub-

a party having a lien or right of set-off for costs, is not deprived of it by issuing a writ of attachment for such costs. [Yelv. 676, note.] Of bankers, for their general balance; *Jourdaine* v. *Lefevre*, 1 Esp. C. 66. *Bolland* v. *Bygrave*,[1] R. & M. 271. *Bawtree* v. *Watson*, 2 Keene, 713. *Davis* v. *Bowsher*, 5 T. R. 488. *Saville* v. *Barchard*, 4 Esp. C. 53. *Bosanquet* v. *Dudman*,[2] 1 Starkie's C. 1. Calico-printers, for a general balance; *Weldon* v. *Gould*, 3 Esp. C. 268. *Exparte Andrews*, Co. B. L. 429. Of carriers, for a lien on the particular goods; *Rushforth* v. *Hadfield*, 6 East, 519. 7 East, 224. *Aspinall* v. *Pickford*, 3 B. & P. 44, n. *Oppenheim* v. *Russell*, 3 B. & P. 42. 6 T. R. 14. By water, *Butler* v. *Woolcot*, 2 N. R. 64. Abbott, 112, 215, 244. 1 Esp. C. 23. Dyers, for a particular lien. *Kirkman* v. *Shawcross*, 6 T. R. 14. *Clarke* v. *Gray*, 4 Esp. C. 178. And in some instances, for a general lien; *Saville* v. *Barchard*, 4 Esp. C. 53. *Rose* v. *Hart*,[3] 8 Taunt. 499. *Hamphreys* v. *Partridge*, Mont. B. L. 18, (n.) And see 6 East, 523. In some instances the evidence has been insufficient to establish a general lien; *Close* v. *Waterhouse*, 6 East, 523, (n.) *Bennett* v. *Johnson*,[4] 2 Chitty, 455. *Green* v. *Farmer*, 4 Burr. 2214. Roscoe on Evidence, 533. Factors, for a general lien; *Kruger* v. *Wilcox*, Ambl. 252. *Walker* v. *Birch*, 6 T. R. 262. 6 East, 25. *Hollingworth* v. *Took*, 2 H. B. 501. *Drinkwater* v. *Goodwin*, Cowp. 251. *Hammonds* v. *Barclay*, 2 East, 227. *Man* v. *Shiffner*, 2 East, 523. *Copland* v. *Stein*, 8 T. R. 199. *Houghton* v. *Matthews*, 3 B. & P. 485. Farriers; 7 East, 229. 1 Salk. 18. Bac. Ab. *Trover*, E. 4. *Brennan* v. *Carrint*, Say, 224. Selw. 1289. See 6 G. 4, c. 94, and tit. Trover. Of an innkeeper; *Thompson* v. *Lacy*,[5] 3 B. & A. 283. *Jones* v. *Thurlow*, 8 Mod. 172. *Jones* v. *Pearle*, 1 Str. 556. 6 East, 23. Bac. Ab. tit. *Inns*. Burn's J., tit. *Alehouses*. Salk. 388. Ld. Raym. 867. *Johnson* v. *Hill*, 3 Starkie's C. 172.

An innkeeper cannot sell or use a horse on which he has a lien as such, except by particular custom. *Jones* v. *Pearle*, 1 Str. 556. *Jones* v. *Thurlow*, 8 Mod. 172. Cowp. Yelverton, 67. *Thompson* v. *Lacy*,[5] 3 B. & A. 283. *Proctor* v. *Nicholson*,[6] 7 C. & P. 67. He cannot take off the clothes of his guest, or detain his person, to secure payment of his bill. *Sunbolf* v. *Alford*, 3 M. & W. 248. The lien is only a particular one on the thing itself in respect of which the debt is incurred; a horse can be detained only for its own meat, &c. 1 Bulstr. 207. Bac. Ab. tit. *Fines*. Burn's J., tit. *Alehouses*. Whitaker on Lien, 118. A livery-stable keeper has not a lien on horses in his stable for their keep, without express agreement. *Wallace* v. *Woodgate*,[7] R. & M. 194. *Johnson* v. *Etheridge*, 1 C. & M. 743. *York* v. *Greenough*, 2 Ld. Raym. 866. A trainer of horses has a lien on a horse for keeping and training. *Bevan* v. *Waltgrs*, M. & M. 236. Insurance *brokers*, for a general balance; *Whitehead* v. *Vaughan*, Co. Bl. 566. *Parker* v. *Carter*, Co. B. L. 567. *Maans* v. *Henderson*, 1 East, 335. *Man* v. *Shiffner*, 2 East, 523. *Snook* v. *Davidson*, 2 Camp. 218. *George* v. *Claggett*, 7 T. R. 359. *Rabone* v. *Williams*, 7 T. R. 360. *Lanyon* v. *Blanchard*, 2 Camp. 597. *Richardson* v. *Goss*, 3 B. & P. 119. *Pulteney* v. *Keymer*, 3 Esp. C. 182. *Mann* v. *Forrester*, 4 Camp. 60. *Maans* v. *Henderson*, 1 East, 335. Of a miller, on the corn ground by him; *Exparte Ockenden*, 1 Atk. 235; 1 M. & S. 180. Packers for a general balance; *Savill* v. *Barchard*, 4 Esp. C. 53. *Green* v. *Farmer*, 1 Bl. R. 651; 4 Burr. 2222. Pawnees, *Hoare* v. *Hartopp*, 3 Atk. 44; Bro. Pledges, 28; Vin. Ab. tit. *Pawn*. E. *M'Combie* v. *Davies*, 6 East, 538. *Paterson* v. *Tash*, 2 Str. 1178. *Newsom* v. *Thornton*, 6 East, 17. *Fitzroy* v. *Gwyllim*, 1 Tr. 153. *Astley* v. *Reynolds*, 2 Str. 915. *Parker* v. *Patrick*, 5 T. R. 175. Tailor; *Hussey* v. *Christie*, 9 East, 433; 6 Bac. Ab. 694; Yelv. 67. A printer employed to print numbers of a work not consecutive has a lien on the copies not delivered, for the general balance for the whole of such numbers. *Blake* v. *Nicholson*, 3 M. & S. 167. The part owner of a whale-ship has a lien for salvage. *Holderness* v. *Shackell*,[8] 8 B. & C. 612. A person who by his own labour preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law of England to retain the possession of the goods saved until a proper compensation is made him for his trouble. Abbott on Shipp. 398. *Hartford* v. *Jones*, 1 Ld. Ray. 393. *Baring & others* v. *Day*, 8 East, 57. This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury, in an action brought by the salvor against the proprietor of the goods, or the proprietor may tender to the salvor such sum of money as he thinks sufficient; and on refusal to deliver the goods, bring an action against the salvor, and if the jury think the sum tendered sufficient, he will recover his goods, or their value, in trover or detinue. Abbott, Ibid. Of a shipwright, for the repairs of a ship; *Franklin* v. *Hosier*,[9] 4 B. & A. 341. [4 Wheat. 438.] Of a ship-owner; *Horncastle* v. *Farran*,[10] 3 B. & A. 497. *Christie* v. *Lewis*,[11] 2 B. & B. 410. *Hulton* v. *Bragg*,[12] 7 Taunt. 14. *Faith* v. *East India Company*,[13] 4 B. & A. 630. A master of a ship has no lien on the receipt for wages, &c.; 1 B. & A. 575. [Sed vide 2 Caines's R. 81; 4 Mass. R. 91.] Of a master of a vessel on the luggage of his passengers, for passage-money; *Wolfe* v. *Summers*, 2 Camp. 631. Of a tailor, on cloth delivered to and made up by him; *Hussey* v. *Christie*, 9 East, 433. A trainer has a lien on a race-horse for the expenses and skill bestowed in the keeping and training him. *Bevan* v. *Waters*, 1 M. & M. 230. And see *Jacobs* v. *Latour*,[14] 5 Bing. 130; 2 M. & P. 201. The plaintiff put a pipe of wine in the defendant's cellar, which he was in the habit of letting, and partly bottled it there, and upon a demand of rent, offered to pay the usual charge, which was refused; held that the defendant was entitled to detain the wine until a reasonable sum was paid for the occupation. *Gray* v. *Chamberlain*,[15] 4 C. & P. 260. A vendor has by the common law a lien upon the property so long as it remains in his possession unpaid for. Hob. 41. *Mason* v. *Lickbarrow*, 1 H. Bl. 363; 2 Bl. Comm. 448. *Hodgson* v. *Loy*, 7 T. R. 440. *Feize* v. *Wray*, 3 East, 93; Noy's Maxims, 88; 7 East, 571. *Dunmore* v. *Taylor*, Peake's C. 41. *Sluhey* v. *Hayward*, 2 H. B. 504. *Hammonds* v. *Anderson*, 1 N. R. 69. And may maintain trover if his possession be devested by fraud. *Hawse* v. *Crowe*,[16] R. & M. 414. Of a wharfinger; *Crawshay* v. *Homfray*,[17] 4 B. & A. 50. Where, by the usage of trade, a specific time is given

[1] Eng. Com. Law Reps. xxi. 436. [2] *Id.* ii. 267. [3] *Id.* iv. 185. [4] *Id.* xviii. 395. [5] *Id.* v. 285. [6] *Id.* xxxii. 440. [7] *Id.* xxi. 414. [8] *Id.* xv. 315. [9] *Id.* vi. 446. [10] *Id.* v. 356. [11] *Id.* vi. 175. [12] *Id.* ii. 9. [13] *Id.* vi. 544. [14] *Id.* xv. 388. [15] *Id.* xix. 374. [16] *Id.* xxi. 477. [17] *Id.* vi. 345.

ject-matter, or by the voluntary relinquishment of that possession which is essential to its existence; or the right, though still existing, may be waived by the party entitled to it (A). Where his possession is determined by wrong, he is entitled to recover in trover. A lien for freight is determined by the receiving and negotiating a bill, although payment was to be made in good and *approved* bills, and the shipowner objected in *the first instance (*i*). *650
A lien is not destroyed or prevented by a special agreement, unless it be inconsistent with the right (*k*). So a lien is determined by abuse of the lien in pledging the goods (*l*). So a lien is waived by parting with the possession (*m*). If an agent part with papers by mistake on which his principal has a lien, the lien is at an end (*n*).

If a party having a lien on goods, does not, when they are demanded of him, insist on his lien, but rests his refusal to deliver the goods on other grounds, it is evidence of a waver of his lien (*o*). But where a defendant having a lien on goods, purchased them of the bailor after the latter had become a bankrupt, and on demand made by the assignees, said, "I may as well give up every transaction of my life;" it was held that these words were no waver, and that the lien had not merged in the purchase (*p*).

A claim to hold for a general balance does not waive a particular lien (*q*); but if possession be wrongfully devested, the lien revives on repossession taken without force (*r*). The lien remains although the vendor recover from the vendee for goods bargained and sold. But it would, it seems, be otherwise if the vendor recovered for goods sold and delivered (*s*). A lien is not devested by reason of a set-off to a larger amount, without a special agreement to deduct the one from the other (*t*); nor by the depositing of goods, on which the captain of a vessel has a lien, in the King's warehouse, under the direction of a statute (*u*). A general lien cannot be sustained against a party having a right to stop *in transitu* (*v*).

to the importer for the payment of wharfage, the bankruptcy of the importer subsequent to that time does not give a right to detain as against a purchaser, previous to that time. Ib. *Qu.* whether a lien is barred by the Statute of Limitations. *Spears* v. *Hartley*, 3 Esp. Ca. 81.

(*i*) *Horncastle* v. *Farran*,[1] 3 B. & A. 497.

(*k*) *Chase* v. *Westmore*, 5 M. & S. 180. If wharfage is to be due at Christmas, whether the goods be or be not removed, there is no lien. *Crawshay* v. *Homfrey*,[2] 4 B. & Ad. 52.

(*l*) *Scott* v. *Newington*, 1 Mo. & R. 252.

(*m*) *Jacobs* v. *Latour*,[3] 5 Bing. 130. *Hartley* v. *Hitchcock*,[4] 1 Starkie's C. 408. And where that is wrongfully done, the owner may maintain trover without tendering what is due on the lien. *Jones* v. *Cliff*, 1 C. & M. 540. *Scott* v. *Newington*, 1 Mo. & R. 252.

(*n*) *Dicas* v. *Stockley*,[5] 7 C. & P. 587.

(*o*) *White* v. *Gainer*,[6] 2 Bing. 23.

(*p*) *Boardman* v. *Sill*, 1 Camp. 410, n.

(*q*) *Scaife* v. *Morgan*, 4 M. & W. 271.

(*r*) *Wallace* v. *Woodgate*,[7] R. & M. 193. *Dicas* v. *Stockley*,[5] 7 C. & P. 587. And see *Levy* v. *Barnard*,[8] 8 Taunt. 149.

(*s*) *Holditch* v. *Desanges*,[9] 2 Starkie's C. 337.

(*t*) *Pinnock* v. *Harrison*, 3 M. & W. 532.

(*u*) *Ward* v. *Felton*, 1 East, 512.

(*v*) *Morley* v. *Hay*, 3 M. & Ry. 396. A house in *N.* directed foreign merchants at *A.* (the appellants) to contract for building a ship, except rigging, and to advise them in good time, to enable them to send it out, and a master, allowing them commission for trouble; such agency was usual. The agents entered into contracts with the builders, made advances to them, and drew from time to time for such advances on their principals. The *N.* house then directed their correspondents at *L.* (the respondents) to send out the rigging, which was done, and delivered to the appellants at *Q.*: held, that the property thereby vested in the *N.* house, and that the agents at *Q.* were entitled to retain the goods as against the *L.* correspondents, as a lien for the advances they had made to the builders, and the custom-house expenses, notwithstanding they had previously to such delivery obtained an assignment of the ship, and procured its registry, in the name of one of their partners; that appearing to have been done for securing the ship, and facilitating an equitable arrangement with the *N.* house. *Rogerson* v. *Reid*, 1 Knapp, 362.

(A) (But see *Morent* v. *Williams*, 11 Wend. 77.)

[1]Eng. Com. Law Reps. v. 356. [2]*Id.* vi. 345. [3]*Id.* xv. 388. [4]*Id.* ii. 447. [5]*Id.* xxxii. 643. [6]*Id.* ix. 302. [7]*Id.* xxi. 414. [8]*Id.* iv. 52. [9]*Id.* iii. 373.

*LIMITATIONS (*w*).

1. *Provisions of the stat.* 3 & 4 *Will.* 4, *c.* 27, *as to making entry or distress, or bringing an action to recover any land or rent,* p. 651.
2. *Of the stat.* 3 & 4 *Will.* 4, *c.* 42, *as to actions of debt for rent on indentures of demise, actions of covenant, debt on bond or other specialty, actions of debt or* scire facias *on recognizance,* p. 656.
3. *Proof of an issue taken on the plea of* actio non accrevit, *&c. under the stat.* 21 J. 1, p. 657.
4. *Evidence of subsequent acknowledgements, mutual accounts, &c.* p. 670.
5. *Proof of disability, &c.,* p. 672.

Right of entry.

By the stat. 3 & 4 Will. 4, c. 27, s. 2, it is (*y*) enacted, that after the 31st day of December 1833, no person shall make an entry or distress, or bring an action to recover any land (*z*) or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims (1);

(*w*) A decree in equity is not affected by the Statute of Limitations (21 J. 1). *Mildred* v. *Robinson*, 19 Ves. 587. Knapp's Case, 202. Where there is a term to attend the inheritance, and the right to the inheritance is lost by fine and nonclaim, equity follows law, and cannot consider him who has lost the inheritance as entitled to claim in equity the term which is to attend it. *Reynolds* v. *Jones*, 2 Sim. & Stu. 206. An estate was by deed of settlement conveyed to trustees, in trust for a tenant for life, who assigned her interest; the possession of the assignee is not to be deemed adverse to the trustee until the death of the *cestui que trust*. *Fauset* v. *Carpenter*, 1 Dow. & C. 233.

(*y*) The main objects of the statute are: 1, to make twenty years the limit for the recovery of land or rent, with an allowance for disabilities, and to prevent the remedy being lost during that period; 2, to make forty years the extreme limit for the recovery of land or rent, notwithstanding the existence of disabilities; 3, to alter the previous law where a person has different rights; 4, to alter the previous law in the case of entails and unbarred remainders; 5, to apply to equitable the same limitation as is provided for legal estates; 6, to provide a limitation as between mortgagor and mortgagee; 7, to provide a limitation as to claims of ecclesiastical and eleemosynary corporations sole, and in respect to advowsons; 8, to abolish all actions, real or mixed, except writs of dower and *quare impedit* and an ejectment, and except plaints for freebench; and 9, to provide a limitation in respect to money secured out of land or rent, or to any legacy and arrears of dower, and of rent, or interest. See Mr. Stalman's notes on this Act, p. 93.

(*z*) By the first clause of the Act land extends to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes other than tithes belonging to a spiritual or eleemosynary corporation sole; and also to any share, estate or interest in them or any of them. Before this statute there was no limitation applicable to the right to impropriate tithes, nor could there have been a prescription *de non decimando* against a lay impropriator. See below, tit. TITHES. As nonpayment furnished no presumption of a grant, the consequence was, that time, instead of justifying, as in other cases, has opened the title to exemption from tithes, by rendering such proof as was sufficient to show a discharge the more difficult. See below, tit. TITHES, and *Peters* v. *Blencowe*, Gwill. 1483. And see above, tit. EJECTMENT. The statute operates, as has been seen, *supra*, 400, to do away with the doctrine of non-adverse possession, and to bar the action unless it has been brought within twenty years from the time when the right first accrued to the claimant or party through whom he claims in the manner pointed out by the statute. Where a party has had possession of land for twenty years, he cannot be ejected but by one who can show either that his right accrued within the twenty years in one of the modes, or that he laboured under one of the disabilities specified in the statute. And should a party after such possession of twenty years be dispossessed or discontinue his possession, he would be entitled to recover in ejectment at any time within twenty years after, for by the third clause the right to recover would be deemed to have accrued at the time of the discontinuance of the possession; so that he would not be barred by the statute, and his title by possession for twenty years would prevail against the defendants, whose title is, by sect. 34, expressly extinguished at the expiration of the period of limitation. *Supra*, 405 (*s*).

(1) [A remainder man or reversioner cannot enter so as to avoid the statute, during the continuance of the particular estate; and consequently as to them, the statute does not commence running, until after the determination of the particular estate. *Jackson* v. *Shoemaker*, 4 Johns. 390. S. P. *Wallingford* v. *Hearl*, 15 Mass. Rep. 471. *Wells* v. *Prince*, 9 Mass. Rep. 508. See also *Jackson* v. *Sellick*, 8 Johns. 262.

If a right of entry for a forfeiture of a life estate be barred by the statute, the right of entry arising afterwards on the death of tenant for life is not thereby affected. One of two rights of entry may be lost without impairing the other. *Stevens & ux.* v. *Winship & ux.* 1 Pick. 327.

or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such *entry or distress, or to bring such action, shall have first ac- *652
crued to the person making or bringing the same (*a*).

By sec. 3, That in the construction of this Act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken (*b*).

Sec. 4 provides, that the right to make an entry or distress, or bring an *action to recover land, shall, in respect of an estate in reversion or remain- *653

(*a*) The effect of the statute is, that twenty years adverse possession will be a bar to all adverse claims, with an allowance of ten years to persons under disability to pursue their rights. The limitation runs,

1. In the case of an estate in possession from the period of dispossession.
2. In the case of a person dying in possession, from the period of his death.
3. In the case of a person claiming by alienation, from the period of such alienation.
4. In the case of a future estate or interest, from the period of its falling into possession.
5. In case of a forfeiture or breach of condition, from the period of such forfeiture incurred or condition broken.

(*b*) See note (*o*), and *supra*, tit. EJECTMENT, 400, as to the effect of this clause as superseding the former doctrine of non-adverse possession.

In cases of an entry by a grantor, from whom a deed had been extorted by duress, or by his heirs, for the purpose of avoiding the deed, the period prescribed by the statute is to commence from the delivery of the deed—as the deed conveys a seisin to the grantee. *Inhabitants of Worcester* v. *Eaton*, 13 Mass. Rep. 375.]

der, be deemed to have accrued at the time when such estate shall have come into possession (*c*).

Sec. 5 provides, that the right shall be deemed to accrue to the reversioner when the estate vests in possession, by the determination of any estate in respect of which such land shall, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previous to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Sec. 6. An administrator is to claim as if he obtained the estate without interval after the death of the deceased (*d*).

Sec. 7. In the case of a tenancy at will, the right shall be deemed to accrue either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy. No mortgagee or *cestui que* trust to be deemed a tenant (*e*) at will within the meaning of the clause.

Sec. 8. In the case of a tenancy from year to year, or other period, without lease in writing, the right shall be deemed to have accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which shall last happen.

Sec. 9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20*s.* or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease, to the person rightfully entitled (*f*).

Sec. 10. No person shall be deemed to have been in possession of any land, merely by reason of having made an entry thereon (*g*) (1).

(*c*) As to the former law, see *Doe* v. *Danvers*, 7 East, 299; 1 Ves. 278.

(*d*) Before this, the time was from the time of taking out administration. See *Stanford's Case*, Cro. J. 61; *Cary* v. *Stephenson*, Salk. 421; *Murray* v. *East India Company*,[1] 5 B. & A. 204. *Supra*, tit. EJECTMENT, 407.

(*e*) The stat. 21 J. 1, did not apply where the person in possession was tenant at sufferance; *Doe* v. *Hull*, 2 Dow. & R. 38. Nor in the case of a mortgagor in possession by consent of mortgagee; *Hall* v. *Doe*, 2 B. & A. 187; *Doe* v. *Maisey*,[2] 8 B. & C. 767.

(*f*) The stat. of James did not begin to run against the remainder-man till the expiration of the lease. *Doe* v. *Danvers*, 9 East, 299.

(*g*) To make an entry or claim available to avoid a fine with proclamations, possession must now be taken, &c. The stat. 4 & 5 Ann. c. 16, s. 16, enacted, that an action should be brought within the year. See the law on this subject previous to the statute, EJECTMENT, 401, 2.

(1) [See *Bryan* v. *Atwater*, 5 Day, 181. *Jackson* v. *Ellis*, 13 Johns. 118. *Jackson* v. *Smith*, ibid. 406. *Jackson* v. *Moore*, ibid. 513. *Doe* v. *Campbell*, 10 Johns. 475. *Jackson* v. *Sears*, ibid. 435. *Jackson* v. *Thomas*, 16 Johns. 293. *Denn* v. *White*, 1 Cox's Rep. 94. *Den* v. *Morris*, 2 Halstead's Rep. 6. *Lux* v. *Pellet*, 1 Har. & J. 83, *n.* *Ridgely* v. *Ogle*, 4 Har. & M'Hen. 123. *Stanley* v. *Turner*, Cam. & Nor. 533;

[1]Eng. Com. Law Reps. vii. 66. [2]*Id.* xv. 335.

*Sec. 11. No continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action (*h*).

Sec. 12. When any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them (*i*).

Sec. 13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir (*k*).

Sec. 14. Provided, that when any acknowledgement of the title of the person entitled to any land or rent, shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgement shall have been given, shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgement shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at the time at which such acknowledgement, or the last of such acknowledgements, if more than one, was given.

Sec. 15. When no such acknowledgement as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this Act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this Act.

(*h*) See Co. Litt. 250, a. b. n. (1). By the present Act the right of entry will not be tolled by a descent cast.

(*i*) See tit. EJECTMENT, 400, as to the former law on this subject; see also 429. Whether a writing amounts to an acknowledgement of title within the above clause, is a question for the Judge and not for the jury to decide. A party in possession adversely of land being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows, "Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years." The bargain subsequently went off, and no rent was paid or lease executed. Held, that this letter was not an acknowledgement of title within the statute. *Doe* v. *Edmonds*, 6 M. & W. 295. Lands in 1786 were settled on the wife for life, with remainder to her issue in tail, and in 1818 the estate tail was enlarged into a fee, and a new estate tail carved out, with limitation in tail to the lessor of plaintiff; held, that the latter tenant in tail had the same time for bringing ejectment as the original tenant in tail had when his remainder came into possession, viz. twenty years. *Ib.*

(*k*) See Co. Litt. 242, a.

2 Hayw. 336; 1 Murphey, 14. *Borrets* v. *Turner*, 1 Taylor, 112. *Clinton* v. *Herring*, 1 Murphey, 414. *Bayley* v. *Isby*, 2 Nott & M'Cord, 343. *White* v. *Reid*, ibid. 534. *Williams* v. *M'Gee*, 1 Rep. Con. Ct. 97. *Bodley* v. *Coghill*, 3 Marsh, 615. *Dale* v. *Good*, 2 Overton's Rep. 394. *King* v. *Travis*, 2 Hayw. (Tenn.) Rep. 284. *Patton* v. *Hynes*, Cooke's Rep. 356. *Pederick* v. *Searle*, 5 Serg. & R. 240. *Mace & al.* v. *Duffield*, 2 ib. 527. *M'Coy* v. *Dickinson College*, 5 ib. 254. *Lessee of Potts* v. *Gilbert*, Circuit Court, 1 Journal of Jurisprudence, 256. *Harrington* v. *Wilkins*, 2 M'Cord, 289.] {*Lund* v. *Parker*, 3 N. Hamp. Rep. 49. *Cummins* v. *Wyman*, 10 Mass. Rep. 464.}

Sec. 16. Persons under disability of infancy, coverture, idiotcy, lunacy,
*655 *unsoundness of mind, or absence, or beyond seas, and their representatives, to be allowed ten years from the termination of their disability or death (*l*).

But by sec. 17, No action, &c. shall be brought beyond forty years after the right of action accrued (*m*).

And by sec. 18, No further time is to be allowed for a succession of disabilities (*n*).

Sec. 20. When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

Sec. 21. Where the tenant in tail is barred, the remainder-men, whom he might have barred, shall not recover (*o*).

Sec. 22. Possession adverse to a tenant in tail shall run on against the remainder-men whom he might have barred.

Sec. 23. Where there shall have been possession under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

Sec. 24. No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action (*p*).

Sec. 25. In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser (*q*).

Sec. 26. In cases of fraud no time shall run whilst the fraud remains concealed (*r*).

Sec. 27. Saves the jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise, to a party whose right may not be barred under the Act.

Sec. 28. A mortgagor is to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgement (*s*).

Sec. 29. No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumbencies and six years, or sixty years (*t*).

Sec. 30. No advowson is to be recovered but within three incumbencies, or sixty years.

Sec. 31. Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishoprics.

Sec. 33. No advowson to be recovered after one hundred years from the time of possession adversely claimed.

(*l*) Imprisonment is not included, as in the stat. of James, for it does not prevent a party from pursuing legal measures.

(*m*) This clause gives a title, notwithstanding a succession of disabilities.

(*n*) It was doubtful before this whether there might not be a succession of disabilities, provided there was no instant of time during which the disability was suspended. 4 T. R. 310; *Doe* v. *Jesson*, 6 East, 80.

(*o*) *Cotterell* v. *Dutton*, 4 Taunt. 826; 3 Cru. Dig. 493; and see, as to the effect of these and the two following clauses, Mr. Stalman's Notes to the statute.

(*p*) This clause places equitable interests on the same footing with legal estates.

(*q*) By the rule in equity no length of time bars an express trust; but this rule is applicable only as between the trustee and *cestui que* trust. *Beckford* v. *Rode*, 19 Ves. 97. (A)

(*r*) See *Brown* v. *Howard*,[1] 2 B. & B. 73; see also p. 659.

(*s*) See *Swanton* v. *Raven*, 3 Atk. 105; *Stockly* v. *Stockly*, 1 Ves. & B. 23.

(*t*) Previously ecclesiastical persons were not bound by the Statute of Limitations. Co. Litt. 115, a.; 11 Rep. 78, b.; 3 Cr. Dig. 513. As to fines under stat. 4 H. 7, c. 24, *see* 5 Cr. Dig. 232.

(A) (In cases of implied trusts in relation to personal property or to the rents and profits of real estate, where persons claiming in their own right are turned into trustees by implication, the right of action in equity will be considered as barred in six years in analogy to the limitation of similar actions at law. 4 Cow. 717. See also *Lyon* v. *Marclay*, 1 Watts, 375.)

[1]Eng. Com. Law Reps. vi. 25.

*Sec. 34. At the end of the period of limitation the right of the party out of possession to be extinguished (*u*).

Sec. 35. The receipt of rent is to be deemed the receipt of profits.

Sec. 36. Real and mixed actions, except of dower, quare impedit, and ejectment, are abolished.

Sec. 39. No descent cast, discontinuance, or warranty, shall toll or defeat a right of entry.

Sec. 40. Money charged upon land and legacies to be deemed satisfied at the end of thirty years, if there shall be no interest paid or acknowledgement in writing in the mean time.

Sec. 41. No arrears of dower shall be recovered for more than six years.

Sec. 42. No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent, or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgement of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to such subsequent mortgage, or incumbrance, may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

2. By the stat. 3 & 4 Will. 4, c. 42, s. 3, actions of debt for rent upon an indenture of demise, actions of covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, shall be commenced and sued within ten years after the end of that session, or within twenty years after the cause of such actions or suits but not after; all actions for penalties, damages, or sums of money given to the party grieved by any statute then or thereafter to be in force within one year after the end of that session, or within two years after the cause of such actions or suits but not after; actions of debt upon any award when the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an escape, or for money levied on any *fieri facias*, within three years after the end of the then present session, or within six years after the cause of such actions or suits, but not after; provided that nothing therein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

Sec. 4. Provides for the case of an infant, feme coverte, non compos, or person beyond sea, as to whom the limitation begins to run from the time of disability removed.

Sec. 5. Provides, that if any acknowledgement shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall be lawful for the party entitled to bring his action within twenty years after such *acknowledgement; or in case the person entitled to such action *657 shall, at the time of such acknowledgement, be under such disability, or the party making such acknowledgement be at the time of making the same

(*u*) See as to the effect of this clause, *supra*, 651, note (*w*), and tit. EJECTMENT, 405, (*s*).

beyond the seas, then within twenty years after such disability shall have ceased, or the party shall have returned from beyond seas; and the plaintiff in any such action on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgement, and that such action was brought within the time aforesaid, in answer to a plea of the statute.

Sec. 6. After reversal of judgment for the plaintiff, or arrest of judgment, or reversal of the defendant's outlawry, the plaintiff or his personal representative, may commence a fresh action within one year, and not after.

Sec. 7. No part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, Sark, nor any islands adjacent to any of them, being part of his Majesty's dominions, shall be deemed to be beyond seas within the Act.

By the stat. 21 J. 1, c. 16, s. 3, the following limitations are prescribed, viz. actions on the case (other than for slander), and actions for account, and actions for trespass, debt, detinue, and replevin for goods or cattle, and an action for trespass, *quare clausum fregit*, within six years next after the cause of such action or suit, and not after; and actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and actions upon the case for words, within two years next after the words spoken, and not after (*w*).

Proof on issue of actio non accrevit.

On issue taken on the plea of this statute (*x*), that the cause of action accrued (*y*) within six years, the burthen of proof lies on the plaintiff, and he must prove a cause of action within the limit (*z*). After proof of the cause of action itself, he must show the commencement of the action according to the issue taken. Where the issue was on the question whether the cause accrued within six years of the *exhibiting of the bill*, the memorandum on the record was held to be evidence to show the day when the bill was exhibited (*a*).

Commencement of the action.

*658 Proof of the cause of action, within, &c. (A).

*Where the bill is entitled generally of the term, it has relation to the first day of the term (*b*).

Where the declaration had been filed in the vacation, and was intitled

(*w*) The statute will bar a foreign debt. A bill having been accepted in France by a Scotchman, the acceptor left France, and was absent till his death; but after he had left France, a suit was instituted, and judgment obtained against him in a French court; six years afterwards elapsed before a proceeding instituted in a Scotch court; it was held that the debt was barred, being no longer enforceable in the country according to the law of which it was sought to be enforced. *Don* v. *Lippman*, 4 Cl. & F. 1. The plea of the statute was held to bar an action in this country, brought on an instrument of obligation in Scotland, although by the law of that country the cause of action thereon continued for forty years from the execution of it. *British Linen Com.* v. *Drummond*,[1] 10 B. & C. 903.

(*x*) The statute must be pleaded by the defendant (as to a set-off, see tit. SET-OFF). But although the statute be not pleaded, yet if more than six years have elapsed, it may still be left to the jury to presume from lapse of time, under the special circumstances, that the debt has been satisfied. See 2 Starkie's C. 407, and tit. PAYMENT. The statute bars the remedy, not the debt. *Higgins* v. *Scott*, 2 B. & A. 413. And therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lord's Act, but at a subsequent period a *fi. fa.* issued against his goods, and the sheriff levied the damages and costs; it was held, that the attorney (though he had taken no step in the cause within six years) had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods. *Higgins* v. *Scott*,[2] 2 B. & Ad. 413.

(*y*) A limitation of action for anything *done*, &c. does not, it seems, apply to an action for money had and received. *Umphelby* v. *Maclean*, 1 B. & A. 42.

(*z*) *Hurst* v. *Parker*, 1 B. & A. 92.

(*a*) And now see the Process Act, tit. HUNDRED.—TIME. Formerly the plea stated the day when the bill was exhibited. 2 Will. Saund. 123, n. 5. (*b*) 1 T. R. 116. [See Yelv. 21, note (2).]

(A) (The time the cause of action may be said to accrue is that when a party has a right of action against another. *Astor V. Girard*, 4 Wash. C. C. R. 711. A statute of limitations affects only the remedy and not the validity of the contract. *Andrews* v. *Heriot*, 4 Cow. 508. And a plea of the statute of limitations of the state where the contract was made, is no bar to a suit in a foreign tribunal, but such plea of

[1]Eng. Com. Law Reps. xxi. 194. [2]*Id.* xxii. 113.

of the preceding term, it was held to be competent to the defendant to prove that the action was in fact commenced after the expiration of the six years (*c*).

If the plaintiff, to a plea of the statute, reply a writ (*d*) sued out within the time, and the defendant, by his rejoinder of *nul tiel* record, deny the existence of such a writ, the trial is by the Court on inspection of the record (*e*) (1).

If the plaintiff reply the writ *generally*, the defendant may in his rejoinder show the time when it really issued, and plead that the cause of action did not accrue within six years from that date. In this case (*f*), if the plaintiff in his sur-rejoinder allege a cause of action within the six years, and take issue on the fact, the day in the rejoinder will be taken to be the commencement of the action.

If the cause has been removed by *habeas corpus* from an inferior court, and after a declaration *de novo* in the superior court, the defendant plead that the cause of action did not accrue within the six years next before the *teste* of the *habeas corpus*, the plaintiff may reply the suit below, and show it to have been commenced within time to save the statute (*g*). So if the plaintiff having commenced a suit within due time die (*h*), or being a feme sole at the commencement of the action, marry; the representative in the one case, or husband and wife in the other, if they *commence* a new action within a reasonable time afterwards (and this is usually understood to be a year), may reply the fact to a plea of the statute (2). The proof

(*c*) *Snell* v. *Phillips*, Peake's C. 209. The defendant might show by the writ that it was not sued out till the 20th of November, the memorandum being general of Michaelmas term. *Granger* v. *George*,[1] 5 B. & C. 149, *supra*, note (*a*).

(*d*) A special *testatum copias*, though irregular, is a sufficient commencement to save the statute. *Beardmore* v. *Rattenbury*,[2] 5 B. & A. 452. *Darwin* v. *Lincoln*, 5 B. & A. 444.

(*e*) *Smith* v. *Bower*, 3 T. R. 662. And regular continuances must be shown on the record. [It is only when the writ and declaration disagree, that it is necessary to enter the continuances, in order to prevent the statute bar. *Schlosser* v. *Lesher*, 1 Dallas, 412.] An attachment of privilege is not a continuance of a bill of Middlesex, to save the statute. Ibid. (*f*) Vide *supra*, 449.

(*g*) *Matthews* v. *Phillips*, Salk. 424; for although this suit above be no continuance of the suit below, yet the plaintiff has legally pursued his right.

(*h*) *Forbes* v. *Ld. Middleton*, Willes, 259, note E; Salk. 424. [*Oothout* v. *Thompson*, 20 Johns. 277.]

the statute of the state where the suit is brought is available. Id.; 3 Johns. Rep. 263; 3 Johns. Chan. Rep. 190, 218. *Lincoln* v. *Battelle*, 6 Wend. 475. *Ruggler* v. *Keeler*, 3 Johns. Rep. 270. *Nash* v. *Tapper*, 1 Caine's, 402.)

(1) [Where a plaintiff, by issuing a writ, has saved the statute bar, and the writ has not actually abated, it is not necessary, in Pennsylvania, that the action should be prosecuted within one year after the limited time has elapsed. *Schlosser* v. *Lesher*, 1 Dallas, 411. See *Brown's Ex'rs* v. *Putney*, 1 Wash. 302. It is not a sufficient replication to a plea of the statute, that the plaintiff commenced a previous action within the period allowed by the statute, and, after the expiration of the period, was nonsuited by order of the court. *Harris* v. *Dennis*, 1 Serg. & Rawle, 236. S. P. *Montgomery* v. *Caldwell*, 4 Bibb, 305. *Peyton* v. *Carr*, 1 Randolph, 436. *Contra*, *Shillington* v. *Allison*, 2 Hawks, 347. *Lynch* v. *Withers*, 2 Bay, 118. The statute is a bar to an action brought within a year after a former action had been *struck off*. *Cawood* v. *Whetcroft*, 1 Har. & J. 103. *Hallis* v. *Waddy*, 2 Munf. 511. S. P. Unless a second writ appears from the record to be an *alias*, it cannot, in Kentucky, be connected with a former writ, so as to avoid the statute. *Hume* v. *Dickinson*, 4 Bibb, 276. See *Jackson* v. *Horton*, 3 Caines' Rep. 127. Where an action is brought in due time after the reversal of a judgment for the same cause of action, it is saved out of the statute 21 Jac. 1, c. 16. *Drane* v. *Hedges*, 1 Har. & M'Hen. 518. So where judgment is arrested. *Schnertzell* v. *Chapline*, 3 ib. 439. The time within which the new action must be commenced, is to be computed from the day on which judgment was reversed, and not from the end of the term of the court. *Edwards* v. *Davis*, 4 Bibb, 211.]

(2) [In Maryland, the statute is no bar where the suit is brought in time, which abated by the defendant's death, there being no letters testamentary taken out—nor is it barred until the expiration of three years, if a suit is brought without delay against the executor. *Parker* v. *Fassit*, 1 Har. & J. 339. See also *M'Lel'an* v. *Hill*, Cam. & Nor. 479. *Jones* v. *Brodie*, 2 Murphey, 594. A replication to the plea of the statute, that the suit was instituted within one year after the death of the intestate, and that five years after the action accrued had not expired at the time of the intestate's death, is not, in Kentucky, a sufficient answer to the plea. *Langford* v. *Gentry*, 4 Bibb, 468. A writ, taken out against one of several administrators, will not prevent the statute from running against the debt. *Hopkins* v. *M'Pherson's Adm'r*, 2 Bay, 194.]

[1]Eng. Com. Law Reps. xi. 185. [2]*Id.* vii. 137.

will be either by inspection of the record by the Court, or by evidence of the cause of action within the time limited, according to the nature of the rejoinder, which may either deny the existence of such a record, or deny that the cause of action arose within the time.

In the case of trespass *quare clausum fregit*, and, as it seems, in other actions of *tort*, it is not sufficient to prove an acknowledgement of the trespass or *tort*, and a promise to make compensation within the limit (*i*). It has even been held, where there was no distinct evidence as to the time of committing the trespass, and it was doubtful whether it had been committed within six years, that such an acknowledgement by the defendant, and a promise to make compensation, was not evidence to go to a jury of a trespass within the six years (*k*). Although fraud will take a case out of
*659 the *statute, yet the statute will be a bar, if six years elapse after the discovery of the fraud (*l*) (1).

In an action against an attorney for negligence, it has been held that the statute runs from the time of the negligence, and not from the time when special damage accrued in consequence of such negligence (*m*) (A) (2).

(*i*) Salk. 424. *Hurst* v. *Parker*, 1 B. & A. 92.

(*k*) Ibid. Note, there was no acknowledgement of a trespass committed within six years of the commencement of the suit, for even although the acknowledgement might prove a cause of action then existing, it does not follow that it existed at a subsequent time.

(*l*) Per King, Ld. C. in *The South Sea Company* v. *Wymondsell*, 3 P. Wms. 143. *Bree* v. *Holbech*, Doug. 630. A law agent was held to be responsible for negligence after a lapse of twenty-five years, and acquiescence in the loss and settlement of account and discharge by the client's representative; it appearing that the defendant had concealed the real state of the transaction, and had not communicated the insolvent state of the parties with whom he dealt. *Macdonald* v. *Macdonald*, 1 Bligh, 315. It is the policy of the statute to prevent the discussion of title where evidence has perished: even in cases where it is not too late to bring ejectment, courts of equity have refused to interfere because evidence has been lost; in a suit by an heir to set aside a deed as fraudulent, it was held that the cause of action arose at the moment when the deed was executed, or as soon after as the parties interested were apprised of the facts. *Whalley* v. *Whalley*, 3 Bligh. 12.

(*m*) The declaration stated the retainer of the defendant, an attorney, to ascertain whether certain mortgages, and a warrant of attorney, were a valid and sufficient security for a loan, and alleged his misrepresentation and misconduct in the premises, and that the securities afterwards turned out wholly insufficient; to which the Statute of Limitations was pleaded; it appeared that the loan was made, and securities were given in 1814, and the interest regularly paid until 1820; it was held that the allegation of special damage did not alter the gist of the action, which was the misconduct of the defendant, which having taken place more than six years since, although the discovery was only recent, the plea was a good bar. *Howell* v. *Young*,[1] 5 B. & Cr. 259; and 8 D. & Ry. 14. And see *Bree* v. *Holbeck*, Doug. 630. *Fetter* v. *Beal*, 1 Salk. 11. And *Brown* v. *Howard*,[2] 2 B. & B. 73. But see *Compton* v. *Chandless*, *one*, *&c.* 4 Esp. C. 18. See *Hickman* v. *Walker*, Willes, 27. *Littleboy* v. *Wright*, 1 Lev. 69. *Peake* v. *Ambler*, W. Jones, 329. 15 Vin. Ab. tit. *Limitation*.

(A) (It seems that actions on the case, though not within the terms of the proviso Act of Limitations, are within its equity, and that it should be so construed as to embrace actions on the case. *Bank of the United States* v. *M'Kenzie*, 2 Brockenb. C. C. R. 393.)

(1) [A plea of the statute may be avoided by replying that the cause of action had been fraudulently concealed by the defendant, until within the time limited by the statute before action brought. *First Massachusetts Turnpike Co.* v. *Field & al.* 3 Mass. Rep. 201. So in an action for fraud, by replying ignorance of the fraud until within the same time. *Homer* v. *Fish & al.* 1 Pick. 435. S. P. *Jones* v. *Conoway & al.* 4 Yeates, 109. See also *Croft* v. *Arthur*, 3 Desauss. 223. *Harrell* v. *Kelly*, 2 M'Cord, 426. But unless there be fraudulent concealment, the statute is a bar. *Bishop* v. *Little*, 3 Greenl. Rep. 405.

This doctrine is denied in New York, North Carolina, and Virginia, where the remedy in cases of fraud, &c. is confined to the court of chancery. *Troup* v. *Ex'rs of Smith*, 20 Johns. 33. *Oothout* v. *Thompson*, ibid. 278, *Hamilton* v. *Sheppard*, 2 Murphey, 115. *Thompson* v. *Blair*, ibid. 583. *Callis* v. *Waddy*, 2 Munf. 511.

See on this subject, Sel. Cas. in Chan. 34. 3 Atk. 538. 1 Bro. P. C. 445. 2 Scho. & Lef. 634.]

(2) [In an action against an officer for an insufficient return upon an original writ, by reason of which the judgment rendered in the suit is reversed, the statute begins to run from the time of such return, and not from the time of the reversal of the judgment. *Miller* v. *Adams*, 16 Mass. Rep. 456. But in an action for taking insufficient bail, the statute begins to run from the return of *non est inventus* upon the execution against the principal. *Mather* v. *Green*, 17 Mass. Rep. 60. Where the letters of guardianship of a spendthrift were revoked, and the spendthrift and his heirs avoided sales of real estate, the license having been granted without

[1]Eng. Com. Law Reps. xi. 219. [2]*Id.* vi. 25.

So on an implied promise to indemnify, the statute runs from the damnification (*n*).

In an action for words actionable in themselves, the statute runs from the time of the speaking, although they have occasioned special damage (*o*), and the action must be brought within two years. Where special damage is the gist of the action, the statute runs from the time of the special damage only; and the limitation is six years (*p*).

In an action for the consideration money for an annuity avoided by the grantor, the limitation runs from the time when the grantor made his election (*q*).

Where the limitation is as to anything *done* under the Act, if the action be *trespass*, it must be brought within the limit from the act of trespass; but if the action be case for consequential damage, the time runs from the time of the damage (*r*).

(*n*) *Huntley* v. *Sanderson*, 3 Tyr. 469.

(*o*) According to the stat. 21 Jac. 1, c. 16, s. 3. 6 Bac. Ab. 241. Cro. Car. 193. Salk. 206. 1 Sid. 95.

(*p*) Ibid. An action for *scan. mag.* may be brought within six years. Cro. Car. 535.

(*q*) *Cowper* v. *Godmond*,[1] 9 Bing. 748. The statute does not run till the action is maintainable. Ib.

(*r*) *Roberts* v. *Read*, 16 East, 215. And see *Sutton* v. *Clarke*,[2] 6 Taunt. 29. An illegal seizure was made by a Canal Company for rates, and a sale was afterwards made of coal, &c. in respect of the lessee of the colliery; the limitation runs from the time of seizure; but in respect of a mortgagee out of possession, and his administrator, from the sale. *Fraser* v. *Swansea Nav. Comp.*[3] 1 Ad. & Ell. 354. Where trespass is barred by limitation, ejectment is still maintainable. Per Parke, J., *Trotter* v. *Simpson*,[4] 5 C. & P. 60. In *Gillon* v. *Boddington*, 1 Ry. & M. C. 161, the defendants had undermined a wall of a wharf, so that on any great tide the water washed away some of the materials of the wall, more than six months (the period of limitation fixed by a Docket Act) before the action, but the wall fell within the six months; the action was held to be maintainable, although the wall was undermined in the lifetime of the plaintiff's father, and where the plaintiff had only an interest in remainder. Note, that the declaration alleged the plaintiff to be seized in fee of a third part, &c. whilst the wall was kept and continued, and suffered and permitt d to be, remain and continue undermined. From the language of the Court in the case of *Umphelby* v. *Maclean*, 1 B. & A. 42, it should seem that where the limitation is as to anything *done*, there must, according to the expression of Lord Ellenborough, be a *positive act done*. See also *Gaby* v. *Wilts & Berks Canal Com.* 3 M. & S. 580. And see *Blakeman* v. *Glamorgan Canal Com.* 3 Y. & J. 60; where it seems to have been doubted whether a matter of complaint arising from omission and nonfeasance would be within the protection of the restrictive clause. In that case the Act contained a limiting clause as to anything *done* within six calendar months before action brought, unless there was a *continuation;* and it was held, that the latter words meant an uninterrupted unintermitting damage, and did not apply to a damage which had ceased previous to the period of limitation. In *Smith* v. *Shaw*,[5] 10 B. & C. 277, Bayley, J. observed that it was not necessary to go to the length of *Sellick* v. *Smith*,[6] 2 C. & P. 284, nor to say whether a mere nonfeasance would be an act done within the meaning of such words; a point much doubted in the case of *Blakemore* v. *Glamorganshire Canal Com.* In *Smith* v. *Shaw*, above cited, the giving of directions by a dock-master as to the transporting a vessel into dock, was held to be a *thing done*. In *Sellick* v. *Smith*, it was held (at *nisi prius*, and afterwards by the Court of Common Pleas,) that a refusal by a Dock Company to deliver up wines, was within the terms of a similar clause. In an action by a reversioner against a surveyor of the highways, for *building* a wall on the plaintiff's close, and *separating* a portion which was thrown into the road, the digging of the soil and erecting the wall had been done more than three months before the action brought, but the wall had been subsequently, and within that period, raised higher; it was held that the action was too late. *Wadsworth* v. *Harley*,[7] 1 B. & Ad. 391. Where the wall had been commenced more than three months before the action brought, but not completed until within that period, held that the plaintiff was entitled to recover for any part of the trespass within this time; or if there had been any encroachment, might bring ejectment. *Trotter* v. *Simpson*,[8] 5 C. & P. 51. Action against commissioners under a local Act requiring the action to be brought within six months after *the matter or thing done*, the grievance alleged was an injury to the plaintiff's house in digging a sewer, whereby the foundation sank and the walls were cracked, and the plaintiff was disturbed in the enjoyment and customers prevented from having access to the house; held that the action not being brought within six months after the digging the sewer which occasioned the crack in the wall, the action could not be sup-

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any authority, and thereupon the guardians were compelled upon their covenants to refund the money paid by the purchasers, it was held, that the guardians had a right of action against the spendthrift's administratrix for the amount refunded, as for so much paid by them for him upon a consideration which had failed; that this right did not accrue until the sales were avoided, and the money refunded, so that the statute of limitations began to run from that time, and not from the time of settling their guardianship accounts. *Shearman* v. *Akins*, 4 Pick. 283.]

[1] Eng. Com. Law Reps. xxii. 452. [2] *Id.* i. 298. [3] *Id.* xxviii. 105. [4] *Id.* xxiv. 207. [5] *Id.* xxi. 75. [6] *Id.* xiii. 66. [7] *Id.* xx. 406. [8] *Id.* xxiv. 207.

*Such a limitation does not, it seems, extend to an action for money had and received (*s*).

In trover the statute runs from the conversion, though it were not known to the plaintiff, provided no means have been used to conceal it (*t*). The plaintiff's want of knowledge makes no difference (*u*).

In an action of *assumpsit* the statute runs from the time of the breach of promise (*x*). On a promise to indemnify, from the time of damnification (*y*).

Non assumpsit, &c.

Where the cause of action and promise are contemporary, as in cases of **indebitatus assumpsit*, the plea of *non assumpsit infra sex annos* is proper; but where the cause of action arises subsequently to the promise, as in cases of executory contracts, the plea of *non accrevit infra sex annos* is the proper plea; for although the promise was not made within the limit, the cause of action accrued within the time, which is sufficient to save the statute (*z*).

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Where goods are sold on an agreement for a fixed credit, the statute runs from the expiration of the time of credit (*a*).

Where money lent is the consideration for a bill of exchange, payable on a future day, or for a promise of repayment at a future day, the latter is the day from which the limitation is to be reckoned (*b*). And where a note is payable at a specified time after sight, the statute does not begin to operate till that time has expired after presentment of the note (*c*) (1).

Where a note is payable on demand, the statute runs from the date (*d*).

ported; the continuance of the crack was not a continuing damage nor repetition of the injury. And that the notice of action and declaration not alleging the *keeping up the shores* as a distinct ground of injury, the action could not be sustained in that respect although continued up to within the time limited for the action. *Lloyd* v. *Wigney*,[1] 6 Bing. 489.

(*s*) *Umphilby* v. *Maclean*, 1 B. & A. 47.

(*t*) *Granger* v. *George*,[2] 5 B. & C. 149. The defendant had delivered up, on the 10th November 1808, to the plaintiff's assignees, the box of papers, &c. for which the action was brought; held, that not having had them in his possession within that period, there could have been no conversion, and that the plea of the Statute of Limitations was a bar, and that the want of knowledge in the plaintiff made no difference. It appearing also that the plaintiff's writ was returnable on the 29th November, although filed generally as of Michaelmas term; held, that the Court was bound to consider the bill as exhibited on that day.

(*u*) 1b. and *Short* v. *Macarthy*,[3] 3 B. & A. 626. *Brown* v. *Howard*,[4] 2 B. & B. 73.

(*x*) *Brown* v. *Howard*,[4] 2 B. & B. 73. *Short* v. *Macarthy*,[3] 3 B. & A. 626. *Battley* v. *Falkner*,[5] 3 B. & A. 288. *Wheatly* v. *Williams*, 1 M. & W. 533. *Wittersheim* v. *Countess of Carlisle*, 1 H. B. 631. *Howell* v. *Young*,[6] 5 B. & C. 259, *supra*.

(*y*) *Huntley* v. *Sanderson*, 1 C. & M. 467.

(*z*) See 1 Saund. 33, n. 2.; 283, n. 2. 2 Saund. 63, c. n. 6. *Gould* v. *Johnson*, 2 Lord Ray. 838. Salk. 422. *Buckler* v. *Moor*, 1 Vent. 191. [*Banks* v. *Coyle*, 2 Marsh, Ken. R. 562.] Debt for goods sold and delivered, plea *actio non accrevit infra sex annos;* evidence of goods delivered beyond the six years, but of an acknowledgement within the six years. Bayley, J. held that this did not take the case out of the statute, but that the plaintiff was entitled to recover on the count on an account stated. York Sp. Ass. 1827.

(*a*) Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option. Held, Parke, J. *dubitante*, that this was in effect a nine months' credit, and consequently that an action for goods sold and delivered, commenced within six years from the end of the nine months, was in time to save the Statute of Limitations. *Helps & another* v. *Winterbottom*,[7] 2 B. & Ad. 431.

(*b*) *Wintersheim* v. *Countess of Carlisle*, 1 H. B. 631; which was an action by the payee against the drawer of a bill of exchange, to secure a sum lent by the payee to the drawer; and it was held that the statute began to operate, not from the loan, but from the time when the bill became due. And see Lord Holt's *dictum*, 3 Bac. Ab. 602.

(*c*) *Holmes* v. *Kerrison*, 2 Taunt. 323. *Savage* v. *Aldren*,[8] 2 Starkie's C. 312.

(*d*) *Norton* v. *Ellams*, 2 M. & W. 461. *Christie* v. *Fonsick*, Sel. N. P. 121. But see Sel. N. P. 344, 7th edit.

(1) [Nor against a parol guarantee of the sufficiency of a mortgage, given to secure a bond payable by instalments, until six years after the last instalment has become due. *Overton* v. *Tracy*, 14 Serg. & R. 311.]

[1]Eng. Com. Law Reps. xix. 145. [2]*Id.* xi. 185. [3]*Id.* v. 403. [4]*Id.* vi. 25. [5]*Id.* v. 288. [6]*Id.* xi. 219. [7]*Id.* xxii. 116. [8]*Id.* iii. 329.

Where a note is payable at so many months after demand, the statute runs from the demand and not from the date (*e*) (A).

Where the cause of action does not arise until request made, the statute runs from the time of the request (*f*).

A factor impliedly contracts to account for such goods consigned to him for sale as he has sold, to pay over the proceeds, and to deliver the residue unsold on demand. An action for not accounting does not lie until a demand be made, and from that time the statute runs (*g*). But in such cases, after a reasonable time has elapsed, the jury may presume that the consignor has made a demand, and that the factor has accounted (*h*).

Where a special damage has resulted from a breach of contract, the limitation is to be computed from the time (*i*) of the breach of contract, and not of the special damage.

*On an agreement to indemnify the plaintiff against a distress, and all costs of action by replevying, the statute runs from the time of payment, not from the time of the delivery of the bill of costs (*k*). *662

Where six years had elapsed since the committing of a trespass by cutting down trees, it was held that an action could not be maintained for the produce of the sale of the trees within the six years (*l*).

Where the defendant had once been tenant to the plaintiff, and no notice to quit had been given, but the defendant had not occupied, paid rent, or done any act within the last six years from which a tenancy could be inferred, it was held that the Statute of Limitations was a good defence (*m*).

A debt is barred by the statute, although a warrant of attorney be given as a collateral security (*n*).

Upon issue taken upon the replication of a promise within six years, the

(*e*) *Thorpe* v. *Booth*,[1] 1 Ry. & M. C. 388. *Thorpe* v. *Coombe*,[2] 8 D. & Ry. 347. Per Ld. Hardwicke, 1 Ves. 344. *Christie* v. *Fonsick*, Sel. N. P. 137, 344, 7th ed.; see *Harris* v. *Ferrand*, Hardr. 36. *Buckler* v. *Moor*, 1 Mod. 89. 15 Vin. Ab. tit. *Limitations*, pl. 14. A bill payable to one who dies intestate, being accepted after his death, the statute runs from the date of the letters of administration; for till then there is no cause of action in any one. *Murray* v. *East India Co.*[3] 5 B & A. 204. *Pratt* v. *Swaine*,[4] 8 B. & C. 285. See *Stamford's Case*, Cro. J. 81; *Cary* v. *Stephenson*, Salk. 421; and a special replication is unnecessary. [5]5 B. & A. 204. To a declaration on a debt to the bankrupt, and promise to his assignee, a plea that the action did not accrue to the bankrupt within six years, held bad, for it excludes the plaintiff from proof of a promise to himself. *Skinner* v. *Rebow*, Str. 919.

(*f*) *Gould* v. *Johnson*, 2 Salk. 422. (*g*) *Topham* v. *Braddick*, 1 Taunt. 572.

(*h*) Ibid.; and fourteen years was held to be a reasonable time.

(*i*) *Battley* v. *Faulkner*,[6] 3 B. & A. 290, where the damage was, the being obliged by a suit in Scotland to pay damages to a vendee on the resale to him of goods originally sold by the defendant to the plaintiff. So in *Short* v. *M'Carthy*,[7] 3 B. & A. 626. {And *Howell* v. *Young*,[8] 2 Carr. & Payne, 238.} But a plea to an action for deceitfully delivering goods to the plaintiff, as the proper goods of the defendants, by means of which they were subsequently damnified, that the defendants were not guilty within six years, was held to be bad on special demurrer. *Dyster* v. *Battye*,[9] 3 B. & A. 448. And see Ld. Ellenborough's observations in *M'Fadzen* v. *Olivant*, 6 East, 387.

(*k*) *Collinge* v. *Heywood*, 10 Ad. & Ell. 633; 1 P. & D. 502.

(*l*) *Hughes* v. *Thomas*, 13 East, 474. The case was decided on the ground, that if a tenant for life levy a fine, and thus acquire a base fee, and cut down timber before the entry of the reversioner and owner of the inheritance, to avoid the fine and base fee, the reversioner cannot recover the value, the entry having no relation during the continuance of the base fee. And see *Berrington* v. *Parkhurst*, 13 East, 489; and *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433.

(*m*) *Leigh & Wife* v. *Thornton*, 1 B. & A. 625. (*n*) *Clarke* v. *Figes*,[10] 2 Starkie's C. 234.

(A) (The statute begins to run against a note payable on demand from the day of its date; but not so as to a note payable at a given day after demand; in the latter case it commences running only from the time of the demand. *Wiseman* v. *The Mohawk Ins. Co.* 13 Wend. 267. So where an action will not lie without a previous demand. *Little* v. *Blunt*, 9 Pick. 488. See also, *Larason* v. *Lambert*, 7 Halsted, 247. And there is no difference between a note payable "when demanded" and one payable on demand; in both cases the statute of limitations begins to run from the date of the note. *Kingsbury* v. *Butler*, 4 Vermont R. 458.)

[1]Eng. Com. Law Reps. xxi. 468. [2]*Id.* xvi. 344. [3]*Id.* vii. 66. [4]*Id.* xv. 219. [5]*Id.* vi. 66. [6]*Id.* v. 288. [7]*Id.* v. 304. [8]*Id.* xii. 107. [9]*Id.* v. 344. [10]*Id.* iii. 330.

Replication of a promise within six years.

plaintiff may give in evidence, not only an express promise within six years (*o*), to pay the debt, but even an acknowledgement that the debt still subsists, for the admission is evidence of a *new promise* to pay the debt (*p*); or the law implies an *assumpsit*, or creates a new debt (*q*); or the acknowledgement rebuts the presumption raised by the statute, that the debt has been paid (*r*). But great mischief and inconvenience have resulted from permitting the salutary provisions of the statute to be defeated by mere oral acknowledgements; a practice by which the statute itself was nearly in effect defeated, and probably more encouragement was given to vexatious litigation and perjury than if it had been altogether repealed (*s*). These

(*o*) A promise made after the action brought, is, it seems, sufficient. *Yea* v. *Foursaker*, 2 Burr. 1099; *secus*, in the case of an infant, *Thornton* v. *Illingworth*, K. B. sitt. in Banc. after Easter T. 1824. Or in any case where the promise creates an entirely new debt. Per Bayley, J., *Holt* v. *Brien*,[1] 4 B. & A. 252.

(*p*) So considered in *Hyeling* v. *Hastings*, Ld. Raym. 422. And by Ld. Ellenborough, in *Hurst* v. *Parker*, 1 B. & A. 93, and P. C. in *Ward* v. *Hunter*,[2] 6 Taunt. 210; and *Pittam* v. *Foster*,[3] 1 B. & C. 248. And see *Boydell* v. *Drummond*, 2 Camp. 162. *Gibbons* v. *M'Casland*, 1 B. & A. 690. The law, where there is a sufficient consideration, presumes a promise in fact, but the plaintiff may rely on any promise actually made, though long after the executed consideration; and a mere admission is evidence of such a promise on the account stated. See 2 H. B. 563; and *Tanner* v. *Smart*,[4] 6 B. & C. 603.

(*q*) See the observations of Ld. Ellenborough in *Bryan* v. *Horseman*, 4 East, 599. It is not necessary that the acknowledgement should be made to the plaintiff. *Halliday* v. *Ward*, 3 Camp. 32. *Mountstephen* v. *Brooke*,[5] 3 B. & A. 141. *Peters* v. *Brown*, 4 Esp. C. 46.

(*r*) The Statute of Limitations (it has been said) proceeds on a presumption that where a debt is really due, a party is not likely to suffer six years to elapse without procuring an acknowledgement of it. *Rowcroft* v. *Lomas*, 4 M. & S. 457. See the observations of Bayley, J. Ibid. 461; and of Lord Ellenborough, in *Thompson* v. *Osborne*,[6] 2 Starkie's C. 98. But now see *Tanner* v. *Smart*, *infra*, 667.

(*s*) It is impossible to read the conflicting cases upon this subject without regretting that the Courts have ever departed from the plain letter of this wholesome statute. [*Cowan* v. *Magauran*, Wall. Rep. 66.] {*Lord* v. *Shaler*, 3 Conn. R. 131.} The following acknowledgements have been held to be sufficient: "I do not consider myself as owing Mr. *B.* a farthing, it being more than six years since I contracted; I have had the wheat, I acknowledge, and I have paid some part of it, and 26*l.* still remains due." There the Court thought themselves bound by the long train of previous decisions to hold that the acknowledgement was sufficient. *Bryan* v. *Horseman*, 4 East, 599, and see *Rucker* v. *Hannay*, Ibid. 604. *Coltman* v. *Marsh*, 3 Taunt. 380. *Leaper* v. *Tatton*, 16 East, 420. *Clarke* v. *Bradshaw*, 3 Esp. C. 157; but see *Bicknell* v. *Keppell*, 1 N. R. 20, *infra*. So where the defendant said, "Prove your debt, and I will pay you." [*Seaward* v. *Lord*, 1 Greenleaf, 163.] Or, "I am ready to account; but nothing is due;" and even slighter acknowledgements than these have been held to be sufficient to take the case out of the statute. Per Ld. Mansfield, C. J. in *Trueman* v. *Fenton*, Cowp. 544.—So where the defendant meeting the plaintiff, said, "What an extravagant bill you have sent me," per Ld. Kenyon, *Lawrence* v. *Worrall*, Peake's C. 93, it was held to be an acknowledgement that some money was due. So where the debtor referred his creditor to his trustee (*Baillie* v. *Lord Inchiquin*, 1 Esp. C. 435). So where in an action on a promissory note, and no other debt appearing, the defendant wrote as follows, "Business calls me to *L.*; should I be fortunate in my adventures you may depend on seeing me in *B.* in less than three weeks; otherwise, I must arrange matters with you as circumstances will permit." *Frost* v. *Bengough*,[7] 1 Bing. 266; and see *Colledge* v. *Horne*,[8] 3 Bing. 119. So where a surety on a promissory note, on a demand within six years, said, "You knew I had not any of the money myself, but I am willing to pay half of it," (B. N. P. 149; 2 Burr. 1099); there the acknowledgement was made after the commencement of the action. So, although in making the admission, the defendant denied his liability in point of law. As where being sued as acceptor of a bill of exchange, he acknowledged his acceptance, and that he had been liable, but denied his liability then, because it was out of date, it was held to be sufficient to take the case out of the statute. (*Leaper* v. *Tatton*, 16 East, 420.) So where the defendant said that the plaintiff had paid money for him twelve years ago, but that he had since become a bankrupt, and been discharged, as well by law as from the length of time since the debt accrued, Ld. Kenyon is said to have held, that it was sufficient to take the case out of the statute. *Clarke* v. *Bradshaw*, 3 Esp. C. 155; *qu. tam. & vid. Owen* v. *Woolley*, B. N. P. 148. So where the defendant said, "If others pay, I will pay." (*Loweth* v. *Fothergill*, 4 Camp. 184.) So where the defendant, on a demand being made for seamen's wages, for services which took place during a Russian embargo, said, "I will not pay, there are none paid; and I do not mean to pay unless obliged; you may go and try;" for there was proof of the service, and an acknowledgement by the defendant that it had not been paid for. (*Dowthwaite* v. *Tibbut*, 5 M. & S. 75). So where the defendant said, "If you had presented the protest it would have been paid," no protest being necessary. *De la Torre* v. *Barclay*,[9] 1 Starkie's C. 7.—In ordinary cases an acknowledgement by the wife will not be evidence against the husband. In an action against *A.* and his wife, on a note made by the wife and *C.* before her marriage, it was held that the acknowledgement of the wife after marriage was not sufficient to take the case out of the statute. *Pittam* v. *Foster*,[10] 1 B. & C. 248.

[1] Eng. Com. Law Reps. vi. 418. [2] *Id.* i. 359. [3] *Id.* viii. 67. [4] *Id.* xiii. 373. [5] *Id.* v. 245. [6] *Id.* iii. 264. [7] *Id.* viii. 316. [8] *Id.* xi. 59. [9] *Id.* ii. 270. [10] *Id.* viii. 67.

*evils have been in a great measure corrected by two measures, the one *legislative*, the other *judicial*.

But an acknowledgement by a wife will be sufficient (1), if she has been entrusted with the management of the business out of which the debt arises. (*Palethorp* v. *Furnish*, 2 Esp. C. 511, n. cor. Lord Mansfield, 2 Freem. 178; *Anderson* v. *Sanderson*,[1] 2 Starkie's C. 204, cor. Richards, C. B., York, 1817. *Supra*, tit. Admissions.) So in general as to an acknowledgement by an agent (*Burt* v. *Palmer*, 5 Esp. C. 145. *Supra*, tit. Agent.) So a conditional promise to pay by instalments, if time should be given, has been held to take the case out of the statute (*Thompson* v. *Osborne*,[2] 2 Starkie's C. 98); but in the previous case of *Davis* v. *Smith*, 4 Esp. C. 36, it was held by Lord Kenyon that it was not enough to prove a promise to pay when the party should be able, without proving that he was able at the time of the action. [S. P. *Robbins* v. *Otis*, 1 Pick. 368. *Rend* v. *Wilkinson*, Circuit Court, 2 Browne's Rep. App. 16.] And it is otherwise where the defendant, admitting the receipt of the money, denies the debt in *fact;* as where the defendent, acknowledging the receipt of money, claims it as a gift (*Owen* v. *Woolley*, B. N. P. 148). So if the defendant, insisting on the statute, deny the debt, as where he said, "I owe you not a farthing, it is six years since," this is not evidence to be left to a jury (*Coltman* v. *Marsh*, 3 Taunt. 380). See also *Hellings* v. *Shaw*, 1 Moore, 340; where the plaintiff, in an action on a promissory note, proved that within the six years he showed the note to the defendant, who said, "You owe me more money; I have a set-off against it;" no set-off having been pleaded, it was held by Bayley and Holroyd, Justices, Best, J. *dissentiente*, that this was not a sufficient acknowledgement to take the case out of the statute (*Swan* v. *Sewell*, 2 B. & A. 759). [See *White* v. *Potter*, Coon. R. 157.] [*Bangs* v. *Heall*, 2 Pick. R. 368.] Where the defendant said, "I have paid the debt, and will send a copy of the receipt," his omission to do so was held to be sufficient to go to a jury; Holt's C. 381,[3] per Gibbs, C. J. But see *Birk* v. *Guy*, 4 Esp. C. 184, where the defendant said, "I have paid the debt and will send a copy of the receipt;" and Lord Ellenborough held that it was not sufficient. So where the defendant stated, "I shall be able to satisfy him (the plaintiff) respecting the misunderstanding which has occurred between us," (*Craig* v. *Cox*, Holt's C. 380.[3] See also *Ward* v. *Hunter*, 6 Taunt. 210). But where the acknowledgement was, that he would satisfy the plaintiff, for he could show his receipt, it was held that he was bound to produce it; and that in case he did not, there was at all events sufficient evidence to go to a jury. *Anon.* Holt's C. 381. Where the defendant, at the time when he admits the debt, insists that it has been discharged by a written instrument, the whole declaration must be taken together (*Partington* v. *Butcher*, 6 Esp. C. 66. Mansfield, C. J. 1806); and *Earl of Montague* v. *Lord Preston*, 2 Vent. 170; and *Bermon* v. *Woodbridge*, Doug. 751. But it was held that if it appeared that the instrument referred to did not amount to a discharge, it was a sufficient acknowledgement. (Ib.) Where an accountable receipt for the payment of money was shown to the defendant, the latter admitted his signature, but added, that he never would pay it; that it was out of date, and that no law should make him pay it; it was held to be insufficient to charge the defendant, since there was no acknowledgement, but the contrary, that the debt ever existed. *Rowcroft* v. *Lomas*, 4 M. & S. 457 (1). The defendant alleged that the

(1) [In *Clementson* v. *Williams*, 8 Cranch, 72, Marshall, C. J. says, it is not sufficient to take a case out of the statute, that the claim should be proved, or acknowledged to have been originally just; the acknowledgement must go to the fact that it is still due. Hence in that case, where the statute was pleaded to an action against two partners, evidence that the account was presented to one of them, who stated that it was due, and that he supposed it had been paid by the other partner, but that he had not paid it himself, and did not know of its being paid, was held insufficient to take the case out of the statute. {And the rule has been since confirmed in the case of *Wetzell* v. *Buzzard*, 11 Wheat. Rep. 309, and recognized in a very elaborate opinion, by the Supreme Court of Massachusetts, *Bangs* v. *Hall*, 2 Pick. 368.}

In *Brown* v. *Campbell*, 1 Serg. & R. 176, Tilghman, C. J. says, "I can never agree that a letter, which denies that the defendant was ever liable to the plaintiff's demand, will avoid the act of limitations, merely because it is not denied that payment has not been made"—and a letter from the defendant, denying responsibility, but referring to a third person whom he represented as liable, and offering to assist the plaintiff with evidence, was held not to amount to an acknowledgement from which the jury might infer a promise.

In *Fries* v. *Boisselet*, 9 Serg. & R. 128, where the defendant, on being arrested on a note, said he owed the plaintiff the money and intended to have paid him, but that as he had taken ungentlemanly steps to get it, he would keep him out of it as long as he could; was held that this was not sufficient to take the case out of the statute. The defendant's words altogether were held to amount to this—that he would not pay until compelled by law—which was wholly inconsistent with a promise to pay. In the same case is cited, with approbation by the Court, *Murray* v. *Titly*, tried before Tilghman, C. J. at *Nisi Prius* 1811, where the defendant, after the lapse of six years, on payment of a note being demanded of him, answered "that if the note had been presented to him in time, he would have paid it, but that he knew the statute of limitations would now bar the claim, and he would not pay it"—and the Chief Justice charged the jury that it was contrary to common sense to call this a promise to pay; and they found a verdict for the defendant. {And see *Bailey* v. *Bailey*, 14 Serg. & R. 195, and the cases there cited.}

In *Sands* v. *Gelston*, 12 Johns. 511; *Danforth* v. *Culver*, 11 Johns. 146; *Lawrence* v. *Hopkins*, 13 Johns. 288; *Guier* v. *Pearce*, 2 Browne's Rep. 35; and *Stanton* v. *Stanton*, 2 N. Hamp. Rep. 426, it was held that if the acknowledgement is qualified in a way to repel the presumption of a promise to pay, it is not evidence sufficient to revive the debt, and take it out of the statute. The same doctrine is asserted by Yeates,

[1]Eng. Com. Law Reps. iii. 314. [2]*Id.* iii. 264. [3]*Id.* iii. 134.

*By the former, a *mere oral acknowledgement* is sufficient to revive a

plaintiff's bill had been paid to Long, a deceased partner of the plaintiff, by the latter retaining the amount out of a floating balance which had been in his hands; and evidence was adduced by the plaintiff to falsify this, by showing the state of the accounts between the defendant and Long. After a verdict for the defendant, the Court held, that even admitting, as laid down by Gibbs, C. J. in *Hellings* v. *Shaw*,[1] 7 Taunt. 612, that where a defendant, alleging payment, designates the time and mode so strictly that the Court can say it is impossible that it should have been discharged in any other mode, then the plaintiff is at liberty to disprove that mode, yet that the principal case did not fall within the rule, as the time and mode were not designated strictly, and the evidence was not sufficient to negative that time and mode. *Beale* v. *Nind*,[2] 4 B. & A. 568.—In the case of *Hellings* v. *Shaw*,[1] 7 Taunt. 608, the defendant, to a demand made for the charges of executing an annuity deed, answered, "I thought I had paid it *at the time*, but I have been in so much trouble since, that I really don't recollect it;" evidence was adduced to show that the debt had not been paid at the time; but the Court held that the acknowledgement was insufficient, as it did not sufficiently put in issue whether the debt had been paid at the particular time. Gibbs, C. J. in that case, in addition to the case already cited, mentioned others, in which the Courts have held a defendant liable who was discharged by the words of the statute, viz. where he has admitted that the debt is unpaid, but alleges that it has been discharged by lapse of time; a third, where the defendant challenges the plaintiff to produce a particular proof of his liability, which the plaintiff does.

A. having by means of misrepresentation obtained money from *B.* and others, to which he was not entitled, on application by *B.* to have the money returned, saying that he and the other tenants had been induced to pay more than was due, replies, if there be any mistake it shall be rectified; this takes the case out of the statute as to all. *Clarke* v. *Hougham*,[3] 2 B. & C. 149. The defendant, upon being applied to for the debt, replied that he had a receipt in full, which he would search for; held, that whether true or false, it was clear he did not intend to pay, and therefore that no promise to pay could be inferred. *Brydges* v. *Plumptree*,[4] 9 D. & Ry. 746. The defendant being applied to for some money on account, said he had not got any; upon a second application, the amount was mentioned, but he made no answer; upon being requested to help the plaintiff to 5*l.*, he said he was going to *H.* in the course of the week, and that he would help him to 5*l.* if he could; held, that even if it were to be taken to amount to a promise or acknowledgement, it was merely a *conditional one*, and it was therefore incumbent on the plaintiff to show that the defendant was able to pay that sum. *Gould* v. *Shirley*,[5] 2 Moore & P. 581. Where a letter, relied on to take the case out of the statute, imported no more than offers on the part of the defendant to surrender his property, with a view to an arrangement with his creditors, provided he were allowed time to arrange his affairs; held, that they amounted to no more than a kind of conditional offer to pay, and not a general and unqualified acknowledgement, from which a promise to pay *was to be implied*, and not sufficient to take the case out of the operation of the statute. *Fearn* v. *Lewis*, 6 Bing. 359. A letter of the defendant, stating it to be "without prejudice of his rights, or as to any future right," is only a conditional statement, and cannot be read for the purpose of taking the demand out of the statute. *Cory* v. *Bretton*,[6] 4 C. & P. 462. But where the defendant, after bankruptcy, by letter acknowledged an application for the debt, and added, that in a few days he should have his banker's account, and would remit the sum by draft on them; it was held to be not a conditional promise, but a sufficient answer to a plea of a statute of limitations, and of the general plea of bankruptcy. *Lang* v. *Mackenzie*,[7] 4 C. & P. 463. Where one of the defendants, upon being called on to pay a debt due from him and his late partner, observed that "it was hard he should be called upon to pay when there were so many outstanding debts due to the concern uncollected;" and upon a second application, desired that the account might be handed to *W.* who was to "*settle* the business;" it was held, that it was not a conditional promise, but was properly left to the jury to say, whether the whole amounted to a promise or not. *Pierce* v. *Brewster*,[8] 12 Moore, 515. On a replication of a promise within six years to a plea of the statute, fraud is no answer to the plea. Ibid. Where the defendant on being arrested said, "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, and I will never pay it," the acknowledgement was held to be insufficient. *A'Court* v. *Cross*,[9] 3 Bing. 329. In *Tulloch* v. *Dunn*,[10] 1 Ry. & M. 416, Abbott, L. C. J. held, that in the case of executors neither a mere acknowledgement by all, nor an express promise by one, was sufficient.

J. in *Jones* v. *Moore*, 5 Binney, 573, and by the Court of Appeals in Kentucky, *Bell* v. *Rowland's Adm'rs*, Hardin, 301. *Harrison* v. *Handley*, 1 Bibb. 443. *Ormsby* v. *Letcher*, 3 Bibb, 569. {And the Supreme Court of Maine, *Perley* v. *Little*, 3 Greenl. 97.} See Mr. Howe's *note* to the case of *Halliday* v. *Ward*, 3 Camp. 32. *Murray & al.* v. *Coster & al.* 20 Johns. 576.

There are many American decisions which cannot be reconciled with those above cited; but the inclination of the English and American court seems now to be, to rescue the statute of limitations from former constructions which have operated almost as a repeal of its provisions.

In Pennsylvania, a debt barred by the statute is not revived by a clause in the debtor's will ordering all his *just* debts to be paid. *Smith* v. *Porter*, 1 Binney, 209. *Secus*, in North Carolina, *Anon.* 1 Hayw. 243. A devise of real or a bequest of personal property, for the payment of his debts, *generally*, does not revive a debt barred by the statute. *Roosevelt* v. *Marks*, 6 Johns. Ch. Rep. 293. *Walker* v. *Campbell*, 1 Hawks, 304. *Campbell* v. *Sullivan*, Hardin, 17. Nor will a provision in a will for the payment of debts generally, if no trust is created. *Brown* v. *Griffiths*, 6 Munf. 450. See also *Chandler's Ex'rs* v. *Neale's Ex'rs*, 2 Hen. & Mun. 124.]

[1]Eng. Com. Law Reps. iii. 236. [2]*Id.* vi. 517. [3]*Id.* ix. 47. [4]*Id.* xxii. 400. [5]*Id.* xvii. 219. [6]*Id.* xix. 473. [7]*Id.* xix. 474. [8]*Id.* xxii. 452. [9]*Id.* xi. 124. [10]*Id.* xxi. 478.

*debt (*t*); by the latter an acknowledgement is insufficient, unless a *new promise* to pay the debt be expressly made or can be clearly inferred.

(*t*) The stat. 9 G. 4, c. 14, s. 1, enacts, that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgement* or promise by words only† shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or any of them, or to deprive any party of the benefit thereof, unless such acknowledgement or promise shall be made or contained by or in some writing‡ to be signed by the party chargeable thereby,§ and that where there shall be two or more contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in re-

* The statute makes no alteration in the form of the acknowledgement, or as to the party to whom it is made. *Haydon* v. *Williams*,[1] 7 Bing. 163; 4 M. & P. 818. But although the acknowledgement be in writing, it must, in order to take the case out of the statute, be such as will raise the implication of a promise to pay. *Brigstocke* v. *Smith*, 1 C. & M. 483. A mere statement of an anteeedent debt by *parol* without any new contract or consideration is not sufficient. *Jones* v. *Ryder*, 4 M. & W. 32. But in the case of *Smith* v. *Forty*,[2] 4 C. & P. 126, Vaughan, B. is reported to have held, where the agents of the plaintiff (an administrator) and the defendant had gone over the accounts within six years, and struck a balance which the defendant promised orally to pay, the plaintiff had a good cause of action on the account stated, and that the statute was not applicable, as the plaintiff proceeded for a *new debt*.

† The stat. excludes oral evidence of an acknowledgement made previous to the day when the stat. began to operate. *Towlar* v. *Chatterton*,[3] 6 Bing. 258. The same point had been previously ruled by Ld. Tenterden and by Hullock, B. at Nisi Prius. See *Ansell* v. *Ansell*,[4] 3 C. & P. 563. An oral acknowledgement by the defendant that he has paid money on account of the debt, is insufficient. *Willis* v. *Newham*, 1 Lloyd & W. 197; 3 Y. & J. 518. But if the fact of payment can be proved by independent evidence, the application of the payment to the particular debt may be proved by the declaration of the debtor. *Waters* v. *Tompkins*, 2 C. M. & W. 723. In an action against *A.* on a note by *A.* and *B.*, the signature of *B.* being attested, a part payment by *B.* cannot be proved in an action against *A.* without calling the attesting witness. *Wild* v. *Porter*, 3 N. & M. 585. Where after the statute a written acknowledgement had been given which had been lost, it was held that secondary evidence of the existence of such writing was admissible. *Haydon* v. *Williams*,[1] 7 Bing. 163. Where, at the time of the sale of the plaintiff's goods, a conversation took place as to the subject of a demand of the defendant's, and which was the subject of his set-off, and otherwise barred by the Statute of Limitations; held that such conversation was improperly rejected at the trial. *Moore* v. *Strong*,[5] 1 Bing. N. C. 441; and 1 Se. 367. Where, upon the settlement of an old account, a new note was given for the balance and a further sum, but was insufficiently stamped; held that it could not be used as an acknowledgement to take the case out of the statute. *Jones* v. *Ryder*, 4 M. & W. 32. The advertisement by an executor to creditors to send in their claims, is not sufficient to revive a debt already barred by the statute. *Scott* v. *Jones*, 4 Cl. & F. 382.

‡ A promise in writing to pay the balance due, is sufficient to take the case out of the stat.; but without other evidence to show what the balance is, the plaintiff will be entitled to nominal damages only. The defendant, in a letter to the plaintiff, promises to pay the balance due from him to the plaintiff, but does not specify any particular amount, this is sufficient to take the case out of the statute; it seems to be evidence of a new or continuing contract at the time of the date. The Act does not require the amount of the debt to be specified; before it passed, a verbal promise to pay the balance would have entitled the plaintiff to recover; a similar promise in writing will have the same effect since, but the plaintiff can recover nominal damages only; the promise is to pay a balance, and there is no evidence to show what that balance is. *Dickinson* v. *Hatfield*, 2 Mo. & M. 141. (Cor. Lord Tenterden.) And see *Dodson* v. *Mackey*,[6] 4 N. & M. 327. Where the defendant wrote, "I beg to say that I cannot comply with your request; the best way for you will be to send another bill, and draw another for the balance of your money, 30*l.*," it was held to be sufficient without showing that another bill had been drawn. *Dubbs* v. *Humphries*, 10 Bing. 496. A promise to pay a proportion of a joint debt is sufficient, though no amount be specified; it may be proved by other evidence. *Lechmere* v. *Fletcher*, 1 C. & M. 623; 3 Tyr. 450. An entry in a bankrupt's examination of a specified sum being due to *A.* is sufficient. *Eicke* v. *Nokes*, 1 M. & R. 359. The drawing a bill of exchange is not an acknowledgement of a debt due in respect of the original demand for which the bill was given. *Gowan* v. *Foster*,[7] 3 B. & Ad. 512. Where the evidence to take the case out of the stat. was a deed of composition in which the defendant stated that he was indebted to the plaintiff in the sum opposite his signature, but the plaintiff had never signed the deed, nor did the amount in any way appear, held that it could not be coupled with a parol admission that there was no other sum due than that on the note on which the action was brought, and that there was no sufficient acknowledgement to take the case out of the statute. *Kennett* v. *Milbank*,[8] 8 Bing. 38.

§ The signature by an agent is not sufficient. *Hyde* v. *Johnson*,[9] 2 Bing. N. C. 776. The acknowledgement, to satisfy the statute, must be signed by the party chargeable *thereby*. Where the party to whom an application was made for payment, replied that "family arrangements have been made to enable him to discharge the debt; that funds have been appointed for the purpose, of which *A.* is trustee; that the defendant has handed the account to *A.*; that some time must elapse before payment, but that the defendant is authorized by *A.* to refer to him for any further information:" it was held that the writing was insufficient to satisfy the statute. *Whippy* v. *Hillary*,[10] 3 B. & Ad. 399.

[1]Eng. Com. Law Reps. xx. 86. [2]*Id.* xix. 305. [3]*Id.* xix. 75. [4]*Id.* xiv. 451. [5]*Id.* xxvii. 450. [6]*Id.* xxx. 377. [7]*Id.* xxiii. 133. [8]*Id.* xxi. 213. [9]*Id.* xxix. 488. [10]*Id.* xxiii. 103.

*From the late decisions on the effect of an acknowledgement under the provisions of the statute 21 J. 1, c. 10, when all the former cases were
*667 *brought under consideration, the result seems to be, that to repel the limiting power of the statute it must neither amount to an *express promise*, or to so clear an admission of a still subsisting liability, that a promise must necessarily be implied. And therefore, although from a general acknowledgement (*x*) that a once existing debt still exists unsatisfied, a promise to pay it may be inferred, yet it is otherwise where the party either *denies* his liability or *limits* it. Where the acknowledgement was, "I cannot pay

spect or by reason only of any written acknowledgement or promise made and signed by any other or others of them; provided always, that nothing herein contained shall alter or take away or lessen the effect of any *payment** of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgement or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.—Sec. 2. That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear on the trial that they could not, by reason of the said recited Acts or this Act or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.—Sec. 3. That no indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.—Sec. 8. No memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties on stamps.†

(*x*) From a general acknowledgement, such a promise "may and ought to be inferred." Per Bayley, B., in *Brigstock* v. *Smith*, 3 Tyr. 445, citing *Tanner* v. *Smart*,[7] 6 B. & C. 603. The acknowledgement need not state the *amount* of the debt: extrinsic evidence is admissible to prove it. *Lechmere* v. *Fletcher*, 3 Tyr. 450; 1 Cr. & M. 633; S. P. *Linley* v. *Bonsor*, York Spring Ass. 1838, cor. Parke, B. A letter, containing as follows: "I beg leave to say, I cannot accede to your request; the best way will be to send the bill you hold, and draw another for the balance of your money;" held to be sufficient. *Dobbs* v. *Humphries*, 10 Bing. 446.

* It should appear that the payment was on account of the debt for which the action was brought, and in part payment of a greater debt. *Tippets* v. *Heane*, 1 C. M. & R. 252. But if evidence be given of a part payment of *some* debt, and it does not appear that any other debt is due from the defendant to the plaintiff, it will be sufficient. *Evans* v. *Davies*,[1] 4 Ad. & Ell. 840. Part payment by one of several joint-contractors, binds the rest. *Whitcomb* v. *Whiting*, Doug. 652. *Wyatt* v. *Hodgson*,[2] 8 Bing. 309. *Pease* v. *Hurst*,[3] 10 B. & C. 122. *Chippendale* v. *Thurston*,[4] M. & M. 411. And see in general as to the effect of acknowledgements by joint-contractors, *infra*, 669. A note having been given by the defendants as overseers, for money borrowed for the parish, payment of interest by the vestry, the accounts being signed by one of the defendants, was held to be sufficient to take the case out of the statute. *Rew* v. *Pettit*,[5] 1 Ad. & Ell. 196; 3 N. & M. 456. So of a payment to an administrator (on a note) who has neglected to take out administration in a diocese, in which the note is within the description of *bona notabilia*. *Clarke* v. *Hooper*,[6] 10 Bing. 480; 4 M. & S. 353. So in case of part payment to a legatee of money lent by the trustees of the legatees, as such trustees, to the defendant. *Megisson* v. *Harper*, 4 Tyr. 94; 2 C. & M. 323. Per Parke, B., it has been held by the Exchequer that a yearly settlement of account by which the items on the credit side were taken in diminution of the debt, amounted to a payment. A mere acknowledgement in a written account of payment of a 100*l.* note, does not take the case out of the stat., without specifying that it was part payment of a larger sum. *Garbut* v. *Wilson*, cor. Parke, B., York Sum. Ass. 1836. Where the testator by letter dated 23 April, 1813, requested of the plaintiff, his attorney, to let him have his account that everything might be settled, and shortly after died, having by will charged his real and personal estate in the hands of trustees for sale, with payment of his debts, the last item in the bill when delivered was of the date 19th August, 1808, but no bill was filed until 18th November, 1820; held that the letter was sufficient to take the debt out of the statute, and that the devise continued it until the filing of the bill. *Rendell* v. *Carpenter*, 2 Y. & J. 484.

† A promissory note improperly stamped is not admissible as a memorandum to take the case out of the stat. under this clause, which applies only to instruments which may be stamped as agreements. *Jones* v. *Ryder*, 4 M. & W. 34. The memorandum, "I acknowledge to owe *M.* 36*l.*, which I agree to pay him as soon as circumstances will permit," is exempt from duty for the purpose of being used as necessary under the Act. *Morris* v. *Dixon*,[8] 4 Ad. & Ell. 745.

[1]Eng. Com. Law Reps. xxxi. 203. [2]*Id.* xxi. 301. [3]*Id.* xxi. 38. [4]*Id.* xix. 293. [5]*Id.* xxviii. 66. [6]*Id.* xxv. 206. [7]*Id.* xiii. 273. [8]*Id.* xxv. 203.

the debt at present, but I will pay it as soon as I can," it was held to be insufficient to take the case out of the statute, without proof of the defendant's ability (*y*).

And notwithstanding an acknowledgement of a debt, yet if it be made in *terms which repel the inference of a promise, it is insufficient to take the case out of the statute; and therefore, where defendant said, "I know that I owe the money, but the bill I gave is on a threepenny stamp, and I will never pay it," it was held to be insufficient to revive the debt (*z*). *668

Two circumstances must be proved:—1st, That a debt *once* existed; 2dly, It must appear from the defendant's acknowledgement that it *continued* to be a debt within the six years. If evidence be given *aliunde* to prove the existence of the debt, then payments (*a*) by the defendant, or statements by him, which now must be in writing, are admissible in evidence to show the *continuance* of the debt. Where the conduct and expressions of the defendant are ambiguous, it is a question of fact for the jury whether they amount to an admission of the continued existence of the debt (*b*). But a mere admission that the sum claimed has not been satisfied, is not sufficient evidence even of the previous existence of a debt (*c*).

If a precedent debt be proved, it seems that a general acknowledgement may be sufficient, if it be applicable to that debt; and whether it be so applicable is a question of fact for the jury (*d*). And if no other account between the parties appear, it seems that the onus of showing that other Evidence of an acknowledgement (A).

(*y*) *Tanner* v. *Smart*,[1] 6 B. & C. 603, on a review of all the cases. See also *Scales* v. *Jacob*,[2] 3 Bing. 638; *Ayton* v. *Bott*,[3] 4 Bing. 105. Where one of several executors acting in the affairs, said that he believed the debt to be a just one, but that he could not do anything without the consent of the testator's family; it was held that it was neither a promise nor even an acknowledgement to take the case out of the statute. *M'Culloch* v. *Dawes*,[4] 9 D. & R. 40. A memorandum is adduced in the hand-writing of the defendant, "T. O. U. 100*l*.," of a date beyond six years; and on the same paper a separate memorandum, "Received 20*l*.," within six years; held that the plaintiff was entitled to the latter sum only. A tender and payment into Court of the principal sum is no implied acknowledgement, so as to revive the claim to interest on the original debt. *Collyer* v. *Willcock*,[5] 4 Bing. 313. Where in an action by the drawers against the acceptor of a bill payable to L. & Co., the defendant admitted that he was indebted to L. & Co. on the bill, but not to the plaintiff, there being no original consideration for the bill; held, that being a denial of liability to the plaintiff, the defendant was within the protection of the statute. *Easterby* v. *Pullen*,[6] 3 Starkie's C. 187. Where the defendant, on application made for payment of an old demand, said, "I will see my attorney and tell him to do what is right," held to be insufficient. *Miller* v. *Caldwell*,[7] 3 D. & R. 266. So where he answered, "I cannot afford to pay my new debts, much less my old ones," the jury being of opinion that there was no acknowledgement of a subsisting debt, the Court refused a new trial. *Knott* v. *Farren*,[8] 4 D. & R. 479. See also *Fearn* v. *Lewis*,[9] 6 Bing. 1; and see Append.

(*z*) *A'Court* v. *Cross*,[10] 3 Bing. 329.

(*a*) The payment of interest is sufficient. *Bealy* v. *Greenslade*, 2 C. & J. 61. *Irving* v. *Veitch*, 3 M. & W. 90. A bill of exchange drawn by the debtor, and delivered in payment of a debt, operates as payment from the time of delivery only, and not from the time when the bill is paid. *Irving* v. *Veitch*, 3 M. & W. 90. On an agreement that goods shall be taken in reduction of the demand, the delivery of such goods operates as payment. *Hooper* v. *Stephens*,[11] 4 Ad. & Ell. 71. *Hart* v. *Nash*, 2 C. M. & R. 337.

(*b*) *Lloyd* v. *Maund*, 2 N. R. 760. *Frost* v. *Bengough*,[12] 1 Bing. 266; where it was left to the jury to decide whether a letter written by the defendant had reference to the promissory note on which the action was brought, and was sufficient to take the case out of the statute. In the subsequent case of *Morell* v. *Frith*, 3 M. & W. 402, it was held that the construction of an instrument given in evidence to defeat the Statute of Limitations was for the Court, although, where extrinsic facts were used in explanation, those were for the consideration of the jury. In *Burkett* v. *Church*, 9 G. & P. 209, it is stated to be the practice for the Judge to give his opinion whether a letter written by the defendant be a sufficient acknowledgement to take the case out of the statute, and to leave the case to the jury; and that it must either amount to a distinct promise to pay, or to a distinct acknowledgement that the sum is due.

(*c*) *Rowcroft* v. *Lomas*, 4 M. & S. 457.

(*d*) *Frost* v. *Bengough*, 1 Bing. 266. *Baillie* v. *Lord Inchiquin*, 1 Esp. 435. {*Whitney* v. *Bigelow*, 4 Pick. R. 110.}

(A) (If the defendant within the time of limitations, admit the debt to be unsatisfied, that takes it out of the Act. *Stump* v. *Hughes*, 5 Haywood's R. 93.)

[1]Eng. Com. Law Reps. xiii. 273. [2]*Id.* xiii. 85. [3]*Id.* xiii. 361. [4]*Id.* xxii. 385. [5]*Id.* xiii. 447. [6]*Id.* xiv. 176. [7]*Id.* xvi. 168. [8]*Id.* xvi. 191. [9]*Id.* xix. 98, 326. [10]*Id.* xi. 124. [11]*Id.* xxxi. 29. [12]*Id.* viii. 317.

transactions existed, to which the acknowledgement might possibly refer, is thrown on the defendant (*e*); although, in the first instance, it lies on the plaintiff to take the case out of the statute (*f*). But if the defendant wholly deny the debt, although he admit the receipt of the money (*g*), or *deny* the debt, insisting that it has been barred by the statute (*h*), there is no evidence of an acknowledgement to go to a jury. It was not necessary before the late statute that the new promise or acknowledgement should be in writing; although the original promise, as to guarantee the debt of another, was required to be in writing (*i*).

The giving a bill in part payment of a debt, more than six years before the action brought, but which bill has been paid within the six years, does not take the case out of the Statute of Limitations; for the reason why a
*669 *payment takes a case out of the statute is, that it is evidence of a fresh promise; and the promise must be considered to have been made when the bill was given, and not when it was paid (*k*).

An acknowledgement to take the case out of the statute may be raised from circumstances, without express promise or admission (*l*).

Evidence of an acknowledgement by one of several joint contractors is sufficient to bind the rest (1), even in separate actions against them; and although the acknowledgement be not made to the plaintiff, but by one of two co-contractors to the other (*m*), or to a third person (*n*); and although it has been made by one of two partners subsequent to the dissolution of partnership (*o*) and although the party to be affected by the acknowledgement, but who has joined in a promissory note, be but a surety for the other (*p*). But since the late statute (*q*), a *new promise*, even in writing, by one joint contractor, or executor or administrator, does not bind any other.

Where one of two makers of a joint and several promissory note became bankrupt, the receiving a dividend under the commission within six years

(*e*) See the observations of the Court in *Frost* v. *Bengough*,[1] 1 Bing. 266. Per Park, J., "A paper is produced, which, though ambiguous, is sufficient to shift on the defendant the *onus*, which at first was on the plaintiff." Burrough, J.: "There is nothing to which the letter appears to relate but the prior demand."

(*f*) Ibid.; and per Bayley, J. in *Beale* v. *Nind*,[2] 4 B. & A. 571. {Contra, *Guier* v. *Pearce*, 2 Browne, 35. See the observations of *Bristol*, J. delivering the opinion of the Court in *Marshall* v. *Dalliber*, 5 Conn. Rep. 487, 488, upon *Hellings* v. *Shaw*, and *Beal* v. *Nind*.}

(*g*) *Owen* v. *Woolley*, B. N. P. 148.

(*h*) *Coltman* v. *Marsh*, 3 Taunt. 380.

(*i*) *Gibbons* v. *M'Casland*, 1 B. & A. 690.

(*k*) *Gowan* v. *Forster*,[3] 3 B. & Ad. 507.

(*l*) The plaintiffs being sued for money paid under a mistake to defendants, gave notice to the latter that if a verdict passed against the plaintiffs, they should look to the defendants, and they from time to time advised particular proceedings in the defence; held sufficient to warrant the jury in finding an acknowledgement, or to justify the proving under the defendant's commission. *East India Company* v. *Prince*,[4] 1 Ry. & M. 407.

(*m*) [*Beitz* v. *Fuller*, 1 M'Cord, 541.] In an action against *A.* on the joint and several promissory note of *A.* and *B.*, it was held that a letter written by *A.* to *B.*, desiring him to settle the money, took the case out of the statute. *Halliday* v. *Ward*, 3 Camp. 32. The same evidence seems also to be sufficient on issue taken on the plea *actio non accrevit infra sex annos*.

(*n*) [*Whitney* v. *Bigelow*, 4 Pick. 110.] As in a deed between the defendants and a third person. *Mountstephen* v. *Brooke*,[5] 3 B. & A. 141. See *Clarke* v. *Hougham*,[6] 2 B. & C. 149.

(*o*) *Wood* v. *Braddick*, 1 Taunt. 104. [*M'Intire* v. *Oliver*, 2 Hawks. 209.]

(*p*) *Perham* v. *Raynal*,[7] 2 Bing. 306. So in *Burleigh* v. *Stot*,[8] 8 B. & C. 36, in an action against the administrator of a surety in a note, part payment by the principal within six years was held to be sufficient; and see *Manderton* v. *Robertson*, 4 M. & Ry. 440. Payment of interest by one joint contractor is sufficient to take the case out of the statute, since 9 Geo. 4, c. 14. *Chippendale* v. *Thurston*, 1 M. & M. C. 411. The payment of interest by one of several makers of a note above six years after it had become due, takes the case out of the statute as to all. *Channel* v. *Ditchburn*, 5 M. & W. 494.

(*q*) 9 Geo. 4, c. 14, s. 1; *supra*, 665.

(1) [*Bound* v. *Lathrop*, 4 Conn. Rep. 336. *White* v. *Hall*, 3 Pick. 291. Even against a joint contractor who is merely a surety. *Hunt* v. *Bridgham*, 2 Pick. 581. *Perham* v. *Raynal et al.* 2 Bing. 306.] [The acknowledgement of one heir, or devisee, is sufficient to take the case out of the statute, as respects all. *Johnson* v. *Beardsley*, 15 Johns. 3.]

[1] Eng. Com. Law Reps. viii. 317. [2] *Id.* vi. 517. [3] *Id.* xxiii. 133. [4] *Id.* xxi. 474. [5] *Id.* v. 245. [6] *Id.* xi. 47. [7] *Id.* ix. 413. [8] *Id.* xv. 151.

next before bringing the action, was held to be sufficient in an action against the other maker (*r*).

The principle upon which such evidence is admissible, is, as has been already observed (*s*), the community of interest between the party making the admission and the party to be affected by it, and the presumption that the former would not acknowledge that which was adverse to his own interest. And hence it may perhaps be doubted, whether such evidence be sufficient for such a purpose, where the party making it is no longer responsible (*t*).

Where one of two joint drawers of a bill of exchange became bankrupt, and the indorsees proved under the commission a debt exceeding the amount of the bill, and exhibited the bill as a security for the debt, and received a dividend within six years next before the action against the solvent partner, it was held that the action was barred by the statute (*u*). This case was *distinguished by the Court from that of *Jackson* v. *Fairbank*, for there the *670
claim was made and the dividend received upon the instrument itself (*x*); in the later case the dividend was on a distinct debt, and the instrument was introduced but incidentally, and the introduction or omission of it neither increased nor diminished the claim upon the dividends. And it seems that such evidence is not sufficient to bind a partner, unless it be clear and explicit (*y*).

Subsequent promise (A).

A subsequent promise, to take the debt out of the statute of limitations,

(*r*) *Jackson* v. *Fairbank*, 2 H. Bl. 340. But see the observations on this case in *Brandram* v. *Wharton*, 1 B. & A. 463. [*Roosevelt* v. *Marks*, 6 Johns. Ch. R. 292.]

(*s*) *Supra*, tit. Admission.

(*t*) 1 B. & A. 463. See the observations of Bayley and Abbott, Justices.

(*u*) *Brandram* v. *Wharton*, 1 B. & A. 463. Lord Ellenborough, in giving judgment, founded himself on the distinction between express and implied acknowledgements; and see his Lordship's observations in *Holme* v. *Green*,[1] 1 Starkie's C. 488.

(*x*) See the observations of Abbott and Holroyd, Justices.

(*y*) Per Lord Ellenborough, 1 B. & A. 468; and *Holme* v. *Green*,[1] 1 Starkie's C. 486. In *Munderson* v. *Reeve*, K. B. Easter T. 1829, it appeared on a special case that payments had been made within the six years by Robertson, who had let judgment go by default, upon the joint note on which the action was brought; and it having been admitted, or at least not disputed at the trial, that an account which Robertson had stated with the plaintiff contained an item for interest on the note, the Court held that the case was not distinguishable from that of *Burleigh* v. *Stott*,[2] 8 B. & C. 39; *supra*, 669, note (*i*). Bayley, J. observed, in the course of the argument, that in *Brandram* v. *Wharton*, *supra*, there was in fact no acknowledgement by any one. An acknowledgement by the acceptor that he was indebted on it to the payees but not to the drawer, there being no consideration for the bill, is not a sufficient acknowledgement in an action by the drawer. *Easterby* v. *Pullen*,[3] 3 Starkie, 186. But an acknowledgement, although it be to a stranger, of a debt due to the plaintiff, is sufficient. *Peters* v. *Brown*, 4 Esp. C. 46; and see *Clarke* v. *Hougham*,[4] 2 B. & C. 149. *Halliday* v. *Ward*, 3 Camp. 32. *Mountstephen* v. *Brook*,[5] 3 B. & A. 141.

(A) (Of late years the courts in England and in this country have considered statutes of limitations more favourably than formerly, on the ground that they rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of those statutes. By requiring those who complain of injuries to seek redress by action at law, within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation. *M'Cluny* v. *Silliman*, 3 Peters, 273. *Wetzell* v. *Buzzard*, 11 Wheat. 316; 3 Conn. R. 133. See also *Bell* v. *Morrison*, 1 Peters, 360. *Bradstreet* v. *Huntingdon*, 5 Peters, 507. *Church* v. *Fetcrow*, 2 Penns. R. 301§ *Gallagher* v. *Milligan*, 3 Id. 179. *Fisher* v. *Harnden*, 1 Paine's C. C. R. 61. *Kimmel* v. *Schwartz*, 1 Breese, 218.

Where defendant said that if a certain witness would say that he had had the goods, he would pay for them, it was held that the promise being conditional would not take the case out of the statute, unless the condition were complied with. *Robbins* v. *Otis*, 18 Mass. Rep. 368. See also *Wetsell* v. *Butsard*, 11 Wheat. 309; and 5 Conn. R. 487. A defendant wrote to the plaintiff, "I would rather come to a settlement, although I should allow the account as insisted on by you, than wait the event of a lawsuit," held that these words took the case out of the statute. *Ferguson* v. *Fitt*, 1 Hayw. 639. The words "It was at the desire of my mother I gave it (a note of hand), I will not pay it; Rosser ought to pay it; I will speak to him about it;" held to take the case out of the statute. *Cobham* v. *Moseley*, 2 Hayw. 6. So also the words "I have credited him in my account with the value of the certificates, if he will meet me at Newbern I will settle it

[1]Eng. Com. Law Reps. ii. 479. [2]*Id.* xv. 151. [3]*Id.* xiv. 176[b]. [4]*Id.* ix. 47. [5]*Id.* v. 345.

must agree with the original promise stated in the declaration (*z*). A subsequent acknowledgement to an executor will not support a declaration framed on promises to the testator (*a*); and an acknowledgement of negligence made within six years will not support a special *assumpsit* founded on negligence, which took place more than six years ago (*b*), although in fact the negligence was first discovered within the six years.

So where the cause of action arises from the doing or not doing some act at a particular time, in breach of a contract, an acknowledgement within six years of the previous breach of contract will not avoid the statute (*c*).

So the principle does not apply to an acknowledgement made by one acting *alieno jure*. *A.* and *B.* made a joint and several promissory note, and ten years after the death of *A.*, *B.* (who was one of *A.*'s executors) made a payment on the note on his own account, and it was held that this was no evidence of a promise by the executors (*d*).

(*z*) The plaintiff may declare on the original promise, and rely on the subsequent acknowledgement to take the case out of the statute. See *Leaper* v. *Tatton*, 16 East, 420, where the plaintiff declared against the defendant, as the acceptor of a bill of exchange; but note, that there the acknowledgement was held to be evidence on an account stated. See *Bicknell* v. *Keppel*,[1] 1 N. R. 21. *A'Court* v. *Cross*, 1 Bing. 332. The original debt remaining, and the remedy only being gone, it is only necessary to declare specially in the case of executors or administrators. *Upton* v. *Else*,[2] 2 Moore, 303. *Secus*, where the new promise is conditional. *Haydon* v. *Williams*,[3] 7 Bing. 163.

(*a*) *Sarell* v. *Wine*, 3 East, 409, and per Holroyd, J. in *Short* v. *M'Carthy*,[4] 3 B. & A. 632. A declaration by the defendant to the plaintiff (executrix), that the testator always promised never to distress him for it, is no evidence of a promise to the testator. *Ward* v. *Hunter*,[5] 6 Taunt. 210; 1 B. & C. 251.

(*b*) *Short* v. *M'Carthy*,[4] 3 B. & A. 626, and *supra*, 658.

(*c*) *Boydell* v. *Drummond*, 2 Camp. 157.

(*d*) *Atkins* v. *Tredgold*,[6] 2 B. & C. 29; and vide *supra*, 665, and *Slater* v. *Lawson*,[7] 1 B. & Ad. 396. The admission of the executors within six years before the filing of a creditor's bill is not sufficient, as against

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with him." *Toomer* v. *Long*, 2 Hayw. 18. An agreement to submit a question of boundary to arbitration, defeats the operation of the statute of limitations. *Lessee of Hunt* v. *Guilford*, 4 Ohio R. 310. In North Carolina it has been held, that in order to repel the statute of limitations, there must either be an express promise to pay or an explicit acknowledgement of a subsisting debt. *Martin* v. *Waugh*, 2 Dev. & Bat. 517. If a party says on his promissory note's being produced to him that it is as good as money, this is sufficient evidence to take the same out of the statute of limitations. *Arnold* v. *Dexter*, 4 Mason's C. C. R. 122. In Tennessee it has been held, that a slight acknowledgement is not sufficient to take a case out of the statute of limitations; but an express promise to pay is not required; if facts are acknowledged from which the existence of the debt necessarily follows, it is sufficient. *Harwell* v. *M'Culloch*, 2 Tenn. R. 275. An acknowledgement of a debt by a partner after the dissolution of the partnership will not take the debt out of the statute of limitations so as to make the copartners liable. *Veaught* v. *Craighead*, 1 Penns. R. 135. *Anon.* Philadelphia, Dec. 1827, stated by Smith, J., 1 Penns. R. 138. S. P. *Bell* v. *Morrison*, 1 Peters, 373. [In Virginia, though the acknowledgement of a debt by one or more partners, after a dissolution of the partnership, will remove the bar of the statute, in an action against the firm—the existence of the debt being first proved by other testimony or admitted by the pleadings—yet it is not of itself proper evidence of the existence of the debt, so as to charge the other parties. *Shelton* v. *Cocke & al.* 3 Munf. 191.] {*Fishe's ex.* v. *Tucker's ex.* 1 M'Cord's Cha. Rep. 169, where the question was elaborately discussed.} *Aliter*, in New York, and Massachusetts, and North Carolina, where it has been held, that the acknowledgement of a previous debt due from a firm made by one of the partners after the dissolution of the firm, binds the other partner so as to prevent him from availing himself of the statute of limitations. *Patterson* v. *Patterson*, 7 Wend. 441. *White* v. *Hall*, 3 Pick. 291. *M'Intire* v. *Oliver*, 2 Hawks. 209. And a promise to pay made by the executor, will not take a case out of the act of limitations as against the heirs. *Peck* v. *Wheaton's Heirs*, Martin & Yerg. 353. *Reynolds* v. *Hamilton* 7 Watts, 420. If a debtor, at the time of acknowledging a debt, refuses to pay it, or offers a smaller sum, saying that if his offer is not accepted he will plead the statute of limitations, there is nothing from which the law can imply a promise to pay the debt. *M'Glensey* v. *Fleming*, 4 Dev. & Bat. Law R. 129. So where a defendant admitted that there ought to have been a settlement with the plaintiff, but that little, if anything, was due, held that the statute was a bar to the action. *Peebles* v. *Mason*, 2 Dev. 367. An agreement or promise by the defendant to settle by the books of the plaintiff, is not sufficient to take the case out of the statute, although the books show a balance against the defendant. *Russell* v. *Gass*, Martin & Yerger, 270. See also *Bank of Newbern* v. *Sneed*, 3 Hawks, 500. Proof that the defendant had promised to pay a debt barred by the statute of limitations, is insufficient to take the case out of the statute unless evidence of the originial consideration of the indebtedness be also given. The promise to pay a debt barred by the statute, only removes the bar, and leaves the case to be proved as if no statute of limitations had been pleaded. *Kimmel* v. *Schwartz*, 1 Breese, 218.)

[1]Eng. Com. Law Reps. xi. 124. [2]*Id.* xxii. 451. [3]*Id.* xx. 86. [4]*Id.* v. 403. [5]*Id.* i. 359. [6]*Id.* ix. 12. [7]*Id.* xx. 409.

*Where there is a mutual account between the parties, every new item and credit in the account given by the one party to the other is an admission of there being some unsettled account between them, the amount of which is to be afterwards ascertained: and any act which the jury may consider as an acknowledgement of its being an open account, is sufficient to take the case out of the statute (*e*) (A). Mutual accounts.

Where the items of account are all on one side, as in an account between a tradesman and his customer, and there be some items within the six years, but the rest are beyond it, the modern items will not enable the plaintiff to give evidence of the former (*f*).

Where there is a mutual account, but no item has accrued within the six years, the plaintiff will be precluded from recovering under this issue (*g*), or indeed from recovering at all, unless he can bring his case within the exception of the statute concerning merchants' accounts, which must be done by means of a special replication (*h*) (1).

the heir or devisee of a trader, so as to entitle him to payment out of the real estate in their hands, under the 47 Geo. 3, c. 74. *Putnam* v. *Bates*, 3 Russ. 188. A charge on the personal and real estate by will is a trust against which the statute does not run; a charge on land is a trust to be executed by the heir or devisee. *Hargraves* v. *Michell*, 6 Mad. 326; and see *Burke* v. *Jones*, 2 Ves. & B. 275.

(*e*) Per Lord Kenyon, C. J. in *Catling* v. *Skoulding*, 6 T. R. 189. In that case the defendants had hired certain premises of the plaintiff's testator for twenty-one years; ten years afterwards the testator died, and rent for nine years and a half was then due; and 20*l.* was also due for cash lent on account, seven or eight years before the death, and the testator was indebted to the defendants for various articles supplied by them in their trade. The last half-year's arrear of rent, and one or two of the last articles of the defendants' bill for goods supplied, were within six years before the suing out of the writ. The amount of the articles furnished by the defendants within the last six years was more than sufficient to cover the last half-year's rent. There had never been any settlement of account between the defendants and the testator. The balance due to the testator at the time of his death was 171*l.* Issues were joined on the pleas of *non assumpsit* and set-off, and on the replication of a promise within six years; and the Court, after a consideration of all the former cases, held that the executors were entitled to recover. Where the whole of the items of the plaintiff's bill, as a proctor in a suit terminated by a sentence, were incurred more than six years before the suit, but two items were added within that period for perusing a letter from the adverse proctor as to the costs being paid and threatening proceedings against the bail, and for attending him thereon, held, that as the latter subject was only accidental and not connected with the former duty of the plaintiff, the statute was a bar to the original demand, and he could only recover for the last items. *Rothery* v. *Munnings*,[1] 1 B. & Ad. 15. Where there has been no account in writing, nor any payment on account of a particular debt, it is not an open account within the meaning of the exception of the statute; where a payment has been made without any specific appropriation, the creditor is entitled to apply it in satisfaction of the part of his demand barred by the statute, but it is not such a part payment as to take the earlier portions out of the operation of the statute. *Mills* v. *Fowkes*,[2] 5 Bing. N. C. 455. And see *Tippets* v. *Heane*, 1 C. M. & R. 45; and *Williams* v. *Griffith*, 2 C. M. & R. 45; and *Bosanquet* v. *Wray*,[3] 6 Taunt. 597. The plaintiffs, as joint owners, worked co-partnership plantations in *I*, and kept an account with merchants and agents at *B.*, to whom they became largely indebted; these were held not to be merchants' accounts within the exception in the statute. *Forbes* v. *Skelton*, 8 Sim. 355.

(*f*) Per Denison, J. in *Cotes* v. *Harris*, B. N. P. 149. (*g*) Per Lord Kenyon, 6 T. R. 192.

(*h*) Ibid. And the clause as to merchants' accounts extends to those cases only where there are mutual

(A) (But if the account be stated the statute will run from the time of such statement. Long acquiescence in an account makes it a settled one. *Baker* v. *Biddle*, 1 Baldwin's C. C. R. 418. The mere rendering an account does not make it a stated account; but if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it as it may be in his favour or against him, then it becomes a stated account. It is not at all important that the account was not made out between the plaintiff and the defendant, the plaintiff having received it, having made no complaint as to the items or the balance, but on the contrary, having claimed that balance, thereby adopted it, and by his own act treated it as a stated account. *Toland* v. *Sprague*, 12 Peters, 300. See also *Sickles* v. *Mather*, 20 Wend. 72. See also *Chamberlain* v. *Cuyler*, 9 Wend. 126. *Ramchander* v. *Hammond*, 2 Johns. 200. *Tucker* v. *Ives*, 6 Cow. 193. *Clarke* v. *Dutcher*, 9 Cow. 674. One item of an account within six years before suit, will not draw after it items beyond six years, so as to protect them from the statute, unless there have been mutual accounts between the parties. *Kimball* v. *Brown*, 7 Wend. 322.)

(1) [As to mutual accounts, &c. see *Franklin* v. *Camp*, 1 Coxe's Rep. 196. *Smith* v. *Ruecastle*, 2 Halsted's Rep. 357. *Murray* v. *Coster*, 5 Johns. Ch. Rep. 522. S. C. 20 Johns. 576. *Bennett* v. *Davis*, 1 N. Hamp. Rep. 19. *Stiles* v. *Donaldson*, 2 Yeates, 105, S. C. 2 Dallas, 264. *Coleman* v. *Hutchinson*, 3 Bibb, 209. *M'Naughton* v. *Norris*, 1 Hayw. 216. *Cogswell* v. *Dolliver*, 2 Mass. Rep. 217. *Mandeville* v. *Wilson*, 5 Cranch, 15. *Bond* v. *Joy*, 7 Cranch, 350.]

[1]Eng. Com. Law Reps. xix. 334. [2]*Id.* xxxv. 175. [3]*Id.* i. 495.

Where there are cross-demands arising out of the same transaction, and the plaintiff has kept alive his claim by continued process, he cannot avail himself of the statute to defeat the defendant's set-off (*i*).

*672 Disability.

*The disability (*k*) of a party must usually be pleaded in reply to a plea of the statute of limitations, but in some instances is matter of evidence, as upon trials of ejectments.

Where it is incumbent on a plaintiff to prove that he laboured under any disability which exempts him from the operation of the statute of limitations, he must show that it was a *continuing* disability from the first; for it seems to be a general rule, that where such a statute has once begun to operate, no subsequent disability will restrain its progress (*l*) (1). If there-

accounts and reciprocal demands between two persons. Per Denison, J., *Cotes* v. *Harris*, B. N. P. 149; and only to accounts *current* between merchants, and not to accounts stated between them. *Webber* v. *Tivill*, 2 Saund. 124; and see the cases cited, 2 Will. Saund. 127 (6). The rule is, that if the account be once stated, the plaintiff must bring his action within six years; but if it be adjusted, and a following account be added, the plaintiff is not barred by the statute, for it is a running account. Ibid. and *Farrington* v. *Lee*, 1 Mod. 270; 2 Mod. 311, 312. *Scudamore* v. *White*, 1 Vern. 456. *Welford* v. *Liddel*, 2 Ves. 400. *Cranch* v. *Kirkman*, Peake's C. 121. The clause is not confined to merchants. Ibid. and 2 Will. Saund. 127, b.; although that opinion seems once to have prevailed. Ibid. (*i*) *Ord* v. *Ruspini*, 2 Esp. C. 270.

(*k*) The exception in the stat. 21 Jac. 1, c. 16, s. 7, was held to apply to the case of absent plaintiffs only. *Hall* v. *Wyburn*, Carth. 136. But the stat. 4 Ann. c. 16, s. 19, enacts, that if any person against whom there is any cause of action for seamen's wages, or of action on the case, the party may bring his action against such person after his return within the time limited by the former statute. See *Williams* v. *Jones*, 13 East, 439.

(*l*) See Lord Kenyon's observations in *Doe* d. *Duroure* v. *Jones*, 4 T. R. 311. *Gray* v. *Mendez*, Str. 556. Ireland is beyond seas, within the meaning of the stat. 21 Jac. 1, c. 16; per Holt, C. J, Show. 91; but Scotland is not. *King* v. *Walker*, Bl. R. 286, (2). Where the statute began to run in the lifetime of the debtor,

(1) [The terms "beyond seas," in the statute of Georgia, are equivalent to *without the limits of the State*. *Murray's Lessee* v. *Baker*, 3 Wheat. 541. So of the statute of any other State. Per Marshall, C. J. 3 Cranch, 177; *Fow* v. *Roberdeau's Ex'r*. The same construction prevails in Maryland, South Carolina and Massachusetts. *Brent* v. *Tasker*, 1 Har. & M'Hen. 89. *Pancoast* v. *Addison*, 1 Har. & J. 350. *Forbes* v. *Foot*, 2 M'Cord, 331. *White* v. *Bayley*, 3 Mass. Rep. 271. *Bryne* v. *Crowninshield*, 1 Pick. 263.

In Pennsylvania, the terms "beyond the sea," is construed to mean *without the United States*. *Thurston & al.* v. *Fisher*, 9 Serg. & Rawle, 288. *Ward* v. *Hallam*, 2 Dallas, 217. S C. 1 Yeates, 329. And in Connecticut, "over the sea" was held by the Superior Court, not to extend to Halifax (N. S.) *Gustin* v. *Brattle*, Kirby, 299. It is believed, however, that this decision was reversed by the Supreme Court of Errors in that State.

"Out of the country," in the statute of Kentucky, means out of the *State*. *Mansell* v. *Israel*, 3 Bibb, 510. But the statute runs against citizens of Virginia, who visited Kentucky, after the cause of action accrued, while it composed a part of Virginia. *May* v. *Slaughter*, 3 Marsh. 507. But where there are several non-resident plaintiffs, the coming of one of them into the State, will not take a case out of the statute as respects the others. *Jones* v. *Hersey*, 2 Littell's Rep. 48.

In *Sleght* v. *Kane*, 1 Johns. Cas. 76, a statute of New York which saved the rights of persons "out of the State," was held to mean *out of the jurisdiction of the State*—and that it applied to a person who was within the British lines within that State, during the war of the revolution—he having been "where the authority, which was exercised, was derived, not from the State, but from the king of Great Britain, by right of conquest."

Foreigners who have never been in the United States or the States where they sue, are within the exception of the statutes of limitation,—the phrase "return" meaning *come into the State* *Hall* v. *Littell*, 14 Mass. Rep. 203. *Chomqua* v. *Mason & al.* 1 Gallison, 342. *Ruggles* v. *Keeler*, 3 Johns. 263. S. P. 3 Wils. 145. 2 Bl. Rep. 723. See also *Jones* v. *Hersey*, *ubi sup.* *Sed vide* 1 Har. & J. *ubi sup.* And this doctrine applies, although the foreign plaintiff had an agent residing in the State where he brings his suit. *Wilson* v. *Appleton*, 17 Mass. Rep. 180.]

(2) [In South Carolina and Kentucky, if an ancestor dies, against whom the statute has begun to run, its practical operation is nullified in favour of his minor heirs; and it begins to run against them in the same manner as if the cause of action had first accrued upon his death. *Rose* v. *Daniel*, 2 Const. Rep. 549. *Cook* v. *Cook*, 1 M'Cord, 139. *Machir* v. *May*, 4 Bibb, 43. This is an exception to the rule which operates in other cases, in those States. *May* v. *Slaughter*, 3 Marsh. 511.

War between the countries of the creditor and debtor suspends the operation of the statute, during its continuance. *Wall* v. *Robson*, 2 Nott & M'Cord, 498.

The treaty of peace of 1783, between the United States and Great Britain, which stipulates (art. 4) "that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted"—prevented the operation of a statute of limitations upon British debts contracted before that treaty. *Hopkirk* v. *Bell*, 3 Cranch, 454. But in the case of *Brattie* v. *Tubb's Adm'r*, 2 Munf. 254, it was held that the circumstance that a plaintiff is a British subject, and was entitled to his claim before the year 1776, is not in itself sufficient to protect him against the operation of the Virginia statute of limitations.]

fore a plaintiff be in England when his right of action or title accrues, and he then depart beyond seas, and the time limited elapses, he and his representatives will be barred (*m*).

So if one of several partners be in England when the cause of action accrues, although the rest be then beyond seas (*n*).

And if an estate descend to parceners, one of whom is under a disability, which continues for more than twenty years, and the other does not enter within the twenty years, the disability of the one does not preserve the title of the other (*o*) (1).

Where an ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son went to sea and was supposed to have died abroad, within age, it was held that the daughter was not entitled to twenty years to make her entry after the death of her brother (*p*), but to ten years only after her coming of age, or to twenty after the death of the ancestor (2).

and after his death, the will being contested, there was for a considerable period no representative who could be sued, held that it did not suspend the operation of the statute. *Rhodes* v. *Smethurst*, 4 M. & W. 42. A direction, in a will of personal estate, for payment of debts, does not prevent the operation of the statute, if once it has begun to run; and it does not cease during the interval between the death and the time of a person being constituted personal representative. *Freake* v. *Cranefeldt*, 3 M. & C. 499. And see *Jones* v. *Scott*, 1 Russ. & M. 255; and *Rhodes* v. *Smethurst*, 4 M. & W. 42.

(*m*) *Smith* v. *Hill*, 1 Wils. 134. Ireland is a place beyond seas within this statute. *Lane* v. *Bennett*, 1 M. & W. 70. [S. P. *Hasley* v. *Beach*, 1 Penn. Rep. 122. *Peck* v. *Randall*, 1 Johns. 165. *Fitzhugh* v. *Anderson*, 2 Hen. & Mun. 289. *Doe* v. *Warren*, 6 Mass. Rep. 328. *Bunce* v. *Wolcott*, 2 Conn. Rep. 27. *Griswold* v. *Butler*, 3 ib. 227. *Gustin* v. *Brattle*, Kirby, 299. *Hudson* v. *Hudson*, 6 Munf. 352. *Anon.* 1 Hayw. 416, 459. *Den* v. *Mulford*, ibid. 316. *Pearce* v. *House*, 2 Taylor, 305. *Faysoux* v. *Prather*, 1 Nott & M'Cord, 296. *Adamson* v. *Smith*, Rep. Con. Ct. 296. *Hall* v. *Vandergrift*, 3 Binney, 374. *Wells* v. *Newbolt*, Cam. & Nor. 375. *Inman* v. *Barnes*, 2 Gallison, 315. *Kendal* v. *Slaughter*, 1 Marsh. (Ken.) Rep. 377. *Richardson* v. *Whitefield*, 2 M'Cord, 148. *Walden* v. *Heirs of Gratz*, 1 Wheat. 392.]

(*n*) *Perry* v. *Jackson*, 4 T. R. 516. *Hall* v. *Wybourn*, Carth. 136; and *Chevely* v. *Bond*, Carth. 226. [See *Pendleton* v. *Phelps*, 4 Day, 476.]

(*o*) *Roe* d. *Langdon* v. *Rowlston*, 2 Taunt. 441. [S. P. *Doolittle & ux.* v. *Blakesley*, 4 Day, 265. *Johnson* v. *Harris*, 3 Hayw. (Tenn.) Rep. 113. *Thomas* v. *Machir*, 4 Bibb, 412. *Riden* v. *Frion*, 2 Murphey, 577.]

(*p*) *Doe* d. *George* v. *Jesson*, 6 East, 80. [See *Eaton* v. *Sanford*, 2 Day, 523. *Bush* v. *Bradley*, 4 Day, 298. *Thompson & al.* v. *Smith*, 7 Serg. & Rawle, 209. *Eager & ux.* v. *Commonwealth*, 4 Mass. Rep. 182. *Demarest* v. *Wynkoop*, 3 Johns. Ch. Rep. 129.]

(1) [Coparceners, whose right of entry is barred by the statute, cannot, in Connecticut, recover in ejectment by joining with them one whose right is saved—each or any number being capable, by the law of that State (and Massachusetts) of vindicating his or their own right, without joining the others. *Sanford & al.* v. *Button*, 4 Day, 310. In *joint-tenancy*, if the right of entry as to some is barred by the statute, all are barred. *Aliter*, as to a tenancy in common. *Dickey* v. *Armstrong*, 1 Marsh. 39. See also *Simpson* v. *Shannon*, 3 Marsh. 462. *Marsteller & al.* v. *M'Clean*, 7 Cranch, 156. *Turner* v. *Dehell*, 2 Marsh. 384.]

(2) [The State is never included in an act of limitation unless expressly named, and is not barred by it. *Commonwealth* v. *M'Gowars*, 4 Bibb, 62. *Inhabitants of Stoughton & al.* v. *Baker*, 4 Mass. Rep. 528. *Weatherhead* v. *Bledsoe*, 2 Overton's Rep. 352. *Johnson* v. *Irwin*, 3 Serg. & Rawle, 292. *Harlock* v. *Jackson*, 1 Const. Rep. 135. *Nimmo's Ex'or* v. *Commonwealth*, 4 Hen. & Mun. 57. See a discussion of the common law doctrine on this point, 2 Mason's Rep. 313.

The local statutes of limitations of the different States do not bind the United States in suits in the national courts, and cannot be pleaded in bar of an action by the United States against individuals. *United States* v. *Ibar*, 2 Mason's Rep. 311.

Remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place where the contract is made—and hence a plea of the statute of limitations of the State where a contract is made is not a bar to a suit brought in a foreign tribunal to enforce that contract. But a plea of the statute of limitations of the State where the suit is brought is a good bar. *Nash* v. *Tupper*, 1 Caines' Rep. 402. *Ruggles* v. *Keeler*, 3 Johns. 263. *Pearsall & al.* v. *Dwight & al.* 2 Mass. Rep. 84. *Byrne* v. *Crowninshield*, 17 ib. 55. *Decouche* v. *Savetier*, 3 Johns. Ch. Rep. 217. *Medbury* v. *Hopkins*, 3 Conn. Rep. 472. *Graves* v. *Graves*, 2 Bibb. 207. *Le Roy & al.* v. *Crowninshield*, 2 Mason's Rep. 151, and see the learned opinion of Mr. Justice Story. *Sed vide Woodbridge* v. *Austin*, 2 Tyler, 364.

Legacies are not barred by the statute of limitations, 2 Freem. 22, pl. 20. *Ishy* v. *M'Crae*, 4 Desauss. 432. *Ward* v. *Reeder*, 2 Har. & M'Hen. 154. *Decouche* v. *Savetier*, ubi sup. See *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 136.

The statute does not apply as a bar to an action against a stockholder in a bank to recover the amount of a dishonoured note of the bank, under a provision of the bank charter making the stockholders personally liable for such note in such case. *Bullard* v. *Bell*, 1 Mason's Rep. 243. (This case, however, is now pending in the Supreme Court of the United States, on a writ of error.)]

It is no answer to a plea of the statute, that the debtor died within the six years; and that by reason of litigation as to the right of probate, an executor was not appointed until after the expiration of the six years (*q*).

MAJORITY.

In the exercise of a public or general power, a majority is to act for the whole (*r*).

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*MALICE.

Legal import of the term.

There are two classes of cases where the real intention of a man in doing a particular act is immaterial to civil or criminal responsibility. The one, where the act is of such a nature, that even though it be in itself noxious and injurious, yet, for reasons of policy, the law, without regard to the motives of the agent, *excludes* civil or penal liability. Thus a witness or deponent in a cause, however defamatory and however malicious his statement may be, is *not responsible* in an action, or in a prosecution for slander or libel.

There is another, and that a large class, where the question of intention is in no way material, so long as the act is *voluntarily* done.

Kinds of malice.

Whenever the law defines a right, or prescribes the performance of a duty, or prohibits a particular act, the *wilful* violation of the right, omission of the duty, or transgression, without legal excuse, is necessarily illegal, without regard to intention; it would be manifestly mischievous, and even inconsistent with the very notion of law, as a general rule of conduct, to allow the crude opinions of individuals to supersede the force of law (*s*). In an intermediate and very extensive class of human actions, the *actual intention* is material; this happens where the act is of such a nature that either unlimited restraint or total prohibition would be inexpedient, and therefore here the law makes the *actual intention* of the agent the test of civil or criminal liability. To permit every man to prefer criminal accusations against others with perfect impunity, or, on the other hand, to subject every

(*q*) *Rhodes* v. *Smethurst*, 1 M. & W. 42.

(*r*) *R.* v. *Justices of Lancashire*, 5 B. & A. 755, upon the question in what cases the act of a majority is binding. See *R.* v. *Beeston*, 5 T. R. 592; Bac Ab. Corp. E. 7. In all cases a majority of a *meeting capable of deciding* binds. In the absence of any peculiar constitution, it is not essential that a majority of the whole should meet. See the St. 33 H. 8, c. 27, which in effect, and in cases within the statute, makes a majority of the body corporate to bind the rest. See Burn's Ecc. L. by Tyr., vol. 2, p. 113. In the case of dean and chapter, the dean has no casting voice. Ib. *Case of Cathedral Church of Gloucester*, Ib.; of *Carlisle*, Ib.; of *Chester*, Ib.; *Dr. Bland's Case*, Ib.; *Howard* v. *Bishop of Chichester*, 1 T. R. 650.

(*s*) A party may be subject even to an indictment for a breach of the law, although he erred not intentionally, but ignorantly. See *R.* v. *Picton*, 30 Howell's St. Tr. 489, and Lord Ellenborough's observations there. Thus magistrates are liable to an indictmint for refusing to license a public house, although they were acting under the advice of able counsel. *R.* v. *Duke of Norfolk*, as cited by Lord Ellenborough in *R.* v. *Picton*, 30 Howell's St. Tr. 489; where his lordship observed, that, "To assert that no man is to be considered as criminal because he has not acted intentionally, but ignorantly, would be leaving it to every man to say, 'I will not inform myself; and in consequence of such negligence I shall not be deemed criminal.' The subject was very much considered when I was at the bar, in the case of some magistrates of Cumberland, and where it was held that they were not entitled to an acquittal, although their mistake originated in the best advice." And see *R.* v. *Sainsbury*, 4 T. R. 451. In the same case (*R.* v. *Picton*, 30 Howell's St. Tr. 489), Lord Ellenborough also observed, "If the act be unlawful, it is a sufficient ground of conviction, although the party may have thought that he had reasonable and probable ground for committing it: being unlawful, he is chargeable for it by indictment. Malice is the essence of an action for a malicious prosecution; here it is an inference of law from the facts." If a judge in the ordinary exercise of his jurisdiction commit an error, he cannot be prosecuted; but if he commit an error in acting beyond his jurisdiction, he is not protected. Per Lord Ellenborough, Ibid. And one who in the exercise of a public function (as a trustee under a turnpike Act), without emolument, and which he is compellable to execute, acts without malice, according to the best of his skill and diligence, is not liable in respect of consequential damage arising from his act. *Sutton* v. *Clarke*,[1] 6 Taunt. 29; see also *R.* v. *Sainsbury*, 4 T. R. 794; but see *Roberts* v. *Read*, 16 East, 215.

[1]Eng. Com. Law Reps. i. 298.

one to the payment of damages or to penal visitation who made a charge which turned out to be false, would be highly inconvenient; such prosecutions are therefore neither wholly permitted, nor wholly prohibited; they are allowed to be made with a *bonâ fide* intention, and under circumstances which supply *a probable cause for the proceeding. Malice, therefore, *674
which in legal and technical language is so frequently used as descriptive of those predicaments which constitute civil or criminal liability, is of two kinds; malice in law, and malice in fact, or *actual* malice.

Malice in law is a mere inference of law, which results simply from a wilful transgression of the law. Malice in law.

In numerous instances it means simply the evil inclination and disposition of one who wholly does that which is wrong, without any legal excuse (*t*). In this sense malice has been said to be *un disposition à faire un mal chose* (*u*).

In the same sense, one who being arraigned of felony refuses to plead, is said to stand mute *of malice* (*x*). Again, the statute "*De malefactoribus in parcis*," (*y*) reciting that trespassers did frequently refuse to yield themselves to justice, adds, "*imo malitiam suam prosequendo & continuando*," did flee or stand on their defence.

So where a clerk in orders entered into warranty for hire, and refused to take his trial before lay judges, *propter privilegium clericale*, then, according to Fleta, the warranty will avail nothing, and *clericus gaolæ pro "malitiâ" committetur & redimatur* (*z*).

So where one as a *hired* champion entered fraudulently into warranty, he is said to do so *malitiosè & per fraudem & mercedem* (*a*).

In such cases the term "malicious" imports nothing more than the wicked and perverse disposition of the party who commits the act, and the precise and particular intention with which he did the act; whether he was moved "*irâ vel odio vel causâ lucri*," is immaterial, he acts *maliciously* in wilfully transgressing the law.

The application of the term "malicious" is strongly illustrated in the case of homicide, where the *malus animus*, which brings the offence within the legal denomination of wilful murder, is frequently to be collected by the Court, as a matter of law, from the circumstances of the case, and is not an inference of fact to be drawn by a jury, as it must necessarily be whenever malice consists in the *specific intention* actually existing in the mind of the agent at the time of the act. "Most, if not all the cases of implied malice," says Sir Michael Foster, "will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as plainly carry in them the indications of a heart regardless of social duty and fatally bent upon mischief" (*b*). Malice of this

(*t*) See *Johnstone* v. *Sutton*, 1 T. R. 493. Cro. Car. 271.

(*u*) 2 Roll. R. 461. Fost. 256. Malice in common acceptation means ill will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. Per Bayley, J. in *Bromage* v. *Prosser*,[1] 4 B. & C. 255. See also *Crozer* v. *Pilling*,[2] 4 B. & C. 26; where Abbott, L. C. J. says, "The act of the defendants in detaining the plaintiff in custody after he had tendered the debt, was wrongful, and must be presumed to have been malicious, in the absence of any circumstances to rebut the presumption of malice." Under the st. 6 G. 3, c. 36. s. 48, the word *maliciously* is to be taken in its general signification as denoting an unlawful and bad act; whereas in order to bring the offender within the penalty of death, under the Black Act, the malice must be *personal* against the owner. Per Bayley, J. 4 B. & C. 252.

(*x*) 4 & 5 P. & M. c. 4. (*y*) 21 Edw. 1, stat. 2.

(*z*) Fleta, lib. i. c. 38, s. 8, 9. Fost. 256. The word malice was used in the same general sense by the best Roman authors, and in the civil law. Fost. 257.

(*a*) Bracton de Corona, c. 32, s. 7.

(*b*) Fost. 257; but even in the case of homicide, malice is frequently a question of fact, depending on the actual intention of the prisoner, and the real state of his mind. Vide *infra*, tit. Murder.

[1]Eng. Com. Law Reps. x. 321. [2]*Id.* x. 271.

*description is sometimes termed malice *in law*, or *implied* or *constructive malice*; it is nothing more than the evil disposition, which is a necessary inference from the wilful doing of an injurious act without lawful excuse (*c*). Here malice does not depend on the actual intention of the prisoner; he may be guilty of malice prepense in legal consideration, although he entertained no malice whatsoever against the deceased (*d*).

In numerous instances it is unnecessary to use any allegation of malice in the description of the offence, and in others, where the averment of malice is usual, or even necessary, it is not essential to give evidence to *prove* the averment, unless it consist in the existence of some precise and particular intention in the mind of the agent; or in other words, where malice consists in a principle of malevolence to particulars (*e*), for otherwise it is a mere inference of law; and even where special and particular malice is essential, the fact itself is usually *presumptive evidence* to prove it.

Malice in fact.

In the next place, the term *malice* is frequently used to signify the actual state or disposition of the mind of the agent, with which he did a particular act; as that he did it with a view to prejudice a particular individual, either generally or in some specific manner. In this sense it is usually termed *actual*, *express*, or *positive* malice, and perhaps it may not improperly be termed malice in *fact*, in contradistinction to malice in law, where it is a mere inference of law; for it is obvious that wherever malice depends upon an actual state and disposition of mind, its existence is a question of pure fact, although undoubtedly in ascertaining that existence certain presumptions in fact which are recognized by the law, are to be regarded by juries. This kind of malice seems usually to resolve itself into a question of *intention*, a subject upon which some observations have already been hazarded (*f*).

A malicious intention in fact is a matter of inference from all the circumstances of the particular case; but nevertheless the terms malice and malicious, being technical terms of law, involve, as indeed all other technical expressions do, the application of legal judgment and consideration to the facts as found by a jury.

Presumptions as to malice.

Presumptions of law (*g*) as to malice in particular instances, depend upon considerations of policy and convenience, which greatly affect the nature of the proof, and the effect of malice when proved. In some instances the very existence of malice is wholly immaterial; in other words, the law will decide conclusively in favour of a defendant, notwithstanding his malice or its injurious consequences to the plaintiff. As, where an action is brought for a libel, or words published or spoken by a Judge, juror or witness, in the ordinary course of a judicial proceeding (*h*). In others, the law will not exclude evidence of malice, but will *presume against* its existence, until it has been established by positive proof; as in cases of libel or slander, *where *the occasion* supports such a presumption(*i*); or where the action is expressly founded upon a malicious proceeding, such as a malicious prosecution by a private person, or a malicious conviction by a magis-

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(*c*) Malice implied in case of murder, is where the act is attended with such circumstances as can admit of no excuse. Per Parker, C. J. 10 Mod. 214, 5. So an appeal brought *per malitiam*, was one which was wholly groundless. Per Lord Coke, 2 Ins. 281.

(*d*) See Foster, 256, 7. In cases of appeals of death, it seems formerly to have been held to be unnecessary to use the term malice as descriptive of the offence; it was sufficient to aver that the fact was done *nequiter & in felonia*.

(*e*) Fost. 256.

(*f*) *Supra*, tit. INTENTION.

(*g*) The assignment of a bond by the Lord Chancellor is, it has been held, conclusive evidence of fraud and malice in the suing out the commission. *Smith* v. *Broombed*, 7 T. R. 300, under the statute, 5 G. 2, c. 30.

(*h*) *Supra*, tit. LIBEL.

(*i*) See the different instances, *supra*, tit. LIBEL.

trate (*k*). In such and similar instances, malice, being the gist of the action, must be established by positive proof, independently of the act itself (*l*).

In other cases, again, where the act of the defendant is unsupported by any presumption of law, supplied in his favour by the occasion and circumstances of the act, which is in itself plainly hurtful and injurious to another, the very fact supplies evidence of malice, and the *onus* of exculpation is thrown upon the defendant (*m*).

Where a defendant is proved to have done that, the malicious doing of which is prohibited by the law, malice is a *primâ facie* inference from the very act, for he must be presumed to have intended to do that which he did, and an *intentional* violation of the law is a *malicious* violation of it (*n*). The proof of facts in justification, excuse, or alleviation, must be, in such cases, incumbent on the defendant. And where the offence consists not merely in the doing a particular act, but in the doing it maliciously, and with *intent* to effect a *specified criminal object*, evidence that the defendant intended to effect that purpose (*o*) is in like manner *primâ facie* evidence of malice.

It seems to be a general rule, that a gross, unfeeling and vicious disregard of consequences, however pernicious they may be to society, or however fatal to the individual in particular, is equivalent to express malice, or perhaps, to speak more correctly, is strong, if not conclusive evidence of a specific intention to injure (*p*).

Such seem to be presumptions of law, in which the Courts in some instances draw the inference; and upon which, in others, juries ought to act under the direction of the Court.

Where any doubt arises whether the party acted maliciously, or with such a fair and *bonâ fide* intention as would in law protect him, or whether the particular injury resulted from mere accident, seems to be a pure question of fact for the consideration of the jury, who are to decide whether the act was *intentional*, and if so, by what motive the agent was really actuated.

MALICIOUS PROSECUTION.

The proofs (*q*) in an action for a *malicious prosecution* are, 1st, Of the prosecution; 2dly, Of the want of probable cause, and of the defendant's malice; 3dly, Of damage to the plaintiff.

1st. Of a *prosecution* (*r*) by the *defendant* (1), from which the plaintiff has been *discharged*. If the prosecution was in the King's Bench, at the assizes, *or quarter sessions, the fact of prosecution and acquittal must be *677

Proof of the prosecution.

(*k*) *Supra*, *Burley* v. *Bethune*, *infra*, tit. Malicious Prosecution.

(*l*) See tit. Malicious Prosecution.

(*m*) And therefore, when noxious and defamatory words are published without explanation from context or circumstances, the question of malice ought not to be left to the jury. *Bromage* v. *Prosser*,[1] 4 B. & C. 255, and *supra*, 629.

(*n*) If one doth a grievous mischief voluntarily, the law will imply malice. Kel. 126. Holt, 484. Cro. Car. 131. W. Jones, 198. 1 Hale, 454. Palm. 585. Fost. 255. And see *Farrington's Case*, *supra*, 52.

(*o*) *Supra*, tit. Intention. (*p*) *Vide infra*, tit. Murder.

(*q*) It is, of course, incumbent on the plaintiff to prove so much as is put in issue by the pleadings, under the New Rules. See tit. Rules.

(*r*) An action lies for a malicious prosecution of a charge in the Ecclesiastical Court. Gibs. 216; Burn's Ecc. Law, tit. Churchwardens.

(1) [A memorial presented to a grand jury (but not acted upon by them) complaining of the conduct of a public officer, will not support an action for a malicious prosecution. *O'Driscoll* v. *M'Burney*, 2 Nott & M'Cord, 54.]

[1]Eng. Com. Law Reps, x. 321.

proved in the usual way, by the production of the record, or proof of an examined copy of it (*s*) (A). It is no objection to this proof, that no order of court, or fiat of the attorney-general, allowing a copy of it to the party acquitted in a case of felony, is proved (*t*). It must appear that the plaintiff was *acquitted* of the charge (*u*); it is not sufficient to prove that the proceeding was stayed by the *nolle prosequi* of the attorney-general (*x*), otherwise if he had pleaded not guilty, and the attorney-general had confessed it (*y*); and it is sufficient that the party was acquitted upon a defect in the indictment (*z*) (1).

Some proof ought to be given of the identity of the plaintiff with the party prosecuted. In order to prove that the defendant was the prosecutor, it may be desirable to be prepared with the original bill of indictment; for although the names of the witnesses on the back of the bill are no part of the record, it is evidence that they were sworn to the bill (*a*); but it may be proved that the defendant was a witness, without producing the bill (*b*); and the indorsement of the party's name as a witness on the bill is no evidence that he was the prosecutor (*c*). Where the defendant merely acted as a magistrate, the proof of his name on the back of the indictment

(*s*) See *Clayton* v. *Nelson*, B. N. P. 13. *Kirk* v. *French*, 1 Esp. C. 81. *Morrison* v. *Kelly*, 1 Bl. R. 385. Where a party acquitted upon an indictment of felony, obtained upon the *fiat* of the attorney-general a copy of the record of acquittal, upon a representation that the Judge had promised to grant it after the assizes, but which it appeared he had no authority to do, the Court refused to restrain the party from making use of it. *Browne* v. *Cumming*,[1] 10 B. & C. 70.

(*t*) *Legatt* v. *Tollervey*, 14 East, 302. *Jordan* v. *Lewis*, 2 Str. 1122. And Ford's MS. [See the *People* v. *Poyller*, 2 Caines, 202. *Mies* v. *Bert*, 2 Rep. Con. Ct. 308. *Taylor* v. *Cooper*, ibid. 208.] The case of *Legatt* v. *Tollervey*, above cited, overruled that of *Guinn* v. *Phillips*, Monmouth Summer Assizes, 1763, where Adams, B. held that a copy of the record in felony ought not to be received, unless it had been ordered by the Judge (see Selw. N. P. 1063). But he held that, in all cases of indictments for misdemeanors, a defendant is entitled to a copy of the record. And the same distinction was taken by Lord Mansfield, C. J., in *Morrison* v. *Kelly*, 1 Bl. R. 385, where the prosecution, however, had been for a misdemeanor. Among the orders and directions to be observed by justices of the peace, at the Old Bailey, 26 C. 2, prefixed to Kelyng's Crown Cases, is one which directs "that no copy of any indictment for felony be given without special order, or motion made in the open court, at the general gaol delivery; because the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the king upon just occasions." If *A.* and *B.* be tried on an indictment and acquitted, and a copy of the record be granted to *A.* alone, it is evidence for *A.* in an action against the prosecutor. *Caddy* v. *Barlow*,[2] 1 M. & R. 275. *Jordan* v. *Lewis*, Str. 1122. In *R.* v. *Brangan*, 1 Leach's C. C. L. 32, 3d edit. Willes, C. J., declared, that every prisoner on acquittal had an undoubted right and title to a copy of the record of such acquittal, for any use he might choose to make of it; but this has been denied in other cases. Ib. In the note.

(*u*) *Hunter* v. *French*, Willes, 517.

(*x*) *Goddard* v. *Smith*, 6 Mod. 262; {*Smith* v. *Shakelford*, 1 Nott & M'Cord, 36;} for, notwithstanding, the *nolle prosequi*, fresh process may be sued out upon the indictment. Ibid. per Ld. Holt; but it was said that there had been no instance of any further proceeding after a *nolle prosequi*. Ibid. S. C. Salk. 21. Note, that the declaration alleged an *acquittal*, but the Court held that the entry of a *nolle prosequi* did not amount to an *acquittal*.

(*y*) Ibid.

(*z*) *Wicks* v. *Fentham*, 4 T. R. 247. *Pippet* v. *Herne*,[3] 5 B. & A. 634.

(*a*) Per Holt, C. J., in *Johnson & Ux.* v. *Browning*, 6 Mod. 216.

(*b*) Ibid. per Ld. Holt.

(*c*) 1 Vent. 47; B. N. P. 14. It is a question of fact for the jury to determine who was the prosecutor. See the observations of Lord Ellenborough, C. J., in *R.* v. *Commerell*, 4 M. & S. 207, and *infra*, n. (*d*). See also *R.* v *Smith*, 1 Burr, 54; *R.* v. *Kettleworth*, 5 T. R. 33; in neither of which was the prosecutor's name in the indictment. Sometimes it is the business of the Court to make the inquiry. Ib. and *R.* v. *Incledon*, 1 M. & S. 268.

(A) (An exemplification of the record of a Court of Quarter Sessions is competent evidence to show the acquittal. *Katterman* v. *Stitzer*, 7 Watts, 189.)

(1) [Where a declaration alleges that the party was acquitted, proof that the grand jury had rejected the bill is not sufficient evidence to support the action for malicious prosecution. *Thomas* v. *De Graffenried*, 2 Nott & M'Cord, 143. If the plaintiff have been regularly discharged by order of court, after the bill is thus rejected, it may, perhaps, be sufficient. Ibid.]

[1]Eng. Com. Law Reps. xxi. 27. [2]*Id.* xvii. 252. [3]*Id.* vii. 217.

as prosecutor, will not render him liable (*d*). The proper evidence to establish *this fact is, that the defendant employed an attorney or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses, or was otherwise active in forwarding the prosecution (A). It has been said that a grand juror may be called to prove that the defendant was the prosecutor (*e*); this, however, appears to be doubtful. *678 Variance.

It has been said that the recognizance to prosecute entered into by the defendant is evidence of his being the prosecutor (*f*); this, however, is inconclusive evidence, to say the least, as the magistrate has it in his power to bind over all those who know or can declare anything material, &c., to prosecute or give evidence, so that a witness or party may be bound over without any option on his part.

Where the substance only of the charge contained in the judgment or information before a magistrate is alleged, it seems that a variance will not be material, unless the charge itself be different (*g*).

Where the declaration professed to set out the substance of the indictment, and in specifying the goods, and their value, used the word *valoris* for *valentiæ*, it was held that the variance was not material (*h*).

Where the declaration alleged that the defendant charged the plaintiff before the magistrate with assaulting and beating him, and the charge in fact was for assaulting and striking, the Court held, that as the declaration did not profess to describe the warrant, and had stated the charge correctly in substance, the variance was not material (*i*).

So where the declaration for a malicious arrest stated the warrant to be to arrest the plaintiff for an assault with intent to rob *A.* (the informant), and the words of the warrant were "with intent to rob, *as he verily believes*" (*k*).

Where the declaration alleged that the defendant charged the plaintiff

(*d*) *Girlington* v. *Pitfield*, 1 Vent. 47. In *R.* v. *Commerell*, 4 M. & S. 203, it was held that the Court of Quarter Sessions might make an order on *A.* and *B.* for costs after an acquittal of a parish on a new indictment, although the names of *A.* and *B.* were not indorsed on the indictment. And per Ld. Ellenborough, "We know that in an action for a malicious prosecution, if the prosecutor be kept out of sight, it sometimes becomes a point of very subtle evidence to determine. But *id certum est quod certum reddi potest;* and it is a question to be ascertained by inquiry and evidence. It sometimes is the business of this Court to make that inquiry; as in *R.* v. *Incledon*, 1 M. & S. 268, one question before the Court was, whether Sir A. Chichester was the prosecutor. So in this case the sessions have found these defendants to be the prosecutors, and the Court will not interfere with that decision unless it appeared that the sessions had improperly or carelessly so found." And per Bayley and Dampier, Js., "it does not follow that he whose name is on the indictment must be the prosecutor;" neither in *R.* v. *Smith*, 1 Burr. 54, nor in *R.* v. *Kettleworth*, 5 T. R. 33, was the prosecutor's name on the indictment.

(*e*) *Sykes* v. *Dunbar*, Selw. N. P. 1066, 7th ed. This evidence is said to have been admitted by Lord Kenyon, on the ground that this was a question of fact, the disclosure of which did not involve a breach of the grand juryman's oath; but yet it seems, that either the witness must disclose the whole that passed, or the defendant would be precluded from ascertaining upon cross-examination, the grounds from which the witness drew his general inference that the defendant was the prosecutor.

(*f*) *Enger* v. *Dyot*,[1] 5 C. & P. 4.

(*g*) See further, tit. VARIANCE. *Walters* v. *Mace*, Ib. and 2 B. & A. 756. *Phillips* v. *Shaw*,[2] 5 B. & A. 964.

(*h*) *Johnson & Ux.* v. *Browning*, 6 Mod. 216; but it was said, that it would have been otherwise had the indictment been set out in *hæc verba*. Ib. Vide *supra*, tit. LIBEL.

(*i*) *Byne* v. *Moare*,[3] 5 Taunt, 187; Marsh, 12.

(*k*) But note, that Holt, C. J. said he would save the point; a juror was afterwards withdrawn.

(A) (Where the jury on the trial of the prosecution complained of, directed the defendant in the suit for the malicious prosecution, as the prosecutor, to pay the costs, and the Court according to the Act of Assembly, sentenced him accordingly; an exemplification of the record of the original suit in the Court of Quarter Sessions is competent evidence to show that the defendant was the prosecutor. *Katterman* v. *Stitzer*, 7 Watts, 189.)

[1] Eng. Com. Law Reps. xxiv. 188. [2] *Id.* vii. 318. [3] *Id.* i. 69.

with felony before a magistrate, it was held that the averment was supported by proof of a charge made, stating the *suspicion* of the defendant (*l*).

*679 *Evidence that the defendant, upon his application to a magistrate, stated facts which showed the plaintiff to have been guilty of nothing more than a tortious conversion of the defendant's goods, upon which the magistrate issued a warrant to apprehend the plaintiff on suspicion of felony, will not support an averment that the defendant imposed the charge of felony upon him (*m*).

If the plaintiff in his declaration set forth the indictment, which contains several charges, it is sufficient to prove that some of them were maliciously preferred, although there were good grounds for the rest (*n*).

If the declaration allege an acquittal in bank, it is not proved by evidence of an acquittal at *Nisi Prius* (*o*).

But if the day of acquittal be not averred by way of description of the record, a variance from the day of acquittal alleged will not be material. The declaration averred that *afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due manner, and by due course of law, acquitted. By the record of *Nisi Prius* it appeared that the acquittal took place on Tuesday next after the end of Easter term, and the proof was held to be sufficient (*p*).

Malicious charge before a magistrate.

If the proceeding was by preferring a charge before a magistrate, the magistrate or his clerk should be served with a *subpœna duces tecum*, to produce the proceedings (*q*). If the information was laid by the defendant, his taking the oath, and hand-writing, should be proved, as also the issuing the warrant to the constable, &c.; the warrant must also be produced and proved, and evidence must be given of the apprehension and detention

(*l*) *Davis* v. *Noak*,[1] 1 Starkie's C. 377. cor. Ld. Ellenborough, C. J. and afterwards by the Court of K. B; Bayley, J. *dissent.*

(*m*) *Leigh* v. *Webb*, 3 Esp. C. 165; 1 Starkie's C. 67. *Cohen* v. *Morgan*, 6 D. & R. 8; *infra*, 680, note (*u*). Where the declaration charged that the defendant maliciously, &c. laid an information against the plaintiff, charging him with having feloniously ridden away with two geldings, and the information, which was of the defendant's servant, merely alleged the riding them away after he was told that he must not, held, that being no more than a trespass, a count stating a malicious charge of felony could not be supported; held also, that a subsequent charge of horse-stealing was evidence as to the motive of the defendant. *Milton* v. *Elmore*,[2] 4 C. & P. 456.

(*n*) *Reed* v. *Taylor*, 4 Taunt. 616.

(*o*) *Woodford* v. *Ashley*, 11 East, 508. The declaration alleged that the plaintiff on Wednesday next after fifteen days of, &c., in the Court of our said Lord the King, before the King himself at Westminster, before the Lord Chief Justice assigned to hold pleas before the King himself, &c. W. & J. being associated with him, &c. was in due manner, and by due course of law, by a jury of the said county of Middlesex, acquitted. In order to prove this, a copy of the original roll was given in evidence, which stated the finding of the bill of indictment in the K. B., the process issued to bring the party into Court, the issue joined, the *venire facias juratores* returnable in Hilary term, the *distringas* returnable in Easter term, the *Nisi Prius* record on the return of the *distringas*, setting out the postea (containing the trial, and verdict and acquittal), and lastly the judgment of the Court in bank.

(*p*) *Purcell* v. *Macnamara*, 9 East, 157, overruling the case of *Pope* v. *Foster*, 4 T. R. 590. And see *R.* v. *Hucks*,[3] 1 Starkie's C. 521; where on an indictment for perjury, alleged to have been committed in the defendant's answer to a bill of discovery filed in the Exchequer, it was alleged that the bill was filed on a day specified, and it was held to be no variance, although the bill was intitled of a preceding term. And see *R.* v. *Payne*, cor. Ld. Kenyon, Westm. after Mich. 29 Geo. 3, where a similar variance was held to be immaterial. See *Phillips* v. *Shaw*,[4] 4 B. & A. 435; 5 B. & A. 984. And though the acquittal be unnecessarily alleged with a *prout patet*, yet if it might have been struck out of the declaration it may be rejected as surplusage. *Stoddart* v. *Palmer*,[5] 3 B & C. 2, and tit. VARIANCE.

(*q*) Where the declaration alleged an information before a magistrate, and evidence was offered of an admission by the defendant that he had laid an information before a magistrate, and it appeared from the evidence of the magistrate's clerk that the practice was to take such information in writing, but no evidence was given of the information itself, the plaintiff was nonsuited. *Smith* v. *Walker*, cor. Bayley, J. York Sum. Ass. 1821.

[1]Eng. Com. Law Reps. ii. 434. [2]*Id.* xix. 470. [3]*Id.* ii. 494. [4]*Id.* vi. 477. [5]*Id.* x. 4.

*of the plaintiff under the warrant, and his ultimate discharge must also be shown (1).

Where evidence was given of the loss of the warrant, parol evidence of its contents was admitted without proof of the information (*r*).

An allegation that the plaintiff wrongfully and without reasonable cause imposed the crime of felony on the plaintiff, cannot be supported but by evidence that the defendant went before a magistrate and made a charge of felony (*s*).

Where the defendant went merely as a witness to support a charge preferred by another, and the magistrate bound the witness over to appear as a witness on the trial (*t*), Lord Tenterden held that the action was not maintainable against him.

2dly. *Malice and the want of probable cause.*—If a party prosecute another on a criminal charge, it is a rule of law, which seems to be founded upon principles of policy and convenience, that the prosecutor shall be protected in so doing, however malicious his private motives may have been, provided he had probable cause (*u*) for preferring the charge (A). Without probable cause.

(*r*) *Newsam* v. *Carr*,[1] 2 Starkie's C. 70, cor. Wood, B. Note, it did not appear that any information had been taken, and yet it seems that it is to be presumed in a case of felony that one has been taken.

(*s*) *Blizard* v. *Kelly*,[2] 2 B. & C. 283. See *Clark* v. *Postan*,[3] 6 C. & P. 423.

(*t*) *Enger* v. *Hurman and others*, West. Sitt. after Trin. 1831.

(*u*) 1 T. R. 520. 1 Salk. 14, 15, 21. 5 Mod. 394, 405. 1 Vent. 86. Carth. 415. Where a party robbed or injured merely states actual facts to a magistrate, on which the latter acts according to his own discretion, the action it seems is not maintainable. The complainant cannot, in propriety, be said to be the prosecutor of the person against whom the magistrate may think fit to issue his warrant; and whether there be or be not probable cause for issuing the warrant, there was, at all events, probable cause for making the statement, and no malice can be inferred from a mere statement of facts according to the truth. Where the defendant went before a magistrate, and stated the fact of his having lost a bill of exchange, and the magistrate's clerk stated the substance, but added that the plaintiff had feloniously stolen the bill; there being no evidence of malice on the part of the defendant, it was held that the plaintiff had been properly nonsuited. *Cohen* v. *Morgan*,[4] 6 D. & R. 8.

(1) [The original warrant issued by a justice on a charge of felony, with the acquittal of the person charged, indorsed and signed by the justices who sat at the trial, is evidence of the acquittal. *Dougherty* v. *Dorsey*, 4 Bibb, 207.]

(A) (Probable cause is such a suspicion as would induce a reasonable man to commence a prosecution. *Cabaness* v. *Martin*, 3 Dev. 54. An action for malicious prosecution will not lie unless the want of probable cause is substantially proved. Proof of malice alone will not sustain the action. *Murray* v. *Long*, 1 Wend. 149. [That malice and want of probable cause must both be established against the defendant, in order to support an action for a malicious criminal prosecution or a vexatious civil suit, see *Lyons* v. *Fox*, 2 Browne, Appx. 69. *Kelton* v. *Bevins*, Cooke's Rep. 90. *Marshall* v. *Bussard*, Gilmer, 9. *Bell* v. *Graham*, 1 Nott & M'Cord, 278. *White* v. *Dingley*, 4 Mass. Rep. 433. *Lindsay* v. *Larned*, 17 ib. 190. *Vanduzor* v. *Linderman*, 10 Johns. 106. Yelv. 105, *a*. (2).] An action for a malicious prosecution cannot be sustained where a verdict and judgment of conviction have been had in court of competent jurisdiction, although the party was afterwards acquitted upon an appeal to a superior tribunal. *Griffs* v. *Sellers*, 2 Dev. & Bat. 492. *Whitney* v. *Peckham*, 15 Mass. R. 243. In an action for maliciously suing out a *capias ad respondendum*, the plaintiff is estopped from denying the existence of probable cause of action by the fact that a judgment was rendered against him in the suit in which he was arrested. *Herman* v. *Brookerhoof*, 8 Watts, 240. [In Virginia, a magistrate's committing a person accused of felony, or binding him in a recognizance to appear at court and answer the charge, is sufficient evidence of probable cause though he was acquitted by the court; unless he prove by other evidence that the prosecution was without any probable cause. *Maddox* v. *Jackson*, 4 Munf. 462.] Want of probable cause must be shown affirmatively, and will not be inferred from the mere neglect to prosecute a suit commenced. *Gorton* v. *De Angelis*, 6 Wend. 418. Malice may be inferred from a want of probable cause, but a want of probable cause is not to be inferred from the most rancorous malice. Per White, J., *Kelston* v. *Benins*, Cooke, 90. Though where a defendant pleaded singly the truth of the facts involved in the prosecution, which was for felony; held, that this was assuming to prove the truth on his own side, and that the plaintiff need not, on the trial in the first instance, show the want of probable cause. *Morris* v. *Carson*, 7 Cow. 281. And a discharge of a defendant by a magistrate upon a warrant for a felony is *prima facie* evidence of the want of probable cause in an action brought by the defendant against the prosecutor for a malicious prosecution. *Bostick* v. *Rutherford*, 4 Hawks. 83. *Secon* v. *Babcock*, 2 John. R. 303. See also *Williams* v. *Narwood*, 2 Yerger, 329. *Johnston* v. *Martin*, 3 Mur. 248. In an action for malicious prosecution the jury ought to be instructed by the Judge as to the law involved in the question of

[1]Eng. Com. Law Reps. iii. 249. [2]*Id.* ix. 87. [3]*Id.* xxv. 467. [4]*Id.* xvi. 250.

This protection appears to be not only one of convenience but of justice, or even of necessity, when it is considered how often it happens that the facts upon which a prosecution is properly founded are confined to the knowledge of the prosecutor alone; and if this proof were not to be required on the part of the plaintiff, every prosecutor would in such case be left exposed to an action, against which he might have no defence (*x*), if malice were to be inferred from the apparent want of probable cause.

It is incumbent on the plaintiff, in the first place, to prove the absence of probable cause (*y*); slight evidence has been held to be sufficient, the plaintiff being called upon to prove a negative (*z*). What will amount to *681 probable *cause may be either a question of *law*, to be decided by the Court on the particular facts, as found by the jury (*a*), or may, it seems, be

(*x*) See Lord Kenyon's observations in *Sykes* v. *Dunbar*, 1 Camp. 202, in note.

(*y*) *Willans* v. *Taylor*,[1] 6 Bing. 183. Action for maliciously suing out a commission of bankruptcy; the plaintiff, after proving the commission and adjudication, and that it was afterwards superseded by the defendant, proved also, that in an action of trespass by him against the defendant for taking goods, under which the defendant justified as assignee, a verdict was given for the plaintiff; he also proved a removal of goods which, under the circumstances, could not amount to an act of bankruptcy, but which, in the absence of any other, was presumed to have been relied on as the act of bankruptcy; held, that it was sufficient evidence on the part of the plaintiff of want of probable cause, to call upon the other party to prove the affirmative. *Cotton* v. *James*,[2] 1 B. & Ad. 128.

(*z*) *Incledon* v. *Berry*, 1 Camp. 203. *Taylor* v. *Willans*,[3] 2 B. & Ad. 857. Per Ld. Tenterden in *Cotton* v. *James*, 1 B. & Ad. 133, it is said to have been held, that observations of the Judge on the trial of the indictment, tending to censure the mode in which the proceedings have been conducted, are admissible for the plaintiff. *Warne* v. *Terry*, *cor.* Littledale, J., Winton Summ. Ass. 1836. Roscoe on Evidence, 413.

(*a*) In *Candell* v. *London*, 1 Tr. 520, Buller, J., stated, that what is reasonable or probable cause is matter of law. In *Johnstone* v. *Sutton*, 1 Tr. 543, it is said, that the question of probable cause is a mixed question of law and fact: whether the circumstances alleged to show it probable or not probable existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law (1), and that upon this distinction the case of *Reynolds* v. *Kennedy*, 1 Wils. 232, was decided. See also B. N. P. 14, which cites *Golding* v. *Crowle*, Mich. 25, G. 2, [Sayer, 1 S. C.] where a verdict for the plaintiff was set aside, not as a verdict against evidence, but as a verdict against law, the Judge having reported that there was probable cause. See also the judgments of Ld. Mansfield and of Ld. Loughborough, in *Johnstone* v. *Sutton*, 1 T. R. 544; 2 T. R. 231. The rule is one of legal policy, which protects a party to a certain extent, notwithstanding his malacious intention; (for although he may intend ill, yet still good may arise by encouraging the prosecution of offenders;) the application of the rule must usually be a question of law, for a jury cannot say how far a mere rule of law is to operate. See tit. Law and Fact, Vol. I. See also *Hill* v. *Yeates*,[4] 2 Moore, 80; *Isaacs* v. *Brond*,[5] 2 Starkie's C. 167. And see *Davis* v. *Hardy*,[6] 6 B. & C. 225. Davis hired a chaise in the name of Hardy, and received from the assignee of Martin, a bankrupt, the amount of the chaise-hire: he did not pay it to the innkeeper or to Hardy, nor did he mention to the latter that he had

probable cause. *Master* v. *Deyo*, 2 Wend. 424. See *Burlinghame* v. *Burlinghame*, 8 Cow. 142. *Murray* v. *Long*, 1 Wend. 420. Whether there be probable cause is a mixed question of law and fact. *M'Cormick* v. *Lisson*, 7 Cow. 715. *Munn* v. *Dupont*, 3 Wash. C. C. R. 31. In an action on the case for malicious prosecution in causing the plaintiff to be arrested on a charge for feloniously taking property, it is sufficient evidence of want of probable cause that the party making the complaint knew that the other party claimed and had at least a *prima facie* right to the property. *Weaver* v. *Townsend*, 14 Wend. 192. But if a defendant by his folly or fraud expose himself to a well-grounded suspicion that he was guilty of the crime for which he was prosecuted, a prosecution based thereon will be founded on probable cause. *Wilmarth* v. *Mountford*, 4 Wash. C. C. R. 79. Evidence of the proof adduced on the trial of the suit complained of as malicious is inadmissible for the purpose of showing probable cause where the defendant himself was not a witness; the party is bound to produce the witnesses, and is not permitted to prove what they testified to. *Burt* v. *Place*, 4 Wend. 591. In an action for a malicious prosecution what the defendant swore on the trial of the indictment may be given in evidence for him. *Moody* v. *Pender*, 2 Hayw. 29. *Scott* v. *Wilson*, Cooke, 315. A justice of the peace before whom the witnesses were examined in a criminal prosecution, cannot, in a subsequent action for a malicious prosecution, testify to the facts as sworn to by the witnesses before him. The witnesses themselves are the best evidence. *Richards* v. *Foulk*, 3 Ohio R. 53.)

(1) [*Leggett* v. *Blount*, 2 Taylor, 123. *Ulmer* v. *Leland*, 1 Greenleaf, 134. *Munns* v. *Dupont*, *& al.* 2 Browne's Rep. Appx. 42. {3 Wash. C. C. Rep. 31.} *Acc.* In *Crabtree* v. *Horton*, 4 Munf. 59, it was held that the court ought not to instruct the jury that probable cause is proved, but should leave the weight of the testimony to the jury, unless the facts are agreed by the pleadings, or submitted to the court by the parties. See also *Maddox* v. *Jackson*, 4 Munf. 462 The Court of Tennessee, in the case of *Kelton* v. *Bevins*, Cooke's Rep. 90, were divided in opinion, on the question whether probable cause be a point for the decision of the jury or the court.]

[1] Eng. Com. Law Reps. xix. 47. [2] *Id.* xx. 358. [3] *Id.* xxii. 195. [4] *Id.* iv. 62. [5] *Id.* iii. 297. [6] *Id.* xiii. 152.

a conclusion or inference of fact to be drawn by the jury (*b*). Evidence of the most *express malice will not dispense with proof of the absence of *682 probable cause (*c*).

received the amount. Upon a charge being preferred against Davis, he was examined before one of the magistrates, and admitted most of the facts. On this evidence the learned Judge at the trial was of opinion, that there was sufficient evidence of the want of probable cause for indicting Davis for embezzlement. (The Court of K. B. were afterwards of the same opinion.) In the same case, Staines, the proprietor of the chaise, was afterwards called as a witness for the defendant; and it appeared on his evidence that Staines having applied to Davis for payment, the latter requested Staines not to tell Hardy, for it would do him a great injury. The learned Judge was of opinion that the subsequent facts, coupled with the former, nonsuited the plaintiff, though pressed by the defendant's counsel to leave it to the jury whether they believed Staines's evidence, and the Court of K. B. refused to set aside the nonsuit. See also *Spencer* v. *Jacob*,[1] 1 M. & M. 180. In an action by an attorney, for maliciously and without probable cause indicting him for sending a threatening letter, it appeared that his clients having inquired of the defendant as to the truth of a representation made by a person who had offered to buy goods of them, the defendant replied that he would not be responsible for the debt, but believed the person had the employment he represented. The goods were then supplied to him. His representations turned out to be false, and the plaintiff, by direction of his clients, wrote a letter to defendant, demanding payment of the price of the goods obtained from his clients through the defendant's representation; and stating, that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount; that he had instructions to adopt proceedings, if the matter were not arranged in the course of the morrow; and that, as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendant was then summoned before a magistrate, to answer a charge of obtaining goods under false pretences; the plaintiff served the summons, and attended with his clients, and the complaint was dismissed. The defendant afterwards indicted the plaintiff for sending a threatening letter, contrary to the 7 & 8 Geo. 4, c. 29, s. 8, and he was acquitted. On the trial of this action the Judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment; held that the decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendant *bona fide* believed that he had a reasonable cause for indicting, but a pure question of law for the Judge, whether the defendant had such reasonable cause. *Blackford, gent. one, &c.* v. *Dod*,[2] 2 B. & Ad. 179. And see Append. vol. ii. 681.

(*b*) See Vol. I. tit. Law and Fact. *Isaacs* v. *Brand*,[3] 2 Starkie's C. 167. *Brookes* v. *Warwick*,[4] 2 Starkie's C. 389. Lord Kenyon's observations, in *Holton* v. *Shepherd*, 6 East, 14, n. *Fry* v. *Hill*,[5] 7 Taunt. 397. Starkie on Libel, &c. vol. 1, p. 379; *infra*, 683, note (*p*). *Beckwith* v. *Phibly*,[6] 6 B. & C. 635. Where a felony has been committed, though not by the plaintiff, a private person may justify not only a prosecution, but even an actual arrest, if he acted on fair and reasonable grounds of suspicion. But in an action of trespass, it would be necessary that the defendant (not being an officer) should plead specially the grounds on which he acted. See *Mure* v. *Kaye*, 4 Taunt. 34. *M'Cloughan* v. *Clayton*,[7] 2 Starkie's C. 445. Haw. b. 2, c. 12, s. 15. In such cases, therefore, it may be a question of law for the Court, whether the circumstances were sufficient to justify an arrest. No one who did not himself believe, on facts within his knowledge, that the party was guilty, would be justified in making an arrest. Haw. b. 2, c. 12, s. 15. *Sir Anthony Ashley's Case*, 12 Co. 92. The defendant, a constable acting upon the information of another, corroborated by a supposed intercepted anonymous letter, apprehended the plaintiff at her lodgings at night, without any warrant; it was left to the jury to consider whether, looking at the facts, the defendant had reasonable ground to suppose the plaintiff implicated in the felony with which she had been charged, and whether, standing in his place, they would have acted as he had done; and it was held that the direction was not improper. *Davis* v. *Russell*,[8] 5 Bing. 354. In an action for maliciously indicting *A.* for perjury, it appeared that the defendant *B.*, in 1824, preferred the indictment, and gave evidence before the grand jury; that the bill was found, was removed into K. B., and tried in 1827; and that *B.*, who was then in custody, was brought into Court under a *habeas corpus*, obtained by his attorney on the ground that he was a material witness; but he did not give evidence, and *A.* was acquitted. The Judge in his direction told the jury, that if the defendant did not appear at the trial as a witness, from a consciousness that he had no evidence to give which would support the indictment, then there was a want of probable cause, and they should find for the plaintiff; but if his non-appearance did not proceed on that ground, then there was no proof of want of probable cause, and they should find for the defendant. The defendant offered no evidence, and the jury found for the plaintiff. Upon error on a bill of exceptions, wherein the objection stated to the summing up was, that the Judge himself ought to have determined upon the facts whether there was probable cause, without leaving any question to the jury, it was held, that under the circumstances, the motive which induced the defendant not to appear as a witness was a question of fact for the jury, and that they might be directed to conclude there was or was not probable cause, and to find for or against the defendant, according to their opinion of the motive. *Taylor* v. *Willans*,[9] (in error,) 2 B. & Ad. 845. In the case of *Macdonald* v. *Rook*,[10] 2 Bing. N. C. 217, it was held that the Judge was warranted, under the particular circumstances of the case, in leaving the question of want of probable cause to the jury; and Tindall, C. J. observed, "There are some cases, no doubt, in which a Judge may be expected to tell the jury whether or not a defendant had probable cause for proceeding against the plaintiff, as in the case of a threatening letter, or the like; but where the probable cause consists partly of facts and partly of matter of law, a Judge would be warranted in leaving the question to a jury." But see Appendix.

(*c*) *Turner* v. *Turner*,[11] 1 Gow. 50. *Johnson* v. *Sutton*, 1 T. R. 545.

[1]Eng. Com. Law Reps. xxii. 284. [2]*Id.* xxii. 53. [3]*Id.* iii. 297. [4]*Id.* iii. 396. [5]*Id.* ii. 152. [6]*Id.* xiii. 287. [7]*Id.* iii. 161. [8]*Id.* xv. 463. [9]*Id.* xxii. 195. [10]*Id.* xxix. 312. [11]*Id.* v. 444.

Under the New Rules probable cause is put in issue by the general plea of not guilty (*d*).

Where, upon an indictment for a malicious prosecution for perjury, it appeared that part of the affidavit on which perjury had been assigned had been falsely sworn, but that there was no probable cause for some assignments of perjury on some of the transactions contained in the affidavit, it was held that the action was maintainable (*e*); for there being no probable cause for some of the charges in the indictment, it was preferred without probable cause (*f*).

It is invariably necessary, in an action of this nature, to give some positive evidence, arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge; for as was observed in the case of *Purcell* v. *Macnamara* (*g*),
*683 the *prosecution may have been commenced and abandoned from the purest and most laudable motives.

Thus it is not enough to show, that on an indictment of the plaintiff by the defendant for perjury, the former was acquitted upon the trial, on failure of the prosecutor's appearance when called (*h*); even although the facts lay within the defendant's knowledge, who, had there been the least foundation for the prosecution might have proved it (*i*).

Or to prove that the bill was thrown out by the grand jury (*k*), or that the defendant, after charging the plaintiff on oath with an assault, omitted to prefer an indictment (*l*).

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved that the defendant was actuated by *malicious motives* in preferring the bill, although some evidence must still be given of the want of probable cause, slight evidence will be sufficient (*m*).

(*d*) *Cotton* v. *Brown*,[1] 3 Ad. & Ell. 312; 4 N. & M. 836, S. C. In an action for maliciously outlawing the plaintiff, the plea of not guilty puts in issue the existence of reasonable and probable cause, but not the reversal of the outlawry. *Drummond* v. *Pigou*,[2] 2 Bing. N. C. 114.

(*e*) *Reed* v. *Taylor*, 4 Taunt. 616.

(*f*) Per Gibbs, C. J., *Reed* v. *Taylor*, 4 Taunt. 616.

(*g*) 9 East, 361. [See also, *Shock* v. *M'Chenny*, 4 Yeates, 507.] *Sykes* v. *Dunbar*, cited 9 East, 363, in the note, where Lord Kenyon ruled, that it was not sufficient for the plaintiff to show his acquittal, without going farther, and giving evidence of malice in the defendant. And see *Incledon* v. *Berry*, 1 Camp. 203. *Wallis* v. *Alpine*, 1 Camp. 204, (n.) *Willans* v. *Taylor*,[3] 6 Bing. 183; [4]2 B. & Ad. 845.

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(*i*) The circumstance, that in the particular case the facts are peculiarly within the knowledge of the prosecutor, and the proof of them within his reach, would clearly be an insufficient reason for departing from the general rule, which seems to be founded partly on the difficulty under which a defendant must often labour, in proving by other witnesses the cause which he had for instituting the prosecution. In Buller's Nisi Prius, 14, it is laid down, that where the facts are in the knowledge of the defendant himself, he must show a probable cause, though the indictment has been found by a grand jury, or the plaintiff shall recover, without proof of express malice; for this position, the case of *Parrott* v. *Fishwick*, Lond. Sitt. after Trin. T. 1772, is referred to; but from the note of this case, given 9 East, 362, it appears that where a defendant had been acquitted by verdict, Lord Mansfield, in summing up, said, "that it was not necessary to prove express malice; for if it *appeared* that there was no probable cause, that was sufficient to prove implied malice, which was all that was necessary to be proved to support this action. For in that case all the facts lay within the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power and incumbent on him to prove it." Verdict for the plaintiff, damages 50*l*. It is observed by Mr. East, in the note referred to, that it was perfectly consistent with the summing up, that the plaintiff had given *prima facie* evidence to negative any probable cause.

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Where the defendant had preferred three bills of indictment against the plaintiff on the same charge, one of which had been found on his own testimony, and he abandoned the last indictment at the time of trial, after it had been pending three years, it was held to be sufficient *primâ facie* evidence of the want of probable cause (*n*).

In an action against a magistrate for a malicious conviction, the question is not whether there was probable cause in fact for convicting, but whether *he* had any probable cause for convicting; and for this purpose, what passed before him upon the hearing is not only proper, but essential evidence with a view to the question of malice (*o*). It is also incumbent on the plaintiff to prove the existence of malice, as well as the want of probable cause (A).

The existence of malice is *usually* (*p*) a question of fact for the jury. Malice (1).

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results from the want of probable cause, which when once established affords a strong presumption of malice (*q*). Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication of the proceedings, is properly adduced to prove malice (*r*) (2). It seems also, that the plaintiff may give in evidence the proof adduced by

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(*q*) No evidence of malice can be more cogent than that the defendant *knew* that the plaintiff was innocent. *Purcell* v. *Macnamara*, 9 East, 361; *Burley* v. *Bethune*,[1] 5 Taunt. 583. *Turner* v. *Gow*, 20. The want of probable cause is not conclusive as to malice. *Mitchell* v. *Jenkins*,[4] 5 B & Ad. 558. 2 N. & M. 301.

(*r*) Str. 691. So it has been held that evidence of malevolent misconduct by the defendant towards the plaintiff, tending to show evil motives after the prosecution, is admissible. *Caddy* v. *Barlow*,[5] 1 M. & Ry. 275. The plaintiff having been taken into custody on a criminal charge, offers bail before the magistrate, to which the prosecutor objects; a letter purporting to have been written by a Judge, on reading which the magistrate was induced to admit the plaintiff to bail, is evidence merely to show that the magistrate refused bail till so induced, without proof that the letter was written by the Judge. *Taylor* v. *Willans*,[6] 10 B. & C. 845. And in order to show that the prosecutor took steps to prevent a person from becoming bail, an affidavit made by the attorney's clerk was put in, as showing that those who conducted the prosecution had taken means to prevent a person becoming bail for *A*. This was held to be admissible, without calling the clerk to prove an authority from his master to make the affidavit. *Taylor* v. *Willans*,[6] (in error,) 2 B. & Ad. 845. It has been held that in order to support the averment of malice, it must be shown that the charge is wilfully false. *Cohen* v. *Morgan*,[7] 6 D. & R. 9, cor. Abbott, C. J.; this doctrine does not seem to be warranted by the authorities.

(A) (If a man prosecute another for real guilt, no matter how malicious his motive may be, he is not liable in an action for malicious prosecution, nor is he liable if he prosecute him from apparent guilt, arising from circumstances which he honestly believes. *Plummer* v. *Gheen*, 3 Hawks. 66.)

(1) [Grand jurors are not liable to an action for malicious prosecution for information given by them to their fellows, upon which a presentment is founded. *Black* v. *Sugg*, Hardin, 556.]

(2) [Where the plaintiff gives evidence of the conversation of the defendant to show malice, the defendant may prove by the committing magistrate what he swore before him. *Guerrant* v. *Tinder*, Gilmer, 36. And where the magistrate records the prosecutor's testimony, the plaintiff may give such parol evidence of this testimony as is consistent with the written statement, and tends to a more exact specification. *Watt* v. *Greenlee*, 2 Murphey, 246.]

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(*p*) See *Johnstone* v. *Sutton*, 1 T. R. 513. [*Ray* v. *Law*, 1 Peters R. 210. *Munns* v. *Dupont*, 2 Browne's R. Appx. 42. *Somner* v. *Wilts*, 4 Serg. & R. 19.] Yet there may be cases so circumstanced, that though the Courts might not go so far as to infer malice in point of law, without the aid of a jury, yet they would leave it to the jury to imply malice, *Brookes* v. *Warwick*,[2] 2 Starkie's C. 389. See also *Isaacs* v. *Brand*,[6] 2 Starkie's C. 167. *Supra*, Vol. I. tit. Law and Fact. The defendant had held the plaintiff to bail, as administratrix, for a debt due from the estate; and upon the trial of the action for maliciously holding to bail, the plaintiff relied wholly on the mere fact of her having been held to bail when she was not liable to arrest, and gave no extrinsic evidence of malice. The jury having found a verdict for the plaintiff, with five shillings damages, the Court, upon a motion for a new trial, doubted whether the very fact of holding the party to bail, under such circumstances, was not evidence from which malice was to be *implied*, and refused to disturb the verdict. *Fletcher* v. *Webb*, 11 Price, 381.

(*q*) No evidence of malice can be more cogent than that the defendant *knew* that the plaintiff was innocent. *Purcell* v. *Macnamara*, 9 East, 361; *Burley* v. *Bethune*,[1] 5 Taunt. 583. *Turner* v. *Gow*, 20. The want of probable cause is not conclusive as to malice. *Mitchell* v. *Jenkins*,[4] 5 B & Ad. 558. 2 N. & M. 301.

(*r*) Str. 691. So it has been held that evidence of malevolent misconduct by the defendant towards the plaintiff, tending to show evil motives after the prosecution, is admissible. *Caddy* v. *Barlow*,[5] 1 M. & Ry. 275. The plaintiff having been taken into custody on a criminal charge, offers bail before the magistrate, to which the prosecutor objects; a letter purporting to have been written by a Judge, on reading which the magistrate was induced to admit the plaintiff to bail, is evidence merely to show that the magistrate refused bail till so induced, without proof that the letter was written by the Judge. *Taylor* v. *Willans*,[6] 10 B. & C. 845. And in order to show that the prosecutor took steps to prevent a person from becoming bail, an affidavit made by the attorney's clerk was put in, as showing that those who conducted the prosecution had taken means to prevent a person becoming bail for *A*. This was held to be admissible, without calling the clerk to prove an authority from his master to make the affidavit. *Taylor* v. *Willans*,[6] (in error,) 2 B. & Ad. 845. It has been held that in order to support the averment of malice, it must be shown that the charge is wilfully false. *Cohen* v. *Morgan*,[7] 6 D. & R. 9, cor. Abbott, C. J.; this doctrine does not seem to be warranted by the authorities.

(A) (If a man prosecute another for real guilt, no matter how malicious his motive may be, he is not liable in an action for malicious prosecution, nor is he liable if he prosecute him from apparent guilt, arising from circumstances which he honestly believes. *Plummer* v. *Gheen*, 3 Hawks. 66.)

(1) [Grand jurors are not liable to an action for malicious prosecution for information given by them to their fellows, upon which a presentment is founded. *Black* v. *Sugg*, Hardin, 556.]

(2) [Where the plaintiff gives evidence of the conversation of the defendant to show malice, the defendant may prove by the committing magistrate what he swore before him. *Guerrant* v. *Tinder*, Gilmer, 36. And where the magistrate records the prosecutor's testimony, the plaintiff may give such parol evidence of this testimony as is consistent with the written statement, and tends to a more exact specification. *Watt* v. *Greenlee*, 2 Murphey, 246.]

[1]Eng. Com. Law Reps. i. 196. [2]*Id.* iii. 396. [3]*Id.* iii. 297. [4]*Id.* xxvii. 131. [5]*Id.* xvii. 252. [6]*Id.* xxii. 195. [7]*Id.* xvi. 250.

the defendant on the trial of the charge (*s*). So he may give in evidence publications by the defendant on the subject of the charge (*t*).

Where the prosecution was against the plaintiff and another, the plaintiff may, as part of the *res gesta* and to show the *animus* of the defendant, give in evidence misconduct in the transaction against the other party indicted (*u*).

Where the defendant, a Bank inspector, had procured the plaintiff, a tradesman, to be taken into custody on a charge of having in his possession a forged bank-note, without legal excuse, because he had refused, after paying the amount to the person to whom he had paid it away, to deliver it up to the inspector, Lord Ellenborough held that the pressing a commitment, under such circumstances, was such *crassa ignorantia* that it amounted to malice (*v*).

*685 *The defendant may give in evidence any facts which show that he had *probable cause* for prosecuting, and that he acted *bonâ fide* upon that ground of suspicion. It is no answer to the action that the defendant acted upon the opinion of counsel, if the statement of facts upon which the opinion was founded was incorrect, or the opinion itself unwarranted (*x*) (1).

If it appear that the jury, upon the trial of the plaintiff, entertained doubts upon the evidence, and deliberated as to his guilt after the case was concluded, the fact is, it seems, evidence of a probable cause (*y*).

It is obviously of importance to prove that a felony has been committed (*z*), and to be prepared with proof of such circumstances as tend to throw suspicion on the plaintiff (*a*) (2). This, however, would probably be deemed to be insufficient in case of express proof that the defendant knew that the prosecution was without foundation.

In the case of *Johnson* v. *Browning* (*b*), where it appeared that no one

(*s*) B. N. P. 13, 14.

(*t*) *Chambers* v. *Robinson*, Str. 691, where the plaintiff gave in evidence an advertisement published by the defendant pending the prosecution of an indictment for perjury, though an information had been granted; but the Chief Justice informed the jury that they were not to consider it in damages, but only as a circumstance of malice.

(*u*) *Caddy* v. *Barlow*,[1] 1 M. & Ry. 275.

(*v*) *Brookes* v. *Warwick*,[2] 2 Starkie's C. 389. The plaintiff had taken the note in the usual course of business, and paid it in the usual course to *B.* The note being stopped at the bank, was stamped as a forgery, and brought by an inspector to the plaintiff. The plaintiff paid the amount to *B.*, and refused to give it up to the inspector, insisting on his right to retain it. The inspector, without any ground for suspicion, charged the plaintiff with feloniously having the note in his possession, without lawful excuse. The case was very pertinaciously pressed on the part of the plaintiff, although Lord Ellenborough had, early in the cause, expressed a strong opinion on the subject, and left it to the jury upon the ground of malice. The jury found for the plaintiff, damages 50*l.*

(*x*) *Hewlett* v. *Crutchley*,[3] 5 Taunt. 277.

(*y*) In *Smith* v. *Macdonald*, 3 Esp. C. 7, Lord Kenyon held, that if the jury paused before they acquitted the plaintiff upon his trial for the offence, he should hold that there was probable cause for the prosecution. It does not appear whether in that case the evidence rested upon the testimony of the prosecutor, the defendant in action. It is also to be observed, that there was no evidence to negative probable cause, a circumstance in itself sufficient to warrant a nonsuit. See also *Lilwal* v. *Smallman*, Selw. N. P. 946. *Golding* v. *Crowle*, B. N. P. 14.

(*z*) In *Johnson* v. *Browning*, 6 Mod. 216, Lord Holt seems to have considered this proof to be essential to the defence; but it seems to be a good defence to prove reasonable grounds for suspecting the guilt of the plaintiff, although no felony was committed. See *Samuel* v. *Payne*, Dougl. 345. *Ledwith* v. *Catchpole*, Cald. 291. *Supra*, 601.

(*a*) See *Knight* v. *Germain*, Cro. Eliz. 134. *Pain* v. *Rochester*, Cro. Eliz. 871.

(*b*) 6 Mod. 216. In B. N. P. 14, citing *Cobb* v. *Carr*, it is said, that the defendant's evidence of what he

(1) [*Moody* v. *Pender*, 2 Hayw. 29.]

(2) [In an action for malicious prosecution, papers taken by a magistrate from the person of the plaintiff, and used upon an indictment against him, and which are in the possession of the defendant, may be read upon the trial. *Munns* v. *Dupont*, 3 Wash. C. C. R. 31.]

[1] Eng. Com. Law Reps. xvii. 252. [2] *Id.* iii. 396. [3] *Id.* iii. 396.

was present at the time of the supposed robbery but the wife of the defendant in the action, Lord Holt admitted evidence of what she swore at the trial of the indictment; but it is obvious that this was done under the impression that it was incumbent on the defendant to establish the fact of probable cause, although no evidence were given to establish the negative.

Where the plaintiff has been arrested on a charge of larceny, it has been doubted whether the defendant, after having given some evidence of probable cause, can give evidence to prove that the plaintiff was a man of bad character (*c*); but it seems that although such evidence affords no presumption of probable cause in the particular instance (*d*), yet that it is matter admissible in mitigation of damages.

3dly. *The damage sustained.*—The plaintiff may prove, in aggravation of damages, the length of imprisonment, his expenses, situation, and circumstances. The peril and jeopardy in which a man's life and liberty are placed by a malicious prosecution, or the prejudice to his fame and reputation, constitute a sufficient ground of action (*e*); so although neither his *fame nor liberty be affected, if he has been put to needless expense to defend himself (*f*). In the assessment of damages, the costs incurred by the plaintiff are to be estimated as between attorney and client (*g*) (1). Damage (A). *686

If a man be falsely and maliciously indicted of a crime which is a scandal to him, and hurts his fame, an action lies, although the indictment be insufficient, or an ignoramus be found (*h*); for although no expense may have been incurred, the mischief of the slander has been effected (*i*).

Upon the execution of a writ of inquiry, where the defendant in an action for slander has allowed judgment to go by default, it is not incumbent on the plaintiff to give any evidence. The jury, in the absence of evidence of damage, are not confined to nominal damages (*k*).

In a joint action against several, the jury cannot assess several damages (*l*).

In an action for a malicious arrest the plaintiff must prove the arrest, the determination of the suit, the want of probable cause, and the defendant's malice, and the damages sustained (*m*).

swore upon the trial of the indictment is evidence: this however, does not seem to be warranted; for if the principle of *necessity* operated in such a case, the effect would be to admit the testimony of the defendant himself, by which means the plaintiff would have the benefit of a cross-examination.

(*c*) In the case of *Rodriguez* v. *Tadmire*, 2 Esp. C. 721, Lord Kenyon admitted general evidence to that effect. In *Newsam* v. *Carr*,[1] 2 Starkie's C. 69, cor. Wood, B., where a witness was asked whether the plaintiff's house had not been searched on former occasions, and whether he was not a man of suspicious character, Wood, B. overruled the question, observing, that in actions of slander such evidence would be admissible to mitigate the damages, but that in the present case it would afford no evidence of probable cause.

(*d*) Ibid. (*e*) *Savill* v. *Roberts*, B. N. P. 13.

(*f*) B. N. P. 14. This was formerly doubted. Ibid. But it has been decided, that such an action lies by the husband for the expense of defending his wife. B. N. P. 13. *Jones* v. *Gwynn*, 10 Mod. 214; 1 Salk. 15; Gilb. 185.

(*g*) *Sandbank* v. *Thomas*,[2] 1 Starkie's C. 306. But see *Sinclair* v. *Eldred*, 4 Taunt. 7.

(*h*) *Savill* v. *Roberts*, B. N. P. 13. *Chambers* v. *Robinson*, Stra. 691.

(*i*) Ibid. (*k*) *Tripp* v *Thomas*,[3] 3 B. & C. 427.

(*l*) *Lowfield* v. *Banckcroft*, Str. 910; B. N. P. 15, 93. *Contra*, *Lane* v. *Santeloe*, B. N. P. 15; Stra. 79.

(*m*) Or so much as is put in issue by the pleadings, under the new rules.

(A) (In Pennsylvania, where the jury in an action for malicious prosecution, have not expressly stated that they assessed only single damages, the court cannot double them. *Campbell* v. *Finney*, 3 Watts, 84.—The defendant may give in evidence in mitigation of damages, that after the prosecution instituted by him, the character of the plaintiff was bad upon subjects unconnected with the felony for which he was prosecuted. *Bastick* v. *Rutherford*, 4 Hawks, 83.)

(1) [This action cannot be maintained for the ordinary costs and expenses of a defence, without an arrest or some special damage. *Potts* v. *Imlay*, 1 Southard's Rep. 330. No action lies to recover of a prosecutor the money expended by the plaintiff in defending against an indictment. *Fleet* v. *M'Intire*, 1 Coxe's Rep. 161.]

[1] Eng. Com. Law Reps. iii. 249. [2] *Id.* ii. 401. [3] *Id.* x. 139.

Malicious arrest. Proof of the arrest.

In an action for a *malicious arrest*, the plaintiff must be prepared to prove the affidavit made by the defendant, either by means of the affidavit itself, or proof of an examined copy; the former, it is said, is the better course (*n*). He must also prove an examined copy of the writ and return, and produce and prove the warrant of the sheriff made by virtue of the writ (*o*), and the arrest and detention under it. The official return made by the sheriff is evidence of the fact for either party (*p*).

Where the plaintiff alleged that he was arrested under and by virtue of a plaint for debt, in the Sheriff's Court, it was held to be proved by evidence that the plaint was entered, and that the officer in consequence arrested the plaintiff, having first received a paper, in the nature of a warrant, containing the parol directions of the sheriff, which were good by custom, although the stat. 12 Geo. 1 requires an affidavit of debt, which had been made (*q*).

The arrest may be proved by the sheriff's officer (*r*).

*687 *Where the declaration alleged a malicious arrest, and the imprisonment of the plaintiff until he was forced to give bail; and it appeared in evidence that, on a message sent by the officer, informing the plaintiff that he had a warrant against him, he went to the officer's house and executed a bail-bond; it was held that there was no evidence of arrest, and that as the allegations were not divisible, the variance was fatal (*s*). But to support an allegation that the defendant held the plaintiff to bail, it is sufficient to show that the plaintiff, on being informed of the writ, went to the officer's house and gave bail (*t*).

The determination of the action (*u*) must also be proved by means of an

(*n*) Peake's Ev. 330. See *Webb* v. *Herne*, 1 B. & P. 289, where the plaintiff, having in an action against the sheriff alleged that *I. S.* was arrested under a writ indorsed for bail, by virtue of an affidavit filed of record, it was held that the allegation must be proved. See *Casburn* v. *Reid*, 2 B. Moore, 60; B. N. P. 14. *Crook* v. *Dowling*, 3 Doug. 75. *Rees* v. *Bowen*, 1 M'Clelland & Y. 392. *R.* v. *James*, 1 Show. 397. Buller, J. held that the writ indorsed was sufficient evidence of the holding to bail. *Rogers* v. *Ilscomb*, 2 Esp. C. 38.

(*o*) As to this proof, see tit. SHERIFF. In an action for maliciously holding to bail, the bare production of the writ by a person who received it in a letter, will not entitle the plaintiff to have it read. *Jackson* v. *Burleigh*, 3 Esp. C. 34. *Secus*, after proof of the affidavit to hold to bail, and of the warrant founded upon the writ. Ibid.

(*p*) *Gyfford* v. *Woodgate*, 11 East, 297; *supra*, Vol. I. *Contra*, *Lloyd* v. *Harris*, Peake's C. 174. It is not sufficient to prove the arrest, and return of *cepi corpus*, without proof of the warrant. *Lloyd* v. *Harris*, Peake's C. 174. See *Drake* v. *Sykes*, 7 T. R. 113. [2 Phil. Ev. 116.]

(*q*) *Arundel* v. *White*, 14 East, 216.

(*r*) If a bailiff, having process against one who is on horseback, or in a coach, say, "you are my prisoner, I have a writ against you;" on which he submits, turns back, or goes with him; though the bailiff never touch him, it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff had laid hold of him. *Herner* v. *Batty*, (n.) B. N. P. 62. See below, tit. TRESPASS; and *Berry* v. *Adamson*,[1] 6 B. & C. 528. *Gage* v. *Radford*,[2] 3 C. & P. 464. *Crainger* v. *Hill*,[3] 4 Bing. N. C. 412.

(*s*) *Berry* v. *Adamson*,[4] 2 C. & P. 503. Where the officer told the plaintiff that he had a warrant against him at the suit of the defendant, and did not touch him, but took his word that he would put in bail; and the plaintiff, giving him a small gratuity, asked him to go to his attorney and desire him to put in bail, which he did, and bail was put in; L. C. J. Tenterden said, that it was the strong inclination of his opinion that it was not a sufficient arrest to sustain the action for a malicious arrest. *George* v. *Radford*,[5] 1 Mood. & M. C. 244.

(*t*) *Small* v. *Grey*,[6] 2 C. & P. 605.

(*u*) When the action is put an end to by a *stet processus* by consent of the parties, no action for a malicious arrest can be supported. *Wilkinson* v. *Howell*,[7] 1 Mood. & M. C. 493. In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action; and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, had not done so. *Whitworth* v. *Hall*,[8] 2 B. & Ad. 695. Proof that no declaration was filed or delivered within one year after the return of the writ is sufficient. *Pierce* v. *Street*,[9] 3 B. & Ad. 396.

[1]Eng. Com. Law Reps. xiii. 245. [2]*Id.* xiv. 391. [3]*Id.* xxxiii. 328. [4]*Id.* xii. 235. [5]*Id.* xiv. 391. [6]*Id.* xii. 284. [7]*Id.* xxii. 368. [8]*Id.* xxii. 173. [9]*Id.* xxiii. 102.

examined copy of the entry on the record (1). Proof of the rule of court to discontinue, and of the taxation and payment of costs, is sufficient evidence of the determination of the action (*x*). But it is said that proof of an order made by a Judge to stay proceedings is insufficient, although the costs have been taxed and paid (*y*). Determination of the action.

The not declaring for a year after the return of the writ, is evidence of the determination of the suit, under an averment that the plaintiff did not declare, but permitted the suit to be discontinued (*z*).

A *stet processus* by consent is not such a determination as will support the action (*a*).

Where it appeared to be the practice in the Sheriff's Court in London, upon the abandonment of a suit by the plaintiff, to make an entry in the *minute-book of "withdrawn by the plaintiff's order," opposite to the entry of the plaint, it was held that proof of such an entry was sufficient to prove the determination of the suit (*b*). *688

Where the declaration, in stating a judgment by default, stated "and thereupon it was considered by the said Court of K. B. that the plaintiffs should take nothing by their said writ, but that *they and their pledges to prosecute should be in mercy*, &c., as by the record and proceedings thereof, &c., now fully appear, and the said action was and is thereby wholly ended and determined," it was held to be no variance, although the record produced wanted the words "and their pledges to prosecute," but only an *&c.*, and that as the substance of the allegation was the discontinuance of the former suit, those words might be rejected as surplusage (*c*). Variance.

Where the declaration alleged a plaint against the defendant at the Sheriff's Court in London, it was held to be supported by proof of a plaint before *one* of the sheriffs (*d*).

An allegation of an arrest is satisfied by evidence of a detainer (*e*).

(*x*) *Bristow* v. *Haywood*,[1] 1 Starkie's C. 48. *Brandt* v. *Peacock*,[2] 1 B. & C. 649. *Gadd* v. *Bennett*, 5 Price, 540. So if the proceedings be stayed by rule of court, though the rule has been obtained on the affidavit of the party. *Brooke* v. *Carpenter*,[3] 3 Bing. 297. The Court held it to be receivable on the ground of necessity. An averment that the defendants did not prosecute their suit, but therein made default, and their pledges were in mercy, &c. is not proved by the production of a will to discontinue. *Webb* v. *Hill*,[4] M. & M. 253.

(*y*) *Kirk* v. *French*, 1 Esp. C. 80, on the ground that the evidence is not the best which the case admits of; but note, that a juror was withdrawn in that case, and Lord Kenyon seems to have entertained doubts. See *Austin* v. *Debnam*,[5] 3 B. & C. 140. An order from the Lord Chancellor for superseding a commission is not evidence, in an action for maliciously suing it out, to show that it has been superseded; a *supersedeas* under the great seal must be produced. *Poynton* v. *Forster*, 3 Camp. 58; [and *Mr. Howe's note* to the case.] See *Barton* v. *Mills*, Cas. temp. Hardw. 125, 6.

(*z*) *Pierce* v. *Street*, 3 B. & Ad. 396.

(*a*) *Wilkinson* v. *Howell*, M. & M. 295. For such a termination does not afford *prima facie* evidence of the essential to the action, that the former suit was without foundation.

(*b*) *Arundel* v. *White*, 14 East, 318. In an action for maliciously suing out a commission of bankruptcy, it must be averred that before the commencement of the action the commission was superseded. *Whitworth* v. *Hall*,[6] 2 B. & Ad. 695. The *supersedeas* alone is not sufficient evidence of the want of probable cause. *Hay* v. *Weakly*,[7] 5 C. & P. 361. An allegation of nonsuit is not proved by showing a rule to discontinue. *Webb* v. *Hill*,[8] M. & M. 253; *Supra*. The mere acceptance of debt and costs, as awarded by the prothonotary on reference to him, under a rule, without the intervention of the Court, does not show a determination of the suit. Per Pattison, J., *Combe* v. *Capron*, 1 Mo. & R. 398.

(*c*) *Judge* v. *Morgan*, 13 East, 547.

(*d*) *Arundel* v. *White*, 14 East, 216. So the Assize Courts may be stated indifferently to be held, either before both the Judges of Assize, or before the one who in fact sat at the time; per Lord Ellenborough, Ibid.; and *R.* v. *Alford*, Leach's C. C. L. 179.

(*e*) *Whalley* v. *Pepper*,[9] 7 C. & P. 506.

(1) [In an action for a malicious prosecution in a foreign country, it is not indispensably necessary to produce a copy of the record of the proceedings there, but the plaintiff may prove them by other evidence. *Young* v. *Gregory*, 3 Call. 446.]

[1]Eng. Com. Law Reps. ii. 289. [2]*Id.* viii. 172. [3]*Id.* xi. 108. [4]*Id.* xiv. 403. [5]*Id.* x. 37. [6]*Id.* xxii. 173. [7]*Id.* xxiv. 361. [8]*Id.* xiv. 403. [9]*Id.* xxxii. 603.

It lies on the plaintiff to prove that the arrest was malicious, and without reasonable or probable cause (*f*) (1). And it seems that if the defendant act merely through mistake, and without actual malice, the action is not
*689 *maintainable (*g*). It is not sufficient to show that the action was *non-prossed* (*h*), or that the defendant in the former action took a less sum out of Court (*i*); or that an action on a bill, in respect of which the present plaintiff had been discharged by the laches of the present defendant, had been discontinued (*j*).

But where the defendant arrested the plaintiff for money paid to his use, but did not declare till he was ruled to do so, and soon discontinued his action, and paid the costs, it was held to be evidence to go to a jury of malice, and the want of probable cause (*k*).

(*f*) Reasonable or probable cause may, it seems, be either a question of law or of fact; *supra*, 680. But see the Appendix, 680, 688. Where the defendant, being the indorser of a bill of exchange, arrested the plaintiff as the acceptor of the bill, when in fact he was not the acceptor, but was of the same name and address, and upon being applied to denied that it was his acceptance, but it did not appear that the defendant was informed that he so disclaimed the bill, Lord Tenterden, on an action for a malicious arrest, nonsuited the plaintiff, observing, "the defendants may have been careless, they certainly were mistaken, but I can see no appearance of *mulice* in their conduct. How can I say that they were without reasonable cause for what they did? It does not even appear that they were informed that the plaintiff, on presentment, disclaimed the acceptance." *Spencer* v. *Jacob*,[1] 1 M. & M. 280. In an action for maliciously holding the plaintiff to bail on a bill, held, that whatever was admissible in the action on the bill, was also admissible in that action; the judgment in the original action would not be sufficient; the plaintiff was therefore entitled to show that the defendant at the time of the action brought, was the holder of the bill as indorsee after it was once due, and that the bill was a mere accommodation bill, and that the defendant therefore had no right of action against the plaintiff on it. *Haddon* v. *Mills*,[2] 4 C. & P. 487. Where the defendant was arrested for 327*l*., after a tender of 250*l*. and upon a reference, the arbitrator awarded the latter sum only, held that the defendant himself, not trusting to the sufficiency of his tender, but having paid it into Court, it was not to be deemed a vexatious arrest, within the 43 Geo. 3, c. 46, to entitle him to costs. *Sherwood* v. *Taylor*,[3] 6 Bing. 280. Upon the 43 Geo. 3, c. 46, s. 3, it is sufficient to entitle the defendant to costs, that the plaintiff had no reasonable or probable cause for arresting the defendant for the amount; it is not necessary that the arrest should have been malicious. *Doulan* v. *Brett*,[4] 10 B. & C. 117. So where there could be no debt until the period of audit had expired, held that till then there could be no reasonable cause for arresting the defendant to that amount. *Day* v. *Picton*, 10 B. & C. 120.

(*g*) *Bicton* v. *Burridge*, 3 Camp. 140. But in that case, on the plaintiff's informing the officer who had the writ to execute, that he did not owe the debt, the officer did not actually arrest the plaintiff, who afterwards needlessly incurred expense by putting in bail. The same was held where the defendant, through mistake, and without malice, caused another to be arrested as the indorsee of a bill of exchange. *Spencer* v. *Jacob*,[5] M. & M. 180.

(*h*) *Sinclair* v. *Eldred*, 4 Taunt. 7. [See *Ray* v. *Law*, 1 Peters, 210.] But in a previous case of *Hamilton* v. *Beddell*, cor. Pratt, C. J., 4 July, 1756, Beareroft's MSS. 22, Roscoe on Ev. 406, it was held that the defendant's suffering the former action to be *non-prossed* was sufficient *prima facie* evidence of malice; and Pratt, C. J., is reported to have said, "Here the defendant's never proceeding and suffering a *non-pros*, is, in my opinion, *prima facie* evidence of malice. I hold most clearly, that the affidavit, bail, and *non-pros*, make up sufficient *prima facie* evidence to call for a defence."

(*i*) *Jackson* v. *Burleigh*, 3 Esp. C. 311, cor. Lord Kenyon.

(*j*) *Bristow* v. *Haywood*,[6] 1 Starkie's C. 48.

(*k*) *Nicholson* v. *Coghill*,[7] 4 B. & C. 21. *Webb* v. *Hill*, M. & M. 254.

(1) [Demanding excessive bail where there is a good cause of action, or holding to bail when there is no cause of action, if done for the purpose of vexation, entitles the party to an action. *Ray* v. *Law*, 1 Peters, 210. So maliciously (and for the purpose of vexing, distressing and impoverishing the plaintiff) directing an officer to levy a much greater sum than is due on a judgment obtained by the defendant against the plaintiff, and causing the officer so to levy and sell the plaintiff's goods to an amount exceeding the sum due. *Somner* v. *Wilt*, 4 Serg. & Rawle, 19.

Pleading the truth of the words in justification, in an action of slander, does not so admit probable cause as to preclude the party so pleading from showing the want of it in an action, for a vexatious suit, against the party suing him. *Sterling* v. *Adams & al.* 3 Day, 411. Where the declaration is for a vexatious suit and holding to bail in one action only, the records of other actions brought by the same defendant against the same plaintiff cannot be given in evidence. *Ray* v. *Law*, 1 Peters, 207. Where the declaration in such action states that the sum demanded as bail in the vexatious suit, was indorsed on the writ, no other evidence but the indorsement can be given in evidence to show that such bail was demanded. Ibid. Sed vide *Munns* v. *Dupont & al.* Wharton's Digest, 5.]

[1] Eng. Com. Law Reps. xxii. 284. [2] *Id.* xix. 487. [3] *Id.* xix. 84. [4] *Id.* xxi. 37. [5] *Id.* xxii. 284. [6] *Id.* ii. 289. [7] *Id.* x. 269.

It is evidence of malice that the defendant sued out the writ after a release of the debt (*l*); but it is not sufficient to show that the writ was sued out after payment of the debt to the defendant's agent, upon an affidavit made before the payment, without proof of malice (*m*).

The action lies for maliciously arresting an attorney in practice, knowing him to be an attorney, although he owes a large sum to the defendant (*n*).

It seems that if the plaintiff allege that the defendant had *no cause* of action against him, upon which by law he could be held to bail, proof of a cause of action, to a bailable amount, would be an answer to the action, and that the plaintiff ought to have declared specially (*o*). But where the declaration was in that form, and it appeared that the defendant's affidavit was for money had and received, and money paid, and that he had a claim to the amount of 100*l.* for commission on the sale of timber, and that on the general balance of account he was indebted in a large sum to the plaintiff, the action was held to be maintainable (*p*). Malice.

In an action for maliciously refusing to sign an authority to the sheriff to discharge a defendant out of custody, on tender of the debt and costs, the refusal to sign the discharge is *primâ facie* evidence of malice, in the absence of any circumstances to rebut the presumption (*q*).

*If one of two parties, between whom there are transactions of mutual account, arrest the other for the whole amount due on one side, without deducting what is due on the other, the arrest is malicious (*r*). *690

If a party having laid his case fairly before counsel, acts *bonâ fide* upon the opinion given, he is not liable to an action for acting *bonâ fide* on that opinion, however erroneous it may be. But it is otherwise where he does not act *bonâ fide* on the opinion, but arrests though he believes that he has no cause of action (*s*); whether he did so or not, is a question of fact for the jury (*t*).

Where the defendant, after arresting the plaintiff, did not declare until he was urged by the plaintiff, and shortly after that discontinued, it was held to be sufficient evidence of malice for the consideration of the jury (*u*). Where the defendant held the plaintiff to bail, when she was liable as ad-

(*l*) *Waterer* v. *Freeman*, Hob. 267.

(*m*) *Gibson* v. *Chater*, 2 B. & P. 129. Note, in that case the Court were of opinion that the circumstances excluded the inference of malice. Vide *infra*, 499, note (*c*).

(*n*) *Whally* v. *Pepper*,[1] 7 C. & P. 506. And the defendant's attorney is liable to be joined in the action, if, besides acting as an attorney, he co-operated in the arrest. Ib.

(*o*) *Wilkinson* v. *Mawby*, cited 1 Camp. 297; *Wetherden* v. *Embden*, 1 Camp. 295; *Savil* v. *Roberts*, 1 Salk. 14.

(*p*) *Wetherden* v. *Embden*, 1 Camp. 295; cor. Sir J. Mansfield.

(*q*) *Crozer* v. *Pilling*,[2] 4 B. & C. 26. Payment of the debt and costs to the landlord or sheriff, does not discharge the defendant, Ib.; and *Taylor* v. *Baker*, 2 Lev. 203. *Slackford* v. *Austen*, 14 East, 468. A defendant is not bound to pay money to the sheriff, but to the party. *Norton's Case*, 2 Show. 139. But see *Whally* v. *Pepper*,[1] 7 C. & P. 506; where it was held, that the question was, whether the former plaintiff had a probable cause of action for the amount for which he held the party to bail, not whether he had a probable cause of action in the particular form of action brought; and that where *A.* having a good cause of action on a covenant against *B.* & *C.* separately, but not jointly, sued *B.* & *C. jointly*, and arrested *B.* in that action, he was not liable as for a malicious arrest.

(*r*) *Austin* v. *Debenham*,[3] 3 B. & C. 139. Note, that the question of malice was left by Abbott, C. J., to the jury. See also *Dr. Turlington's Case*, 4 Burr. 1996; and *Drovefield* v. *Archer*,[4] 5 B. & A. 513. *Barclay* v. *Hunt*, 4 Burr. 1996. *Contra*, *Brown* v. *Pigeon*, 2 Camp. C. 594.

(*s*) *Ravenga* v. *Muckintosh*,[5] 2 B. & C. 693. Where the affidavit of debt was made by the defendant, and it was to be inferred from circumstances that he knew of the plaintiff's being discharged under the Insolvent Act; held that he was to be deemed responsible for the acts of his attorney, although it was sworn by the latter that the arrest was by his mistake, and without the interference or knowledge of the defendant. *Jones* v. *Nicholls*, 3 M. & P. 12.

(*t*) Ibid.

(*u*) *Nicholson* v. *Coghill*,[6] 4 B. & C. 21.

[1]Eng. Com. Law Reps. xxxii. 603. [2]*Id.* x. 271. [3]*Id.* x. 37. [4]*Id.* vii. 177. [5]*Id.* ix. 225. [6]*Id.* x. 269.

ministratrix only, it was held to be such evidence of malice that the Court refused to disturb a verdict with 5*s.* damages (*v*).

The taking a less sum than that arrested for out of Court is not enough to maintain the action (*x*).

If the defendant, though advised by a competent person that he has a good cause of action, believes that he must fail, and yet arrests the plaintiff from indirect motives, there is no probable cause.

Although a jury *may*, they are not *bound* to infer malice from the want of probable cause (*y*).

It has been held at *Nisi Prius*, that one, who as arbitrator in an action between the parties has seen their books of accounts, and awarded that nothing was due, is not a competent witness for the plaintiff in an action for a malicious arrest, on the ground that he has had access, by consent, to documents which the present defendant, the plaintiff in the former action, could not have been compelled to produce (*z*).

Expressions showing malice on the part of the defendant cannot be taken into consideration as showing the want of probable cause (*a*).

Damages. The plaintiff must prove the arrest, and the expenses to which he was put (*b*). Where a bailable writ was sued out against the plaintiff by mis-

*691 take, *and the bailiff to whom the warrant was delivered to be executed merely requested payment of the money, informing him that he had a writ out against him, and on the mistake being discovered, the plaintiff was told that he need give himself no further trouble, but the plaintiff afterwards incurred expense by putting in bail above, it was held that the action was not maintainable (*c*).

Defence. It is competent to the defendant, for the purpose of rebutting the inference of malice, to show that he acted under professional advice, although it was unfounded in law: the defendant, after taking the present plaintiff's bail in execution, arrested the plaintiff on a *testatum ca. sa.* after notice from the plaintiff's attorney that the proceeding was irregular; the defendant proved that he had acted upon *Higgins's* case (*d*), and on the opinion of a special pleader, and the plaintiff was nonsuited (*e*).

(*v*) *Fletcher* v. *Webb*, 11 Price, 382.

(*x*) *Jackson* v. *Burleigh*, 3 Esp. C. 34.

(*y*) *Mitchell* v. *Jenkins*,[1] 5 B. & A. 588. The defendant arrested the plaintiff for 35*l.* knowing that 25*l.* only was due. The Judge told the jury that the law implied malice. After a verdict for plaintiff the Court of K. B. granted a new trial. K. B. Mich. 1833.

(*z*) *Hubershon* v. *Troby*, 3 Esp. C. 38. *Qu. tamen.*

(*a*) *Whally* v. *Pepper*,[2] 7 C. & P. 506.

(*b*) He cannot, it is said, recover any damage for extra costs. *Sinclair* v. *Eldred*, 4 Taunt. 7. In *Webber* v. *Nicholas*, 1 Ry. & M. 419, Best, C. J. said, that though he should have thought that Lord Ellenborough's opinion in *Sandback* v. *Thomas* (1 Starkie's C. 306) was the more correct one, yet that he was bound by the decision in the Common Pleas. But see *Grace* v. *Morgan*,[3] 2 Bing. N. C. 534, where it was held that a plaintiff in replevin who had received the taxed costs of his replevin, could not in an action for an excessive distress, recover the extra costs of the replevin as damages; and see *Hodges* v. *Earl of Lichfield*,[4] 1 Bing. N. C. 500.

(*c*) *Bicten* v. *Burridge and others*, 3 Camp. 139. See *Arrowsmith* v. *Le Mesurier*, 2 N. R. 211. In general, an action does not lie for bringing an action without good ground, unless it be done maliciously with intent to imprison the party for want of bail, or to do some special prejudice. *Per Cur. Savil* v. *Roberts*, B. N. P. 13. *Purton* v. *Honnor*, 1 B. & P. 205. And an action will not lie against a party for neglecting to countermand a writ, after payment of debt and costs, unless it be alleged to have been done maliciously. *Page* v. *Wiple*, 3 East, 313. *Scheibel* v. *Fairbain*, 1 B. & P. 388; and if in such a case it be incumbent on the party suing out the writ, to countermand it, what shall be a reasonable time for so doing is a question of law. 1 B. & P. 388. [See *Vail* v. *Lewes*, 4 Johns. 450.]

(*d*) Cro. J. 320; 2 Buls. 68; 10 Vin. Ab. 578.

(*e*) *Snow* v. *Allen*,[5] 1 Starkie's C. 502; and see *Ravenga* v. *Mackintosh*,[6] *supra*, 690. *Secus* where a full case has not been stated to counsel. *Hewlett* v. *Cruchley*,[7] 5 Taunt. 281. [S. P. *Sumner* v. *Wilts*, 4 Serg. & Rawle, 19.]

[1] Eng. Com. Law Reps. xxvii. 131. [2] *Id.* xxxii. 603. [3] *Id.* xxix. 409. [4] *Id.* xxvii. 469. [5] *Id.* ii. 485. [6] *Id.* ix. 225. [7] *Id.* i. 107.

It has been held that the arbitrator in the former suit, who had inspected the defendant's books and decided that he had no cause of action, was not competent to prove the defendant's malice (*f*).

MALICIOUS INJURIES, INDICTMENTS FOR.

For maliciously cutting, &c.

Upon an indictment for shooting at or cutting another, with intent to murder or maim him, or to do him some grievous bodily harm (*g*), whether *the act was done by the prisoner with the particular intention wherewith it is charged to have been done, is, as in other cases of *specific* malice and intention, a question for the jury. Their inference upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and above all, on the *nature* and *extent* of the violence and injurious means he has employed to effect his object (1). *692

Proof of intention.

In estimating the prisoner's real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted; according to the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses and the acts which he does (*g*). If with a deadly weapon he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results that his mind and intention was to destroy.

It is not, however, essential to the drawing such an inference that the wound should have been inflicted on a part where it was likely to prove mortal; such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it

(*f*) *Habershon* v. *Troby*, 3 Esp. C. 38, cor. Ld. Kenyon. This was on the ground that the parties themselves could not have been examined in the former cause, and the plaintiff in that cause could not have been compelled to produce his books. *qu.*

(*g*) See the St. 9 G. 4, c. 31, sec. 12, 13, &c. A striking on the face with a sharp claw of a hammer, by which the face was cut, has been held to be within the Act 43 G. 3, c. 58, s. 1. *Atkinson's Case*, York Spring Ass. 1806, Russ. & Ry. C. C. L. 104. So the cutting off part of the skull by means of an instrument adapted to the purpose of prizing open doors, was held to be within the statute; a piece of the skull, according to the evidence, having been taken out as if sawed out, not *broken* out, but *cut* out. *R.* v. *Hayward*, O. B. Jan. 1805; and afterwards before the Judges. Russ. & Ry. C. C. L. 78. The intent there was to resist the lawful apprehension of the prisoner; and the jury found that the intent was not to *cut* but to *break or lacerate* the head. The Judges held that the conviction was right, and the prisoner was executed. In *Adams's Case*, O. B. Sess. 1808, and afterwards before the Judges, 1 Burn's J. 296, 23d edition, it was held that the striking with a square iron bar was not within the statute; but there the wound was not an *incised wound*, but contused and lacerated. It has been said, that in a case before Dallas, C. J. and Burton, J. at Chester, 5 Ev. St. part V. c. 4, p. 334, note (*z*), it was held that a blow with the handle of a windlass was not within the Act, although it made an *incised* wound; but in *Atkinson's Case*, above referred to, the *nature of the wound*, and not of the *instrument*, seems to have been considered to be the proper test of decision. The shooting at another with a pistol loaded with powder and wadding only, was held to be within the Act, if it be fired so near the person that it would probably kill or do some grievous bodily harm. *R.* v. *Kitchen*, Bridg. Sum. Ass. 1705; and afterwards by the Judges, 1 Burn's J. 293, 23d edit. Russ. & Ry. C. C. L. 95. But in order to constitute the offence of attempting to discharge loaded fire-arms, it must appear that they are so loaded as to be capable of effecting the mischief. *R.* v. *Carr*, Russ. & Ry. C. C. L. 377. A blow with a hammer (*R.* v. *Withers*), or with a stick or club (*R.* v. *Lancaster*), is within the Act, if it occasion a *wound*. S. P. ruled at York, cor. Park, J. But the inflicting blows with a hammer or iron instrument, so as to break the collar bone and violently bruise, but without breaking the skin, is not a wounding within the statute. *R.* v. *Wood*,[1] 4 C. & P. 381. Striking on the head with a bludgeon, whereby the skin was broken and blood flowed, was held to be a wounding within the stat. 9 Geo. 4, c. 31, ss. 11, 12. *R.* v. *Payne*,[2] 4 C. & P. 558.

(*g*) See tit. Intention—Malice—Murder.

(1) [See *Pennsylvania* v. *M'Birnie*, Addison, 30. *Respublica* v. *Langcake & al.* Yeates, 415.]

[1]Eng. Com. Law Reps. xix. 430. [2]*Id.* xix. 526.

could not have proved mortal (*h*), provided the criminal intention can be clearly inferred from other circumstances.

In the case of an attempt to poison, evidence of former and also of subsequent attempts of a similar nature are admissible.

Where the question was, whether the shooting was by accident or design, proof is admissible that the prisoner at another time maliciously shot at the same person (*i*).

Where the cutting was laid with intent to do some grievous bodily harm, and the jury found that the act was done with intent to resist a lawful apprehension of the prisoner, and with *no other intent*, it was held by the Judges that the conviction could not be supported (*j*).

Where the act is charged to have been done with intent to resist a lawful
*693 *apprehension, the right of the prosecutor to arrest must be proved by the production and proof of the warrant or other authority (*k*).

(*h*) *R.* v. *Case*, York Summer Ass. 1820, cor. Park, J., who said that it had been so held by the Judges. See *R.* v. *Akenhead*,[1] Holt's C. 469. It is obvious that a case may fall within both the letter and the spirit of the statute, although from *accident* or from *ignorance* the prisoner has not succeeded in reaching a vital part. *Supra*, tit. INTENTION—MALICE.

(*i*) *R.* v. *Voke*, Russ. & Ry. C. C. L. 531.

(*j*) *R.* v. *Marshall & others*, Surrey Spring Assizes, 1818. Cor. Wood, B. and afterwards by the Judges. The jury in this case negatived any *other intent;* and therefore the case differs most essentially from that of *R.* v. *Fox*, above cited, p. 783; where, although it seems that the primary intention of the prisoner probably was to commit a rape, yet the jury found that he did by cutting intend to do some grievous bodily harm.

(*k*) *R.* v. *Dyson*,[2] 1 Starkie's C. 246, cor. Le Blanc, J. York Spring Ass. 1816; there the prisoner having cut *A. B.* on the cheek, the prosecutor and several others who were *not present* at the transaction, went *without any warrant* to the prisoner's house to apprehend him, and he then wounded the prosecutor; and Le Blanc, J., held, that to enable a private person to apprehend in such a case, he must either have been present when the offence was committed, or must be armed with a warrant, this branch of the statute being intended to protect officers and others armed with authority in the apprehension of persons guilty of robberies or other felonies.—Note, that it did not appear in the above case that the first cutting amounted to a felony, or that the wound was likely to be mortal. Vide *supra*, 441. Where a private person arrests for felony, a notification of his purpose must be given before he can legally arrest. *Infra*, tit. MURDER. Where the prosecutor, whose property had been stolen, found it concealed in an adjoining field, and waited at night to detect the thief, and when he came and had lifted up the bag containing the property, seized him without any previous notification, whereupon the prisoner cut the prosecutor, it was held that for want of previous notification the case was not within the statute. (*Rickett's Case*, cor. Lawrence, J., 3 Camp. 68.) But where, in a case somewhat similar, the goods had been concealed by the thief in an out-house, and the owner, together with a special constable under the Watch and Ward Act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night and *removed* the goods from the place where they were deposited, and upon an attempt to apprehend them, the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice, *stop thief*, and on being overtaken, the prisoner drew a knife with which he cut the hands of the prosecutor, and made many attempts to cut his throat, the prisoner was convicted and executed. *R.* v. *Robinson*, cor. Wood, B. Lancaster. Under the 7 & 8 Geo. 4, c. 29, the servant of the owner, finding a party in the act of committing the offence of stealing vegetables, and taking him before a justice, was held to be entitled to all the protection of a constable, and that the cutting him with intent, &c. would be a capital felony; but where the party was only found with the stolen property in the adjoining close, and was taken by the servant, not to a justice, but to the owner's house, it was held that the party stabbing the servant was not guilty of a capital offence: if he had killed him it would not have amounted to murder. *R.* v. *Curran*,[3] 3 C. & P. 397. But where the prisoner was discovered at night in the act of felony, and being pursued escaped over into an adjoining garden, where he was found secreted, and upon being apprehended resisted and stabbed the prosecutor; held that the arrest was lawful, and that no previous notice of the cause of apprehension was necessary. *Howarth's Case*, 1 Ry. & M. 207. A party was wrongfully arrested and detained by a constable on a charge of assault, which did not take place in his presence, and whilst in such custody, struck a party assisting the constable having him in charge, for which the constable also said he should take him before a magistrate; whilst proceeding thither, the prisoner in resisting struck the party with a knife, for which he was indicted under the 43 Geo. 3, c. 58; held that as he might be considered to be still acting under the provocation of the original wrongful arrest, he was entitled to an acquittal. *Curran's Case*, 1 Ry. & M. 132. Where two parties were seen by watchmen with two carts containing stolen apples, and upon one watchman going up and walking by one, was wounded by him whilst his colleague was near the other, held that the latter could not be convicted of the wounding, unless the jury found not merely that they went together with the common intent of stealing apples, but also of resisting with extreme violence any attempt to apprehend them. *R.* v. *Collison*,[4] 4 C. & P. 565.

[1] Eng. Com. Law. Reps. iii. 159. [2] *Id.* ii. 376. [3] *Id.* xiv. 368. [4] *Id.* xix. 529.

A variance from the particular instrument, or poison, alleged to have been used, does not appear to be material (*l*). Variance.

An indictment for striking and cutting is not supported by evidence of stabbing (*m*).

Upon an indictment for administering (*n*) a noxious substance to a woman *quick with child, with intent to procure abortion, it is essential to prove that she was quick with child at the time (*o*). But where the indictment charged the prisoner with administering a decoction of savin (describing it to be a noxious substance) to a woman with child, but not quick with child, it was held to be unnecessary to prove that the substance so administered was savin, or that it was capable of procuring a miscarriage, or that the woman was with child; these being unnecessary averments (*p*). *694

Under indictments framed upon the stat. 9 Geo. 1, c. 22 (*q*), for maiming (*r*) or wounding cattle, it has been held that if it *appear* that the malice was against the *animal*, and not against the *owner*, the case is not within the statute (*s*). But it was not essential on the part of the prosecution to prove previously existing malice against the owner (*t*). The brutality of the act indicates a malignant mind, and the jury are to judge of the real motives and intention of the prisoner. Under the late stat. 7 & 8 G. 4, c. 30, s. 25, it is immaterial whether the offence be committed from malice against the owner or otherwise. Indictment for maiming cattle.

Where the prisoner broke into a stable at night, and cut the sinews of the fore-leg of a racer, in order to prevent his running, he was capitally convicted (*u*).

Where persons riotously assembled, had obtained money from the prosecutor, under the pretence of advice; held, that other demands of the same

(*l*) Vide tit. MURDER.—VARIANCE.—Starkie's Crim. Pleadings, *R.* v. *Goldsmith*, 3 Camp. 75; where, on an indictment for administering a decoction of savin to a woman with child, but not quick with child, with intent to procure a miscarriage, it was held by Lawrence, J., to be unnecessary to prove that the substance administered was savin; for if the prisoner believed at the time that the substance which he administered would procure a miscarriage, and administered it with that intent, the case was within the statute.

(*m*) *R.* v. *Macdermot*, Nott. Lent. 1818, cor. Garrow, B.

(*n*) Where the prisoner merely gave the poisoned article to the party intended to be destroyed, but the latter never took or applied it, it was held to be insufficient to sustain a charge for administering, &c. under 43 Geo. 3, c. 58, s. 1; but that if any part were taken, it was not necessary that it should be swallowed, *Cadman's Case*, 1 Ry. & M. 114. Where the prisoner, a servant, placed the coffee-pot, in which she had mixed arsenic, by the fire, and told her mistress it was for her, and the latter took and drank of it, it was held to be a sufficient "causing the poison to be taken," and to be an "administering," within the 9 Geo. 4, c. 31, s. 11; manual delivery not being necessary. *R.* v. *Harley*,[1] 4 C. & P. 369.

(*o*) *Goldsmith's Case*, 3 Camp. 73; cor. Lawrence, J. The medical men differed as to the time when the fœtus may be stated to be quick, and to have a distinct existence; but they all agreed that, in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens usually about the fifteenth or sixteenth week after conception. Lawrence, J., said, that this was the construction to be put on the words of the statute; and as the woman had not felt the child move within her before she took the medicine, he directed an acquittal. On an indictment for administering drugs to *A. B.* in order to procure miscarriage, alleging her "being with child;" held that it appearing negatively that she was not with child, a conviction on 43 Geo. 3, c. 58, was wrong. *Scudder's Case*, 1 Ry. & M. 216. See *R.* v. *Phillips*, 3 Camp. C. 76. (*p*) *Goldsmith's Case*, 3 Camp. 73; per Lawrence, J.

(*q*) The word cattle in this statute includes horses, mares, and colts. *Paty's Case*, 2 East's P. C. 1074; 2 Bl. R. 721. The statute applies although the wound be not mortal, and does not occasion any permanent injury. *Haywood's Case*, East's P. C. 1076.

(*r*) Injuring a mare by pouring nitrous acid into the ear and eye, so that it became necessary to destroy her, it was held to be a maiming within the 7 & 8 Geo. 4, c. 30, s. 16. *Owen's Case*, 1 Ry. & M. 205.

(*s*) *Shepherd's Case*, cor. Hotham, B. and Heath, J., O. B. 1790, East's P. C. 1073; where it was left to the jury to say whether a brutal injury to a horse resulted from sudden passion against the animal itself, or from motives of personal revenge against the master; and the prisoner was acquitted. S. P. in *R.* v. *Austin*, cited by Bayley, J.,[2] 3 B. & C. 248. See also *Pearce's Case*, East's P. C. 1072; 1 Leach, 527. *Kean's Case*, O. B. 1789, 1 Leach, 527.

(*t*) So held by the Judges in *Ranger's Case*, Surrey Summer Ass. 1798, East's P. C. 1074.

(*u*) *R.* v. *Dobbs*, 3 East's P. C. 513. So in *Dawson's Case*, Russel, 1688, who was executed for poisoning a mare in order to prevent her from running a race, he having betted against her.

[1] Eng. Com. Law Reps. xix. 423. [2] *Id.* x. 67.

kind on the same day, when the prisoners were present, were admissible (*x*).

On an indictment for destroying machines (*y*), against the stat. 7 & 8 *Geo. 4, c. 30, s. 4, the prisoner was allowed to ask in cross-examination if persons had not been compelled to join the mob, and to call a witness to prove they had agreed to run away from the mob the first opportunity, and did so shortly afterwards (*z*). *695

MANDAMUS.

As to a mandamus to Justices to set out facts in a conviction, see *R.* v. *Wilson*, 1 Ad. & Ell. 627. As to a traverse of a return, see 1 Ad. & Ell. 297.

MANOR.

Evidence essential to proof of manor.

EVERY manor consists of demesnes and services (*a*), and it is essential to the existence of a manor, not only that there should be two freeholders within the manor, but two freeholders holding of the manor, and subject to escheats (*b*); and in default of freehold tenants, the manor ceases to be a legal manor (*c*). But that which has been once a legal manor may still be a manor by reputation, and exist for the purpose of many prescriptive rights attached to it, although the right of holding courts, for want of freehold tenants, may have been severed from it (*d*).

Where the plaintiff alleged that he was seised of the manor of Froome Selwood, by virtue of which he claimed a prescriptive right to appoint a sexton, and it appeared in evidence that Froome Selwood had once been a legal manor, but had for some time ceased to be so for want of any freehold tenants, it was held that it might still be a manor by reputation, for the special purpose to satisfy the allegation (*e*).

The question, whether a certain manor be of ancient demesne or not, is proved, as all such tenures are, by an inspection of Domesday by the Court (*f*).

Proof of the existence of a manor.

The existence of a manor is proved by the production of the ancient muniments of the manor, the court-rolls, the exercise of manorial rights (*g*), and by reputation (*h*). Reputation is also admissible evidence to prove the boundaries of a manor. And it seems that the description of the manor as *such in ancient deeds (*i*), or even mere oral reputation, without proof (*k*) of the actual exercise of any manorial rights, is evidence of a manor by reputation. *696

Proof of manorial rights.

In actions by or against the lord of a manor, the right usually depends

(*x*) *R.* v. *Winkworth*,[1] 4 C. & P. 444.

(*y*) Where the prisoners broke only the detached parts of a machine which had been taken to pieces, it was held to be within the 7 & 8 Geo. 4, c. 30, s. 4. *R.* v. *Mackerel*,[2] 4 Carr. & P. C. 448. So where they broke the water-wheel, the moving power of a threshing machine. *R.* v. *Fidler*,[2] 4 Carr. & P. C. 450.

(*z*) *R.* v. *Crutchley*,[3] 5 C. & P. 133.

(*a*) Com. Dig. *Copyhold*, (Q. 1.) A manor commenced where the king granted lands with jurisdiction to another, who before the statute of *Quia Emptores* granted parcel of them to others, to hold of him by certain services. Co. Litt. 58. A grant of tithes within a manor, includes the tithes of the freehold as well as of the demesne lands. *Best* v. *Heightman*, Cro. Eliz. 689. But a grant of free manor, rent-charge, &c. extends to the demesne lands only, for otherwise it would be a charge upon other men. Ibid.

(*b*) Per Lord Kenyon, *Glover* v. *Lake*, 3 T. R. 447. *Bradshaw* v. *Lawson*, 4 T. R. 443.

(*c*) *Soane* v. *Ireland & others*, 10 East, 259. *Finch's Case*, 6 Co. 63.

(*d*) Ibid. A manor by reputation is sufficient to entitle the lord to manorial wastes. *Curzon* v. *Lomax*, 5 Esp. C. 60. See *R.* v. *Bishop of Chester*, Skinn. 661; Ld. Raym. 291. *Thinne* v. *Thinne*, 1 Lev. 87; Cary, 33, 4; 2 Brownl. 223. *Lenox* v. *Blackwell*, Skinn. 191.

(*e*) *Soane* v. *Ireland*, 10 East, 259. See also 2 Brownl. 223, Hill. 7, J. B. R. citing *Finch* v. *Durham*, where it was said to have been held, on issue joined on the plea of *non dimisit manerium* in ejectment, that upon a finding by the jury that there were not any freeholders, but divers copyholders, and that it was known by the name of a manor, that it should pass to him who pleaded the demise of the manor. See also 12 Vin. Ab. T. b. 67.

(*f*) Hob. 188; B. N. P. 248. *Supra*, Vol. I.

(*g*) *Supra*, tit. COPYHOLD.

(*h*) Ib.

(*i*) *Curzon* v. *Lomax*, 5 Esp. C. 60.

(*k*) *Steele* v. *Prickett*,[4] 2 Starkie's C. 466.

[1]Eng. Com. Law Reps. xix. 465. [2]*Id.* xix. 467. [3]*Id.* xxiv. 244. [4]*Id.* iii. 433.

on proof of the particular custom (*l*) of the manor, and of the actual enjoyment of that which is claimed by or against the lord (*m*).

Where a tenant has made an inclosure of part of the waste, it is to be presumed to have been made for the benefit of the landlord (*n*). An inclosure from the waste made without objection, and seen from time to time by the lord and his steward, may be presumed to have been made with the desire of the lord, and the tenant cannot be treated as a trespasser without notice to give it up (*o*).

Upon a question, whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it was held that he might give parol evidence to show that there was a known distinction within the manor between *old* and *new* land, and to show by evidence of reputation, *as well as by acts of taking coal under the lands of other freeholders within the *new* land, that the lord was entitled to the coal within that boundary (*p*). And it was held that it was necessary in such a case to prove the exercise of the lord's right in getting coal in the particular land then in question; it was sufficient to prove the exercise of the right with respect to lands similarly circumstanced, and then reputation was evidence *697

(*l*) Independently of custom, the lord of a manor, as such, has no right to enter on copyholds within the manor, to bore and work for coals. *Bourne* v. *Taylor*, 10 East, 189. Nor to enter on a copyhold of inheritance to cut timber for his own use, leaving sufficient for botes and estovers. *Whitechurch* v. *Holworthy*, 4 M. & S. 340. It is a good custom that the inhabitants of a manor shall grind all their corn, grain and malt, which by them, or any of them, shall be used, spent or ground within the manor, at certain mills. *Cort* v. *Birkbeck*, Dougl. 218. That the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor. *Rex* v. *Rigge*, 2 B. & A. 550. Where there is a custom in a manor for the payment of a separate set of fees to the steward upon the surrender of each separate tenement, and two are admitted as tenants in common of one piece of land; two sets of fees become due, and continue payable, although the land is afterwards conveyed to one person, as in the case of indivisible services. *Attree* v. *Scott*,[1] 2 Smith, 449; 6 East, 476. Where a person is admitted to several distinct copyhold tenements, the steward of the manor is not entitled, in the absence of a special custom, to the full fees on each admission separately, and must therefore stand on his *quantum meruit*. *Everest* v. *Glynn*, 2 Marsh, 84; Holt's C. L. *Semble*, that coparceners are entitled to admission as one heir. *R.* v. *Bonsall*,[2] 3 B. & C. 173. Where the custom of a manor is silent, the common law must regulate the course of descent. *Denn* d. *Goodwin* v. *Spring*, 1 T. R. 466. An agreement between the lord and tenants of a manor, that the tenants may cut down, use and dispose of wood for the repairing, upholding or maintaining of their houses, hedges and fences, "or for any other their necessary uses," does not empower them to fell wood for sale; for which, if they do, the lord may support trover. The words "or for any other their necessary uses," mean, uses in their characters of *tenants*. *Blackett*, bart. v. *Lowes*, 2 M. & S. 494. If a manor be granted, reserving the waste, these are thereby severed from the manor, subject, however, to the rights of common, &c. as before. *Revell* v. *Jodrell*, 2 T. R. 415. A fine by tenant for life of parcel of a manor, the residue being in possession of the tenant in fee, severs it from the manor. *Goodright* ex. dem. *Fowler* v. *Forrester*, 8 East, 552.

(*m*) Where the lord claimed the exclusive privilege of cutting sea-weed (braie) from rocks covered at ordinary tides by the sea, held that, in the absence of any grant from the Crown, he could only sustain such right by evidence of long continued and undisturbed enjoyment, as well by the common law of England as by the civil law of Normandy. Where the evidence was of continued adverse claim without resistance, followed up by suit, the Court of Appeal (Privy Council) set aside the judgment in favour of the lord. *Benest* v. *Pipon*, 1 Knapp, 60.

(*n*) *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; 1 Esp. C. 461; and by Park, B. in *Doe* v. *Rees*,[3] 6 C. & P. 610. Ld. Kenyon was of opinion that if a tenant inclose part of a waste, and remain in possession for a length of time sufficient for giving a possessory right, the inclosure does not belong to the landlord, unless, perhaps, where he acknowledged such part to belong to his landlord. *Doe* v. *Mulliner*, 1 Esp. C. 140. See *Attorney-gen.* v. *Fullarton*, 2 V. & B. 263. (*o*) *Doe* d. *Foley* v. *Wilson*, 11 East, 56.

(*p*) *Barnes* v. *Mawson*, 1 M. & S. 77. Evidence of rights exercised by the lord over conventionary tenants in one of several manors forming one district under the same lord, may be received to show what rights he had reserved or parted with to a class of tenants called conventionary tenants throughout the district. *Rowe* v. *Brenton*,[4] 8 B. & C. 862. Where the largest interest ever claimed by the conventionary tenants was from seven years to seven years, renewable for ever, it was held that it would not give them a right to the minerals; and though a positive usage to take them might be valid in law, it must be proved, otherwise the right would remain in the lord. *Rowe* v. *Brenton*,[4] 8 B. & C. 766. Where the question was whether a slip of land between an old inclosure and the highway belonged to the lord of the manor or to the owner of the adjoining land, it was held that acts of ownership by the lord, as inclosure of other slips in open places in the same manor, were properly admitted in evidence, and that such evidence of right ought not to be confined to the part in dispute, the circumstance of all being in the same manor, giving a general unity of character to the whole. *Doe* d. *Barrett* v. *Kemp*,[5] 7 Bing. 732, and 5 M. & P. 173.

[1]Eng. Com. Law Reps. iii. 5. [2]*Id.* x. 47. [3]*Id.* xxv. 561. [4]*Id.* xv. 335. [5]*Id.* xx. 150.

to show the generality and extent of the right (*q*). It was observed that the nature of the right rendered it probable that the exercise of it would be confined to the same spot until the subject-matter was exhausted; and therefore that the proof could not be expected of the exercise of the right in all places to which it might extend, for that would be proving a right to a thing, which had ceased to be of any value (*r*). So, in general, what old people, deceased, have said concerning the boundaries of manors, is evidence, although what they have said as to particular facts and transactions is not admissible (*s*).

Usual reputation for sixty years past as to the *contents* of a manor, was held by Lord Chancellor Egerton to be evidence to be left to a jury, notwithstanding the production of ancient deeds, which showed that part of the lands claimed as parcel of the manor belonged to another manor (*t*). The evidence to prove the existence of a custom within a manor has already been considered (*u*).

The lord is not entitled to salvage for taking and preserving parts of a ship against the consent of the owner, whose servants were there to take care of them for him (*x*).

Variance. Where the plaintiff in ejectment claimed the manor of Artam as ancient demesne, and upon inspection of Domesday it appeared that the manor of *Nettam* was of ancient demesne, the plaintiff was not allowed to prove that Nettam was the ancient name of the manor claimed, for the variance ought to have been averred on the record (*y*). If the lord convey a customary estate to the tenant, he cannot reserve the ancient services (*z*); for the
*698 *tenant, under the statute of *Quia Emptores*, must then hold of the superior lord.

MARRIAGE.

Jurisdiction on questions of marriage. The Spiritual Court has the sole and exclusive cognizance of questioning and deciding directly the legality of marriage, and of enforcing specifically the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and so far as such rights are concerned, they have the inherent power of deciding, incidentally, either upon the fact or legality of marriage: when such questions lie in the way to the decision of the proper objects of their jurisdiction, they do not want or require the aid of the Spiritual Courts (*a*); nor has the law provided any legal means of sending to them for their opinion, except where an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, general bastardy. In those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary; and his certificate, when received, returned, and entered upon the

(*q*) Ibid. And see Lord Ellenborough's observations in that case.

(*r*) Per Lord Ellenborough, C. J. *Barnes* v. *Mawson*, 1 M. & S. 77.

(*s*) *Nicholls* v. *Parker*, Exeter Summer Ass. 1805, cor. Le Blanc, J. 14 East, 331. *Supra*, Vol. I. tit. Witness.—Hearsay. [*Smith* v. *Walker*, 1 Car. Law. Rep. 514.]

(*t*) 12 Va. Ab. T. b. 67. (*u*) *Supra*, tit. Copyhold.

(*x*) *Sutton* v. *Buck*, 2 Camp. 392.

(*y*) B. N. R. 248, cites *Gregory* v. *Withers*, Hil. 28 Car. 2. *Qu.* as to the description in the declaration in this case.

(*z*) And a confirmation to a customary tenant, of his customary and tenant-right estate, discharged from all customs, services and demands, except, &c., is tantamount to a release of the rents and services not specifically excepted; and the customary tenement becomes frank-free, or held in free and common socage. *Doe* d. *Reay* v. *Huntington*, 4 East, 271.

(*a*) The answer to the claim of the Spiritual Courts to decide exclusively in such matters, in the reign of Edward 2, was, *Quando eadem causa diversis rationibus coram judicibus ecclesiasticis et secularibus ventilatur, dicunt quod non obstante ecclesiastico judicio curia Regis ipsum tractet negotium ut sibi expedire videtur.* 2 Inst. 22; 11 St. Tr. 261.

record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point (*b*).

The proof of a marriage is either, 1st, of a marriage in fact; or 2dly, of a marriage by evidence of repute, cohabitation, &c.; or 3dly, by evidence of a sentence or decree in the Spiritual Courts.

Proof of a marriage in fact.

1st. The usual proof of a marriage in fact, before a jury, is by means of a witness who was present at the celebration (A).

Where it has been celebrated in a parish church it does not appear to be necessary, in the *first instance*, to prove that the church was one in which marriages may lawfully be celebrated (*c*); so in general it is not essential to prove, in the first instance, that the officiating minister was a clerk in holy orders (*d*), or that the banns have been duly published (*e*), or that a license has been granted, nor is proof of registration necessary (*f*).

(*b*) Per De Grey, C. J., in giving judgment in the *Duchess of Kingston's Case*. As the certificate of the ordinary is peremptory, the stat. 9 Henry 6 requires public proclamation to be made, in order that parties who are interested may come in and be parties to the proceeding. Vide *supra*, tit. BASTARDY; and Vol. I.

(*c*) Previous to the Marriage Act, it was not essential that the marriage should be performed in a church or chapel; it might be celebrated in a private room. *R.* v. *Fielding*, 5 St. Tr. 614. *Jesson* v. *Collins*, Salk. 487; 6 Mod. 155. Marriages solemnized in chapels, &c. whilst the parish church is under repair, and in chapels wherein banns cannot be legally published, or of which the due consecration may be doubtful, were declared valid, 6 Geo. 4, c. 18.

(*d*) Before the Marriage Act, 26 Geo. 2, c. 33, s. 18, it was essential to the validity of a marriage that it should have been solemnized by a person in holy orders; (*Haydon* v. *Gould*, Salk. 119; 1 Bl. Comm. 439. *R.* v. *Luffington*, 1 Burr. S. C. 232). But this was much questioned in a late case. But a marriage celebrated by a Roman-catholic priest was binding. Evidence of the ceremony being celebrated in England between the prisoner and a Roman-catholic woman, by a Romish priest, in a language which the witnesses did not understand, and which they cannot swear to, as the ceremony of marriage according to the church of Rome, was held to be insufficient. *Lyon's Case*, O. B. Dec. 1748, cor. Willes, L. C. J. East's P. C. 469. And see the observations of Lord Ellenborough, *R.* v. *Brampton*, 10 East, 287. In *Haydon* v. *Gould*, Salk. 119, the parties were Sabbatarians, and the ceremony had been performed according to the rites of their sect, and they lived together for seven years, till the death of the wife; yet the officiating minister being a layman, the Ecclesiastical Court repealed the letters of administration granted to the husband, and the Court of Delegates, on appeal, confirmed the sentence. In *R.* v. *Fielding*, 5 St. Tr. 610, the marriage here by a Roman-catholic priest was held to be good, on evidence of the words of *present contract*, the rest being read in the Latin tongue, which the witness did not understand. And see *R.* v. *Brampton*, 10 East, 287, and *infra*, 704. And see the observations of Willes, L. C. J. in *Lyon's Case*, East's P. C. 469.

(*e*) But it is competent to the adverse party to prove that the banns have not been regularly published. *Standen* v. *Standen*, Peake's C. 32. See Ld. Mansfield's observations, *St. Devereux* v. *Much Dewchurch*, Bl. R. 367; 4 Burn's J. 280, 22d edit.

(*f*) *R.* v. *Allison*, Russ. & Ry. C. C. 109. Even upon an indictment for bigamy. Ibid. See below, 700, note (*p*).

(A) The validity of a marriage is to be determined by the law of the place where it was celebrated; if valid there, it is valid everywhere. *Phillips* v. *Gregg*, 10 Watts, 158. But although the place is necessarily the law of a marriage for its primitive obligation, yet the courts of the country where the marriage was celebrated, have no jurisdiction of a cause of divorce alleged to have been committed by one of the parties within another country. The law of the actual domicil at the time and place of the injury is the rule in cases of divorce, for everything but the original obligation of marriage. *Dorsey* v. *Dorsey*, 7 Watts, 349. A marriage is complete if there be a full, free and mutual consent between the parties capable of contracting, though not followed by cohabitation, and the circumstance of a party being in custody as the putative father of a bastard child is not a duress to avoid the contract. *Jackson* v. *Winner*, 2 Wend. 47. See *Fenton* v. *Read*, 4 Johns. 52. Strict proof of solemnization of the marriage is only necessary in prosecutions for bigamy, and in actions for criminal conversation. A marriage may be proved in other cases from cohabitation, reputation, acknowledgement of the parties, reception in the family, and other circumstances from which a marriage may be inferred. *The People* v. *Humphrey*, 7 John. R. 314. For civil purposes, cohabitation and reputation are sufficient evidence of marriage. But every intendment may be made in favour of legitimacy; and a jury are not bound to presume a prior marriage from the facts of cohabitation and reputation for the purpose of invalidating a subsequent one, and rendering the issue of it illegitimate. *Senser* v. *Bower*, 1 Penns. R. 453. Marriage is a civil contract which may be completed by any words in the present tense without regard to form. But where the parties, who had for some time lived in an adulterous intercourse, although considering themselves lawfully married, went together to their counsel on business, without any intention of marrying, and there the man said, "I take you for my wife," &c., the woman being told that if she would say the same thing the marriage would be complete, answered, "to be sure, he is my husband good enough," it was held that these words did not establish a marriage. *Huntz* v. *Sealy*, 6 Binn. 405. [See *Commonwealth* v. *Norcross*, 9 Mass. Rep. 492. *Commonwealth* v. *Littlejohn*, 15 Ib. 163. *Ellis* v. *Ellis*, 11 Ib. 92. *Inhabitants of Milford* v. *Inhabitants of Worcester*, 7 Ib. 48, as to the evidence of a marriage required in Massachusetts, in different cases. After a divorce *a vinculo*, in Massachusetts, for adultery, a marriage contracted there by the guilty party is illegal and void, and the issue thereof illegitimate. But such marriage in another state, where it is permitted by the laws thereof, will so far render it valid in Massachusetts as to entitle the

*A marriage may also be proved by the production of the register, or proof of an examined copy of it (*g*), with some evidence of the identity of the parties (*h*).

It has been seen that although the entry be first made in a day-book, the day-book is not evidence, if the entry has been afterwards made in the register (*i*). It is not necessary to call one of the subscribing witnesses to the entry in the register (*k*).

The identity of the parties may be proved (*l*) by evidence of their handwriting, payment of money to the bell-ringers, the giving a wedding-dinner, or any other circumstances which satisfy the jury (*m*).

Chapel. Where the marriage has been solemnized in a chapel, evidence should be given that banns have been usually published there previous to the Marriage Act (*n*); as by old registers of marriages solemnized in such chapels ante-
700 cedently to the Act, and registers of banns published there since; and to prove as far as can be done by living testimony, that marriages have been usually celebrated there (*o*). Such evidence furnishes a reasonable presumption that the chapel is one in which marriages may legally be solemnized.

(*g*) *Supra*, Vol. I. Ind. tit. MARRIAGE. (*h*) *Hemings* v. *Smith*, 4 Doug. 29.
(*i*) Vol. I. p. 243. *May* v. *May*, Str. 1073. *Lee* v. *Meecock*, 5 Esp. C. 177.
(*k*) *Birt* v. *Barlow*, Doug. 170; *supra*, 352. See further provisions as to registers, 52 G. 3, c. 146.
(*l*) *Supra*, 353. (*m*) B. N. P. 27.
(*n*) 26 G. 2, c. 33. By sect. 1, all banns shall be published in the parish church, or in a public chapel in which banns have been usually published.—By sect. 8, all marriages solemnized in any other place than a church or chapel, unless by special license, or without publication of banns, or license of marriage, from a person having authority to grant the same, shall be void. It has been held, that the words "*have usually been published*," refer to the time of the Act, and consequently that marriages in a public chapel erected since the passing of the Act are illegal. *R.* v. *Northfield*, Doug. 658. By different statutes, marriages celebrated in such subsequently erected churches, which have been duly consecrated, are rendered valid. See 21 G. 3, c. 53; 44 G. 3, c. 77; and the stat. 48 G. 3, c. 127, as to marriages solemnized before August 23d, 1808, and 6 G. 4, c. 92. Provisions are also made by those statutes for the reception of the registers of those marriages in evidence, subject to the same exceptions as in the case of other marriage registers. By the stat. 48 G. 3, c. 127, such registers are to be removed within thirty days next after August 23d, 1808, to the parish church; or if the situation of the chapel be extra-parochial, to the parish church of the next adjoining parish, to be there kept with the parish registers of the parish; copies are also to be transmitted to the bishop of the diocese, or his chancellor. A publication of banns in an adjoining parish church, where the publication in the proper parish church was impossible from the state of the church, which was under repair, was held to be sufficient. *Stallwood* v. *Tredgar*,[1] 2 Phillim. 287. By the stat. 4 G. 4, c. 76, s. 2, banns are to be published in the parish church, or in some public chapel, in which chapel banns of matrimony may now, or may hereafter be lawfully published in, of, or belonging to such parish or chapelry, &c. —By sect. 3, the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed may be situated, or of any chapel situated in an extra parochial place, signified to him under their hands and seals, may authorize the publication of banns and the solemnization of marriages in such chapel, for persons residing in such chapelry or extra-parochial place.—By sect 9, where a marriage shall not be had within three months after the complete publication of banns, it shall not be solemnized without republication, or license granted. By the 6 G. 4, c. 92, s. 2, it shall be lawful for marriages to be in *future* solemnized in all churches and chapels erected since the passing of 26 G. 2, and consecrated, in which churches and chapels it has been customary and usual, before the passing of the 6 G. 4, to solemnize marriages; and the registers of such marriages, or copies thereof, are declared to be evidence.—By sect 3, power is given to the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel, with a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, to authorize under his hand and seal, the publication of banns and the solemnization of marriages in such chapels for persons residing in such chapelry or extra-parochial place. And see 6 & 7 W. 4, c. 85, s. 26.
(*o*) See *Taunton* v. *Wybourne*, 2 Camp. 297. There a register of marriages, going back to the year 1758, and a register of the publication of banns from the year 1754 (when the Marriage Act was passed), were produced from the chapel in the Tower. Lord Ellenborough held that it might be presumed that banns had usually been published there before the Marriage Act.

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issue to the rights of legitimate children. *Inhabitants of West Cambridge* v. *Inhabitants of Lexington*, 1 Pick. 506. So where a mulatto and a white person belonging to Massachusetts, (where their intermarriage was prohibited and made void by statute) went to Rhode Island, where such intermarriage was not forbidden by law, and were there married, and immediately returned to Massachusetts, the marriage was held to be valid in the latter state, and the issue legitimate. *Inhabitants of Medway* v. *Inhabitants of Needham*, 16 Mass. R. 157.]

[1] Eng. Com. Law Reps. i. 260.

Although the Marriage Act requires an entry to be made in the register immediately after the celebration, in which it shall be expressed that the marriage was by banns or by license; and that, if both or either of the parties be under age, that it was with the consent of the parents or guardians; and that it shall be signed by the minister and parties, and attested by two witnesses; yet the registration of a marriage is but evidence of it, and is not essential to its validity (*p*).

The banns ought to be published in the true names of the parties (*q*). But if they have been published in the names by which alone the parties *are known*, and *without fraud*, the marriage is within the meaning of the statute. Abraham Langley resided for three years in Lamberhurst, and during that time was known by the name of George Smith only, and the banns of his marriage were published and he was married under that name, and the Court of King's Bench held that the marriage was valid (*r*). And where a deserter assumed another name, and after residing for sixteen weeks at L., where he was known by that name only, and then married there, the Court held that the marriage was valid, the name having been assumed for the purpose of concealment, and not in order to impose upon the woman whom he married (*s*) But where there has been a change of the name for the purpose of fraud, or (*t*) even a deliberate omission of part of a real name (*u*) with a view to mislead, it seems that the marriage will be void. *So if the banns be published in a wrong name, although without any fraudulent motive (*x*). *701

Publication of banns.

The law was held to be as above stated under the st. 26 G. 2; the statute

(*p*) *R.* v. *St. Devereux*, 1 Bl. R. 377. *Read* v. *Passer*, Peake's C. 231; 1 Esp. C. 213.

(*q*) For although the Marriage Act does not specify in what manner the banns shall be published, yet it was the clear intention of the Legislature to require it; and the statute requires that notice in writing shall be delivered to the minister, of the true christian and surnames of the parties seven days before the publication.

(*r*) *R.* v. *Inhabitants of Billinghurst*, 3 M. & S. 250; and see *Frankland* v. *Nicholson*, there cited, where Sir W. Scott says, there may be cases where names acquired by general use and habit may be taken by repute as the true christian and surnames of the parties.

(*s*) *R.* v. *Inhabitants of Burton-upon-Trent*, 3 M. & S. 537. So where a widow assumed her maiden name, and many years afterwards was married by that name with the addition of widow. *R.* v. *St. Faith's, Newton*,[1] 3 D. & R. 348.

(*t*) See *Frankland* v. *Frankland*, cited 3 M. & S. 258; where Ann Nicholson, with a view to fraud, described herself to be Mrs. Ross, and was known by that name at the house where she lived: but it did not appear that she ever went by that name down to the time of the marriage, for before that time she cohabited with the producent, under the name of Frankland, Sir W. Scott pronounced the marriage to be null and void. Vide *etiam*, *Fellowes* v. *Stewart*,[2] 2 Phillim. 257. *Meddowcroft* v. *Gregory*,[3] Ib. 365. [2 Haggard, 207, S. C.] *Bayard* v. *Morphew*,[4] 2 Phill. 321.

(*u*) *Pougett* v. *Tompkyns*, cited 3 M. & S. 263; [2 Haggard, 142; 1 Phillim. 490, S. C.]; where William Peter Pougett, who was a minor, of the age of sixteen, and generally known and addressed by the name of *Peter* only, few people knowing that he had likewise the christian name of William, was married by banns to Letitia Tomkyns, his father's maid-servant, in a parish where the parties had never resided, the banns were published in the names of *William Pougett* and Letitia Tomkyns, and the marriage was pronounced to be null and void. See Lord Tenterden's observations in *R.* v. *Tibshelf*,[5] 1 B. & Ad. 195.

(*x*) *Mather* v. *Ney*, [cited 2 Haggard, 254,] Consistory Court, 1807, where the real name of the woman was *Ney*, and the banns were published under the name of Wright, and the marriage was held to be void. And see Lord Tenterden's observations in *R.* v. *Tibshelf*,[5] 1 B. & Ad. 195. But where Anna Colley was married upon a publication of banns in the name of Anna *Sophia* Colley, it was said by Sir W. Scott, that in the absence of fraud the Court would be very unwilling to question the validity of the marriage, after a long cohabitation by the parties. And see *Tree* v. *Quinn*, cited 3 M. & S. 266; [2 Phillimore, 14 S. C. 2 Haggard, 255, n.]; and *Mayhew* v. *Mayhew*, Ibid. [2 Phillimore, 11 S. C.][6] A publication in the name of Edward Stanhope, the real name being Augustus Henry Edward Stanhope, was held to be bad. *Stanhope* v. *Baldwin*, Ad. 93;[7] see also *Green* v. *Dalton*,[8] Ib. 289. So where a false name is fraudulently assumed for the purpose of marriage. *Frankland* v. *Nicholson*, cited 3 M. & S. 259; and see *Fellowes* v. *Stewart*,[9] 2 Phill. 257. *Bayard* v. *Morphew*,[10] Ib. 321. *Meddowcroft* v. *Gregory*,[11] Ib. 365. But where the banns were published, the woman being a natural daughter, in the name of the mother, as well as of the putative father, it was held to be sufficient. *Sullivan* v. *Sullivan*,[12] Ib. 45. [2 Haggard, 238, S. C.] A marriage of sixteen years' standing was refused to be set aside on the ground of a false name used in the banns, it not appearing which was the true name, and no intention of fraud. *Diddeur* v. *Faucit*,[13] 3 Phill. 580.

[1]Eng. Com. Law Reps. xvi. 171. [2]Eng. Eccles. Reps. i. 250. [3]*Id.* i 278. [4]*Id.* i. 273. [5]*Id.* iv. 523. [6]*Id.* i. 161. [7]Eng. Com. Law Reps. xx. 375. [8]Eng. Eccles. Reps. i. 166. [9]*Id.* ii. 42. [10]*Id.* ii. 121, [11]*Id.* i. 273. [12]*Id.* ii. 314. [13]*Id.* i. 479.

now in force does not annul the marriage except where *both parties* knew of the undue publication (*y*).

Minor. Where the marriage was by license, and either of the parties, not being a widower or widow, was a minor, it is essential to prove the consent of the father of that party, if he was then living, or if he was dead, then of the guardians of the minor, or of one of them, or if there was no guardian, then of the mother, if living and unmarried, and if there was no mother living and unmarried, then of a guardian of the person appointed by the Court of Chancery (*z*).

*702 *In a prosecution for bigamy, where it appeared that the first wife was a minor at the time of the marriage, which was by license, the prisoner was acquitted for want of proof of the consent of a parent or guardian (*a*).

(*y*) And therefore where the proposed husband procured the banns to be published in a christian and surname which the woman had not borne, and she was ignorant of the fact till after the solemnization of the marriage, it was held to be good. *R.* v. *Wroxton*,[1] 4 B. & Ad. 640.

(*z*) 26 G. 2, c. 33, s. 11. An illegitimate child has been held to be within this clause; *R.* v. *Hodnett*, 1 T. R. 96; although it seems once to have been held that the consent of the putative father was sufficient. *R.* v. *Edmonton*, East, 24 G. 3; 2 Bott. 76, pl. 114, cited 1 T. R. 97. And the consent of the putative father or natural mother in such a case has been held to be insufficient. *Horner* v. *Liddiard*, *Daniel* v. *Cooke*, cor. Sir W. Scott; and *Priestly* v. *Hughes*, 11 East, 3, Grose, J. being of opinion that illegitimate children were not within the contemplation of the Legislature in framing this clause. Where the parties have long cohabited, the Court (ecclesiastical) will require the evidence of minority and want of consent to be full and conclusive. *Johnston* v. *Parkes*,[2] 3 Phillim. 49. [2]*Hayes* v. *Watts*, Ibid. Where a testamentary appointment of a guardian was not attested by two witnesses, the marriage of a minor, with the consent of such guardian, held to be void. *Reddall* v. *Liddiard*,[3] 3 Phillim. 256. Consent is necessary, although the minor be a Jewess, married according to Christian rites. *Jones* v. *Robinson*,[4] 2 Phillim. 285. But the Ecclesiastical Court will not dissolve the marriage without satisfactory proof of minority, especially where the father's consent is rendered probable by circumstantial evidence. *Agg* v. *Davies*,[5] 2 Phill. 341. By the stat. 3 G. 4, c. 75, s. 2, marriages by license before the passing of the Act, without such consent as is required by the Marriage Act, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of this Act, or shall only have discontinued their cohabitation for the purpose or during the pendency of any proceedings touching the validity of such marriage, shall be deemed good and valid. Where an infant was married by license without consent of parents between the repeal of 26 Geo. 2, c. 33, by 3 Geo. 4, c. 75, and the time when the latter Act came into operation, held that such marriage was valid. *Waully's Case*, 1 Ry. & M. 163. A marriage which would have been void by the 26 Geo. 2, c. 33, and had once been rendered valid by the second section of the 3 Geo. 4, c. 75, cannot subsequently be rendered invalid by the marriage of either of the parties, during the life of the other, with a third person. *R.* v. *The Inhabitants of St. John Delpike*,[6] 2 B. & Ad. 226. The stat. 4 G. 4, c. 76, repeals the stat. 3 G. 4, c. 75, except as to things done under its provisions, and except so far as it repealed any former Act, or any clause, matter or thing therein contained. The retrospective clause (sect. 1) in the 3 Geo. 4, c 75, operated, with respect to the marriages to which it was applicable, as a repeal of the clauses in the former Marriage Act which rendered them invalid; it therefore was not repealed by the subsequent statute. And, therefore, where one of the parties was married by license, under age and illegitimate, before the passing of the 3 G. 4, c. 75, and at the time of the passing of that Act they were living together as husband and wife, and were of full age, the marriage was held to be good. *Rose* v. *Blakemore*,[7] 1 Ry. & M. 372. But where the marriage was void, under 26 G. 2, by reason of undue publication of banns (in a false name), held that the statute was still unrepealed as to that ground of nullity, and the marriage void, notwithstanding the later Acts. *Farquharson* v. *Farquharson*,[8] 3 Ad. 282. *Bridgewater* v. *Crutchley*,[9] Ad. 473. The stat. 4 G. 4, c. 76, s. 16, provides that such consent as was required under the 26 G. 2, shall be necessary, unless there be no person authorized to give such consent.—This clause is directory only, sec. 23 inflicting a penalty on parties disobeying the directions of sec. 16; a marriage, therefore, by a minor by license, without consent of his father then living, was held to be valid. It is no objection to its validity that the marriage was obtained by the fraudulent practice of the parish officers. *R.* v. *Birmingham*,[10] 8 B. & C. 29; and 2 M. & Ry. 230. By sec. 17, where a father is *non compos*, or the mother or guardian is *non compos*, or beyond the seas, the Lord Chancellor shall have power to consent on petition made. Where the marriage of a minor by license was void, under the 26 G. 2, c. 33, but the parties at the passing of 3 G. 4, c. 75, were living separate, under a mere voluntary agreement, without any legal sanction; held that they were to be deemed to have "continued to live together as man and wife," within the meaning of the retrospective effect of the latter Act, and in a state of matrimonial cohabitation, how *locally* soever situate, and upon what terms soever of matrimonial intercourse. *King* v. *Sansom*,[11] 3 Ad. 277. A conviction for bigamy will not preclude the party from setting up the nullity of the first marriage, in a cause of divorce. *Bruce* v. *Buck*,[12] 2 Add. 471.

(*a*) Cor. Le Blanc, J. York Assizes. *R.* v. *Butler*, 1 Russ. & Ry. 61. *Qu.* Whether the license reciting the consent of the father or guardian would be *prima facie* evidence of the fact? See tit. Polygamy.

[1]Eng. Com. Law Reps. xxiv. 131. [2]Eng. Eccles. Reps. i. 163. [3]*Id.* i. 402. [4]*Id.* i. 260. [5]*Id.* i. 276. [6]Eng. Com. Law Reps. xxii. 63. [7]*Id.* xxi. 465. [8]Eng. Eccles. Reps. ii. 532. [9]*Id.* ii. 186. [10]Eng. Com. Law Reps. xv. 151. [11]Eng. Eccles. Reps. ii. 532. [12]*Id.* ii. 381.

Whether the marriage has been solemnized upon a license granted, or the publication of banns, it is unnecessary after solemnization to give any evidence in support of the marriage that the parties resided within the limits and for the times specified by the Act, and evidence to the contrary is inadmissible (*b*). Residence.

*It is provided by the st. 6 & 7 W. 4, c. 85, that superintendant registrars may grant licences to be married in a building registered under the Act, or in his office (*c*); provision is made for the registration of chapels (*d*). *703

It is further provided, that if any persons shall knowingly and wilfully intermarry in any other place than the church, chapel, registered building, or other place specified in the notice and certificate (to be given according to the Act), or without due notice to the superintendant registrar, or without certificate of notice duly issued, or without license where a license by the Act is necessary, or in the absence of a registrar or superintendant where their presence is necessary, the marriage shall be void (*e*).

The Marriage Act does not extend to any of the marriages of any of the royal family (*f*), or to Scotland, or to marriages among Quakers or Jews (*g*) (1), &c., or to marriages beyond seas (*h*).

A marriage of English minors in Scotland is valid (*i*), although the mar-

(*b*) See the stat. 26 G. 2, c. 33, s. 11, and 4 G. 4, c. 76, s. 26, which provides, that after the solemnization of any marriage under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage. But by sec. 22, if any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may lawfully be published, or without due publication of banns, or license from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes. See also *Drovey* v. *Archer*,[1] 2 Phill. 347. *Clarke* v. *Hawkins*, Ib. in the note. *Wiltshire* v. *Wiltshire*,[2] 3 Hag. 333. But the stat. avoids the marriage only where the parties knowingly and wilfully intermarry without due publication; and to avoid the marriage under this clause, *both* must *know*. *R.* v. *Wroxton*, *Inhabitants of*,[3] 4 B. & Ad. 640. Where the pauper and her husband were married by banns in the surname of her baptismal register, which appeared by mistake to have been that of the grandfather, and she had never been called or known by it; held, that under 26 Geo. 2. c. 33, the marriage was void. *R.* v. *Tibshelf*,[4] 1 B. & Ad. 190.

(*c*) Sec. 61.

(*d*) See secs. 18, 19, 34, &c.

(*e*) Sec. 42. But it is provided that nothing therein contained shall annul any marriage solemnized under the st. 4 G. 4.

(*f*) Sec. 17.

(*g*) [*Jones* v. *Robinson*,[5] 2 Phillimore, 285.] In the case of a Jewish marriage, it has been held at *Nisi Prius* to be insufficient to give evidence of the solemnization at the synagogue, without also proving the previous written contract of marriage. *Horn* v. *Noel*, 1 Camp. 61. In the case of *Ganer* v. *Lady Lanesborough*, a Jewess was allowed to give parol evidence of her own divorce in a foreign country. As to the form of a Jewish contract of marriage, see *Lindo* v. *Belisario*, 1 Hagg. Con. 225, 247. *Goldsmid* v. *Bromer*, 1 Hag. Con. 324. In the case of *Woolston* v. *Scott*, Norfolk Lent Assizes, 1753, Denison, J. in an action for crim. con., admitted the plaintiff, who was an Anabaptist, to prove that the marriage was celebrated according to the Anabaptists' form of religion. B. N. P. 28. In the case of a Quaker, the marriage must be proved according to the ceremonies of the sect. In the case of other dissenters, no provision was made previous to the 6 & 7 W. 4, c. 85.

(*h*) Sec. 18.

(*i*) *Crompton* v. *Bearcroft*, Bull. N. P. 113. *Phillips* v. *Hunter*, 2 H. B. 412; 2 Burr. 1080; Co. Litt. by Harg. & Butler, note 79, b.; Huberus, 33.

(1) [On the subject of Jewish marriages, see the interesting cases of *Lindo* v. *Belisario*, 1 Haggard, 216, and *Goldsmid* v. *Bromer*, ibid. 324, and the papers, Nos. 1, 2, 3 and 4, in the Appendix to that volume.]

[1]Eng. Eccles. Reps. i. 274. [2]*Id.* v. 130. [3]Eng. Com. Law Reps. xxiv. 131. [4]*Id.* xx. 375. [5]Eng. Eccles. Reps. i. 260.

riage be contracted in direct contravention of the law of England, between parties repairing to Scotland for the purpose (1).

A marriage by a dissenting minister in Ireland, in a private room, is valid (*k*).

A marriage may be avoided by evidence of the incapacity of either of the parties to the contract, either by reason of consanguinity or affinity (*l*), *704 or *of a previous and still-subsisting marriage with another; from want of reason, for consent is absolutely requisite to matrimony (*m*), although formerly a lunatic was supposed to be able to contract matrimony (*n*).

By 15 Geo. 2, c. 30, all persons found lunatics under a commission of lunacy, or committed to the care of trustees, are declared incapable of marrying before they have been declared of sound mind by the Chancellor, or by the majority of the trustees.

Beyond the seas. Marriages beyond the seas are excepted out of the prohibition in the Marriage Act. To be valid, however, they must be celebrated either as marriages were in England before that Act (*o*), or according to the law of the country where the marriage takes place (*p*). And therefore it seems,

(*k*) *R.* v. ——, Old Bailey, Jan. 1815, *cor.* Sir J. Silvester. Although no evidence be given of any license obtained. *Smith* v. *Maxwell*,[1] 1 R. & M. 80. Upon a charge of bigamy, the first marriage was proved to have been in Ireland by license, the party being a minor, and without consent of parents; it was held a valid marriage, the 9 Geo. 2, c. 11 (Irish Marriage Act), making it voidable only. *Jacob's Case*, 1 Ry. & M. 140. Upon a question as to the settlement of Elizabeth the wife of *C.*, the respondents proved by the testimony of *C.* his marriage with the panper in 1829. The appellants, in order to prove that that marriage was void, on the ground that he had been married in 1826 to *M. B.*, called the latter, who stated that she, in 1826, went with *C.* before W., a reputed clergyman of the Established Church in Ireland, who in his private house there read to them the marriage ceremony. A document was also produced, purporting to be *W.*'s letter of orders, signed in 1799, by the then Archbishop of Tuam, which was proved to have been among *W.*'s papers at the time of his death, in July 1829. Held, first, that *M. B.* was a competent witness to prove the first marriage, although her husband had been before examined and proved the second marriage; secondly, that the certifiate of the ordination of *W.* was properly received in evidence, having come from the proper custody, and being more than thirty years old; and that the certificate not being the act of any Court, and not having any relation to the corporate character of the Archbishop, the seal was to be considered the seal of the natural person, and not of the corporation; had it been of the latter character, *quære* whether it would have been admissible without evidence that it was the proper seal. *The King* v. *The Inhabitants of Bathwick*,[2] 2 B. & Ad. 639.

(*l*) By the 5 & 6 W. 4, c. 54, marriages within the prohibited degrees of consanguinity or affinity, thereafter celebrated, are to be void.

(*m*) 1 Bl. Com. 438. *Morrison's Case*, *cor.* Deleg. cited ibid. *Semble*, it is unnecessary to prove a decree of nullity in such a case. See Nolan, 200. [Sed vide *Wightman* v. *Wightman*, 4 Johns. Ch. Rep. 343.]

(*n*) By three Judges, *Manby* v. *Scott*, 1 Lev. 4, 5; 1 Sid. 109; Bac. Abr. *Baron and Feme*, H.; 1 Roll. Ab. 357.

(*o*) A marriage between two British subjects, solemnized by a Catholic priest at Madras, and followed by cohabitation, but without license of the governor (although it had been the uniform practice to obtain such license), is valid. *Lautour* v. *Teesdale*,[3] 8 Taunt. 830; and see *R.* v. *Brampton*, 10 East, 286.

(*p*) 1 Hale's P. C. 692, 3; 1 Haw. c. 43, s. 7; Roll. 79, 80; 1 Sid. 71; East's P. C. 465, 469; 3 Inst. 88. A marriage between Protestant British subjects, celebrated at Madras by a Catholic priest, according to the rites of the Romish church, is valid, although no license be obtained from the governor, according to the local usage there. *Lautour* v. *Teesdale*,[3] 8 Taunt. 830. Such a marriage would have been valid in England before the Marriage Act. Ibid. The canon law is the general law of marriage, unless it be altered by the municipal law of the particular place. Ibid. And therefore a marriage between British subjects, celebrated at Versailles by a Protestant English clergyman there, but which is invalid according to the law of France, is invalid here. *Lacon* v. *Higgins*,[4] 3 Starkie's C. 178. So a marriage by contract in Scotland, valid according to the law of Scotland, is valid here. *Dalrymple* v. *Dalrymple*,[5] 2 Haggard, 54 *Harford* v. *Morris*, Ib. 430. So a marriage in Ireland, celebrated in a private house by a person who had been curate of a parish for eighteen years, was held to be valid, without any proof of license granted. *Smith* v. *Maxwell*,[3] 1 Ry. & M. 80; and see 1 Russ. C. L. 205. By the stat. 4 G. 4, c. 91, marriages celebrated by a minister of the Church of England, in the chapel or house of any British ambassador residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing within such factory, and those solemnized within the British lines by any chaplain or officer, or other person

(1) [See *Inhabitants of Middleborough* v. *Inhabitants of Rochester*, 12 Mass. Rep. 363. *Wightman* v. *Wightman*, 4 Johns. Ch. Rep. 343. *Turner* v. *Myers*, 1 Haggard, 414. *Browning* v. *Reane*, 2 Phillemore, 69.]

[1]Eng. Com. Law Reps. xi. 390. [2]*Id.* xxii. 152. [3]*Id.* iv. 299. [4]*Id.* xiv. 176.[d] [5]Eng. Eccles. Reps. iv. 485.

that if the ceremony be not performed according to the laws of the country where such marriage is had, it must be solemnized by a person in holy orders (*q*), and not by a mere layman (*r*), and *per verba de presenti* (*s*).

*Where the marriage is celebrated between English subjects in a foreign country, occupied by the troops of the King of England, it is to be presumed that the law of England, ecclesiastical and civil, was recognized and observed there (*t*). *705

In general, if it be insisted that the marriage has been solemnized in conformity with the law of the country where the marriage took place, it is necessary to prove what the law of that country was (*u*).

Where the marriage appeared to have been solemnized by one who publicly assumed the office of a priest, and appeared to be such, and was performed openly in a public chapel, and was followed by a long cohabitation of the parties, it was held, in a settlement case, that a valid marriage was to be presumed (*x*).

Evidence of the law of the country, with respect to marriages, must be derived from a person of competent knowledge on the subject (*y*). The Lord Chief Baron of the Exchequer refused to receive evidence of the law of Scotland, in regard to the validity of a marriage contracted there, from a tobacconist.

2dly. Cohabitation and repute, including the declarations of deceased members of a family, are, it has been seen, evidence not only as to the fact of marriage, but also as to the state and condition of the family, and the relationship of its various members (*z*). It seems to be a general rule, that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage (*a*) (1). Cohabitation and repute.

officiating under the orders of the commanding officer of a British army serving abroad, shall be deemed to be good and valid. A marriage between English subjects in a foreign country, not celebrated according to the laws of that country, nor according to the law of this country before the marriage, nor according to the stat. 4 G. 4, c. 91, seems to be void. See *Middleton* v. *Javerin*, 2 Hag. Con. 437. *Lacon* v. *Higgins*,[1] 2 Starkie's C. 183. *Scrimshire* v. *Scrimshire*, 2 Hag. Con. 437. In the case of a foreign marriage, some evidence should be given of the law of the country; the Ecclesiastical Courts receive such evidence from professors of the law of the foreign state. *Lindo* v. *Belisario*, 1 Hag. Con. 248. *Middleton* v. *Javerin*, 2 Hag. Con. 441; and see *Dalrymple* v. *Dalrymple*,[2] 2 Hag. Con. 81, and *Harford* v. *Morris*, 2 Hag. Con. 431.

(*q*) See the cases referred to in *R.* v. *Brampton*, 10 East, 287. It appeared that a soldier in the British army in St. Domingo, in 1796, went with the widow of another soldier to a chapel in the town, where they were to be married; the ceremony was performed there by a person appearing to be a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk, which the woman understood by means of an interpreter, at the time, to be the marriage service of the Church of England. After this they cohabited as man and wife for eleven years, till the death of the husband. Upon a question as to the validity of this marriage in a settlement case, the Court held that the facts warranted a presumption that the marriage had been legally contracted, since it appeared to have been contracted *per verba de presenti;* to have been celebrated by one who publicly assumed the habit of a priest, and appeared to be such, in a public chapel; and had been followed by cohabitation for eleven years.

(*r*) *Haydon* v. *Gould*, Salk. 119. *Smith* v. *Maxwell*, *supra*, note (*p*).

(*s*) Lord C. J. Holt said, that a contract, *per verba de presenti*, was a marriage, viz. "I marry you—you and I are man and wife;" and that such a contract amounts to actual marriage, as if it had been in *facie ecclesiæ*. 6 Mod. 155; and see Dyer, 369, a. S. P.

(*t*) Per Ld. Ellenborough, *R.* v. *Brampton*, 10 East, 288.

(*u*) See tit. Foreign Law, and *supra*, p. 704, note (*p*).

(*x*) *R.* v. *Brampton*, 10 East, 289, and *supra*, p. 704, note (*p*).

(*y*) Ibid. Vide *supra*, tit. Foreign Laws. In *Ganer* v. *Lady Lanesborough*, Peake's C. 17, a Jewess was allowed by Lord Kenyon to prove that she had been divorced in a foreign country, according to the custom and ceremonies of the Jews there.

(*z*) *Supra*, Vol. I. Ind. tit. Reputation, &c. Vol. II. tit. Bastardy; and *infra*, tit. Pedigree, where this subject, and also that of the competency of witnesses in such cases, is further considered.

(*a*) Ibid.; and *Leader* v. *Barry*, 1 Esp. C. 353. *Read* v. *Passer*, Peake's C. 231. *May* v. *May*, B. N. P. 112. *Hervey* v. *Hervey*, 2 W. Bl. 877; 2 Roll. Ab. 551. *Kay* v. *Duchess de Pienne*, 3 Camp. 123. Vide

(1) [By the canon law, which is the basis of the marriage law all over Europe, and by the law of Scot-

[1]Eng. Com. Law Reps. xiv. 176.[d] [2]Eng. Eccles. Reps. iv. 485.

Sentence of Ecclesiastical Court.

3dly. The effect of judgments in ecclesiastical courts, upon the question of marriage, has been already adverted to (*b*).

In the case of civil proceedings, a direct sentence of nullity, or sentence in affirmance of a marriage, are, it has been held, conclusive evidence upon a question of legitimacy, arising incidentally upon a claim to a real estate (*c*).

*706 *A sentence in a jactitation suit, it has been held, is evidence as to a marriage upon a question of title in ejectment, and in personal actions, founded upon a supposed marriage between the *same parties* or their privies (*d*).

So a direct sentence in a suit upon a promise of marriage against the contract, is evidence to disprove the contract in an action brought upon the same contract for damages (*e*). But in these cases it is to be observed, that the suits in which the evidence is so receivable must be between the same parties or their privies (*f*).

Bigamy.

It seems that a sentence concerning marriage in a spiritual court is not evidence in a criminal proceeding, unless it be a direct proceeding in *rem*, and final and conclusive in its nature; and that even there it is liable to be impeached for fraud (*g*).

It has been solemnly determined, in the case of the Duchess of Kingston, that a sentence in a jactitation suit is not conclusive evidence upon a prosecution for bigamy (*h*), and that at all events it is liable to be impeached on the part of the Crown by evidence of collusion (*i*).

Standen v. *Standen*, cited 4 T. R. 469, and *infra*, tit. PRESUMPTION. Where a marriage in Ireland was inferred from circumstances of avowal and reputation, the Ecclesiastical Court held that it was not invalidated by evidence of belief on the part of the husband that it was invalid, having been celebrated by a Popish priest. *Stedman* v. *Powell*,[1] 1 Add. 58. In *Doe* d. *Fleming* v. *Fleming*,[2] 4 Bing. 266, it was held that reputation was good evidence of a marriage, although the plaintiff adducing it claimed as heir at law, and his parents are still living.

(*b*) *Supra*, Vol. I. Ind. tit. JUDGMENT.

(*c*) 11 St. Tr. 261. *Supra*, Vol. I. tit. JUDGMENT.

(*d*) 11 St. Tr. 261. *Supra*, Vol. I.

(*e*) Per De Grey, C. J., 11 St. Tr. 231. *Da Costa* v. *Villa Real*, Stra. 691; *supra*, Vol. I. tit. JUDGMENT.

(*f*) *Supra*, Vol. I. tit. JUDGMENT; 11 St. Tr. 261. It is there said by Chief Justice De Grey, that in such cases the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it, or claimed under those who were parties, and had acquiesced. *Qu.* whether such a sentence would be evidence for a stranger against a party, there being no mutuality. Vide *supra*, Vol. I. tit. JUDGMENT.

(*g*) Vide *Supra*, tit. FRAUD.

(*h*) 11 St. Tr. 262. *Supra*, tit. FRAUD. It seems upon principle that such a sentence is not evidence at all. Vide Vol. I. tit. JUDGMENT.

(*i*) Ibid.

land, and of those States in the Union where there are no marriage acts to control it, consent alone to a contract of marriage, *de presenti*, is sufficient to render the marriage binding, without any other act. See *M'Adam* v. *Walker*, 1 Dow, 148. *Dalrymple* v. *Dalrymple*, 2 Haggard's C. Rep. 54, 81. *Inhabitants of Milford* v. *Inhabitants of Worcester*, 7 Mass. Rep. 48. *Inhabitants of Londonderry* v. *Inhabitants of Chester*, 2 New Hamp. Rep. 268. *Cheseldine* v. *Brewer*, 1 Har. & M'Hen. 152. *Fenton* v. *Reed*, 4 Johns. 22. See also *Benton* v. *Benton*, 1 Day, 111. *Dumarsely* v. *Fishly*, 3 Marsh, 370. *Hammock* v. *Bronson*, 5 Day, 290. *Furcell* v. *Purcell*, 4 Hen. & Mun. 507. *Inhabts. of Newburyport* v. *Inhabts. of Boothbay*, 9 Mass. Rep. 414. *Telts* v. *Foster*, 1 Taylor, 121. *Whitehead* v. *Clinch*, 2 Hayw. 3. *Fenton* v. *Reed*, 4 Johns. 52, *acc.* But where, without any apparent rupture, the parties after a cohabitation of about two years, separated and continued separate nearly forty years, without any claims or pretensions on each other as husband and wife, the presumption of marriage arising from the previous cohabitation is rebutted. *Sem. Jackson* v. *Claw*, 18 Johns. 346. In cases of cohabitation, the presumption is in favour of its legality; but when it is known to have been illicit in its origin, this presumption cannot be made. *Cunninghams* v. *Cunninghams*, 2 Dow. 482. *Sed vide Fenton* v. *Reed* and *Jackson* v. *Claw*, ubi. sup. In an information for incest, alleged to have been committed with a legitimate daughter, an actual marriage between the prisoner and the daughter's mother must be proved; neither cohabitation, reputation, nor the confessions of the prisoner, are admissible. *The State* v. *Rosewell*, 6 Conn. Rep. 446.

In *Forney* v. *Hallacher*, 8 Serg. & Rawle, 159, the Sup. Ct. of Pennsylvania decided, that in an action for *crim. con.* the declaration of the defendant, that he knew the woman was married to the plaintiff, and that with knowledge of that fact, he had seduced her affections, &c. might be given in evidence in proof of the marriage. 2 Phil. Ev. 151; where the same doctrine is suggested.

The weight of such evidence may be very small; its admissibility seems to rest on clear principles.]

[1]Eng. Eccles. Reps. ii. 26. [2]Eng. Com. Law Reps. xiii. 426.

In the case of *Martin Lolly* (*k*), the prisoner being indicted for bigamy, his defence was, that previous to his second marriage, he had been divorced from his first wife, whom he had married in England, by virtue of a sentence of the Consistorial Court in Scotland, in a suit instituted by the first wife, on the ground of adultery committed by the prisoner in Scotland; it appeared that although the proceedings had been instituted *bonâ fide* by the wife, the whole had resulted from the artful practices and contrivances of the husband: the prisoner was convicted, and sentenced to transportation. The case was afterwards argued before the Judges, who are stated to have been unanimously of opinion that a marriage solemnized in England could not be dissolved but by act of the Legislature (*l*).

Action for breach of promise of marriage (A).

In an action for breach of promise of marriage, evidence of the promise is either, 1st, *express*, or 2d, is from the nature of the case frequently *presumptive* (*m*). It has been seen that the promise need not be in writing (*n*); where it is in writing it need not be stamped (*o*).

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*A promise to marry generally is in point of law a promise to marry within a reasonable time (*p*). Where the defendant, having called upon the plaintiff, to whom he paid his addresses, at her father's house, said to the father upon going away, "I have pledged my honour to marry her in six months, or in a month after Christmas;" and this varied from the counts, which alleged a promise to marry within a specified time; it was left to the jury to presume from the circumstances a general promise to marry (*q*).

Proof of refusal.

The refusal to marry should also be proved, either by proof of an actual refusal (*r*), or of conduct and declarations equivalent to an absolute refusal: and where it is alleged that the plaintiff has married another woman, the fact must be proved (*s*) (B) (1).

(*k*) Cor. Wood, B. Lancaster Sum. Ass. 1812.

(*l*) Russel, 287. See *Tovey* v. *Lindsay*, 1 Dow. 117; where this case is referred to by the Lord Chancellor.

(*m*) If there be an express promise by the man, and it appear that the woman countenanced it by her actions at the time, and behaved as if she agreed to the matter, although there be no actual promise, yet it shall be sufficient evidence of a promise on her part; per Holt, C. J. in *Hatton* v. *Mansel*, 3 Ann. A promise on the woman's part may be inferred from such circumstances of apparent acquiescence as usually attend such an engagement; from her being present and not objecting when the consent of a parent was asked; the making preparation as for the wedding; the receiving her suitor's visits, and demeanour towards him. Ib. and *Daniel* v. *Bowles*,[1] 2 C. & P. 554. The promise on the part of the man is more frequently capable of proof by means of explicit declarations, but it is also frequently matter of presumption from his conduct.

(*n*) *Supra*, 479. The contrary has been held. *Phillip* v. *Walcot*, 3 Lev. 65; Skin. 24; Com. Dig. *Action on the Case*, F. 3. The position in the text seems however to be now established in practice. B. N. P. 210. *Orford* v. *Cole*,[2] 2 Starkie's C. 351; and see *Cock* v. *Baker*, 1 Str. 34. *Harrison* v. *Cage*, 1 Ld. Ray. 386.

(*o*) *Orford* v. *Cole*,[2] 2 Starkie's C. 351. *Infra*, tit. Stamp.

(*p*) *Potter* v. *Deboos*,[3] 1 Starkie's C. 82. *Phillips* v. *Crutchley*,[4] 3 C. & P. 178; 1 M. & P. 239.

(*q*) *Potter* v. *Deboos*,[3] 1 Starkie's C. 82; cor. Ld. Ellenborough.

(*r*) As where, in answer to a question by the father of an infant child, whether the defendant meant to marry her, he replied, "Certainly not." *Gough* v. *Farr*,[5] 2 C. & P. 631.

(*s*) As to the proof, vide *supra*, 699.

(A) (In an action for breach of promise of marriage, a witness may be asked his opinion, whether from living with the plaintiff, and an observance of her deportment, &c. he is of opinion that she was sincerely attached to the defendant. *M'Kee* v. *Nelson*, 4 Cow. 355.)

(B) (Where a promise to marry generally was proved without any time fixed, but the defendant broke off all intimacy with the plaintiff, and though requested, gave no explanation; it was held, that it might be left to a jury to infer a refusal to marry. *Willard* v. *Stone*, 7 Cow. 22.)

(1) [In an action for breach of promise of marriage, an express promise need not be proved (6 Mod. 172. Holt, 458); a promise may be inferred from those circumstances which usually accompany such an engagement; such as expressions of attachment in letters, &c. *Wightman* v. *Coates*, 15 Mass. Rep. 1.

In *Peppinger* v. *Lowe*, 1 Halsted's Rep. 384, it was held that declarations of the plaintiff, that she had promised to marry the defendant, made long before the suit was brought, were good evidence for herself, to show the mutuality of the contract.

Evidence of seduction may be given in evidence to enhance the damages. *Semb.* Per Parsons, C. J. *Paul*

[1]Eng. Com. Law Reps. xii. 258. [2]*Id.* iii. 378. [3]*Id.* ii. 305. [4]*Id.* xiv. 260. [5]*Id.* xii. 293.

Proof in defence.

A defence (*t*) to an action of this kind frequently results from the very peculiar nature of the contract (A). It would be going much too far to say, that a party who is morally excused in breaking off an engagement to marry, is also in all cases legally absolved.

Nevertheless, the practising of fraud and deception in matters likely to influence the conduct of the other contracting party, would in this case, as well as in any other matter of contract, render the agreement void. It seems, also, that where it is discovered that one party has been guilty of fraudulent or dishonest conduct in collateral transactions, the other party is not bound to fulfil a promise made previously to the discovery (*u*). But it would be incumbent on the defendant in such a case to substantiate the grounds of refusal by evidence. It would be insufficient to prove merely that a suspicion of the kind existed; and that upon being called upon to repel the charge, the plaintiff omitted to do so. But although the omission on the part of the plaintiff to exculpate himself would be no bar to the action, it may nevertheless, under the circumstances, materially affect the damages (*x*). It seems that in general where one party has improvidently made a promise to marry another, the gross misconduct and general bad character of the plaintiff is a good defence to the action (*y*) (B).

If, however, a man promise to marry a loose and immodest woman, knowing her to be such, he is bound by his promise (*z*).

*708 *So if a man, after a promise of marriage has been made by the woman, conduct himself in a brutal or violent manner, and threaten to use her ill, she is not bound to commit her happiness to his keeping, and this would be a legal defence to the action (*a*). And even in cases where the misconduct of the plaintiff does not afford a legal bar to the action, yet if he has betrayed gross habits or want of feeling, such circumstances ought, it seems, to be considered by a jury in their estimate of damages (*b*).

So it is a good defence to show that the defendant was induced to enter

(*t*) See the new rules of Hil. T. 4 W. 4.

(*u*) See *Baddely* v. *Mortlock & Ux.*[1] Holt's C. 151. And in general, as to the principles on which a justification of this nature rests, see Pothier's Traité du Contrat de Marriage, part 2, c. 1, art. 7. *Qu.* whether a discovery of a woman's want of chastity be not a legal bar to an action by her. *Semble*, it is; per Abbott, C. J. in *Foote* v. *Hayne*, West. Sitt. after Mich. T. 1824.

(*x*) Ibid.

(*y*) *Foulkes* v. *Sellway*, 3 Esp. C. 236. In that case the defendant had a verdict, but note, that he proved not only that the plaintiff was a woman of general bad character, but also one instance of gross misconduct. In the same case Lord Kenyon held, that a witness might give evidence as to the character which he had heard of the woman upon inquiry in the neighbourhood, although it was objected that those who knew her character in the neighbourhood ought to be called and give evidence, since otherwise the party would be precluded from cross-examining as to the means of knowledge. *Tam. qu.*

(*z*) Per Lord Tenterden, in *Irving* v. *Greenwood*,[2] 1 C. & P. 350.

(*a*) Per Lord Ellenborough, in *Leeds* v. *Cook & Ux.* 4 Esp. C. 256.

(*b*) Ibid.

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v. *Frazier*, 3 Mass. Rep. 73. *Boynton* v. *Kellogg*, ib. 189. *Conn.* v. *Wilson*, 2 Overton, 233. *Contra*, 2 Bibb, 341, *Burks* v. *Shain*.

If no time or place for the marriage is appointed, an offer to perform must be alleged and proved; allegation and proof of readiness and willingness are not sufficient. *Burks* v. *Shain*, ubi sup. See *Martin* v. *Patton*, 1 Littell's Rep. 235.

A promise of marriage, made to an infant by an adult, is binding on the latter, and the infant may maintain an action for the breach of it, without averring the consent of his parent or guardian to the marriage (*Connor* v. *Alsbury*, 1 Marsh. 78); but if the infant be sued for a breach of his promise, his infancy is a good defence. *Pool* v. *Pratt*, 1 Chip. Rep. 252.]

(A) (After a defendant has once broken a promise of marriage, his offer to renew it is no defence to an action for the breach of the promise. *Sothward* v. *Resford*, 6 Cow. 254.)

(B) (Unchastity or immorality in the plaintiff may be given in evidence by the defendant. *M'Kee* v. *Nelson*, 4 Cow. 355.)

[1] Eng. Com. Law Reps. iii. 57. [2] *Id.* xi. 412.

into the engagement by any fraudulent misrepresentation or suppression of the circumstances of the family, or conduct of the plaintiff (*c*). In proof of such misrepresentations, letters written by the father of a female plaintiff to the defendant, with her knowledge, and containing representations concerning her, are admissible to show deceit on her part (*d*).

Where the plaintiff's counsel was apprized by the course of cross-examination of the plaintiff's intention to impute deceit to the plaintiff, it was held that the plaintiff's counsel ought, upon such notice, to offer evidence for the purpose of rebutting the charge, before he closes his case.

Any circumstances which enable the jury to appreciate the loss sustained by the plaintiff are admissible in evidence, in order to mitigate the damages. It is competent to the defendant for this purpose to show that his parents disapproved of the match (*e*) (A).

MERGER OF CIVIL ACTION.

See ASSUMPSIT.

OF a civil action in a felony, see tit. RECORD (*f*).

MISNOMER (B).

A MISNOMER of the plaintiff's or defendant's name was formerly pleadable in abatement, but could not be taken advantage of under a plea in bar (*g*). But it was otherwise, if the misnomer constituted a misdescription of a contract (*h*).

(*c*) *Wharton* v. *Lewis*,[1] 1 C. & P. 531. And see *Foote* v. *Hayne*,[2] 1 C. & P. 547.

(*d*) *Foote* v. *Hayne*,[2] 1 C. & P. 547. But she will not be responsible for particular expressions. Ib. And a representation made by the father orally to a third person, though communicated to the defendant, is not admissible against her. Ib.

(*e*) *Irving* v. *Greenwood*,[3] 1 C. & P. 350. And where the father was incompetent, having employed the attorney, a relation was admitted to prove such disapprobation. Ib.

(*f*) See also *Crosby* v. *Levy*, 12 East, 412. *M.* has an annuity for the life of *W*; *J.* kills *W.* in order to determine the annuity; no action lies; Freem. 382. *Qu.* whether maintainable after *J.* had been acquitted of the murder.

(*g*) *Jowett* v. *Charnock*, 6 M. & S. 45. *Mayor of Stafford* v. *Bolton*, 1 B. & P. 40. *Boughton* v. *Frere*, 3 Camp. 20. The Court will not set aside process on the ground of a misnomer of the plaintiff. *Morley* v. *Law*,[4] 2 B. & B. 34. *Secus*, in the case of a defendant. Ib. *Wilks* v. *Lorck*, 2 Taunt. 399; and see *Clerk of Trustees of Taunton Market* v. *Kinleedey*, 2 Blk. 1120. *Gardner* v. *Walker*, 3 Ans. 935. A plaintiff may sue by his name of baptism or confirmation, or both. Per Holt, C. J. in *Walden* v. *Holman*, 6 Mod. 115. See 2 Ld. Ray. 1015. The transposing two christian names, *e. g.* James Richard, for Richard James, is a misnomer. *Jones* v. *Macquillin*, 5 T. R. 195. It is a good plea in abatement for the defendant to say, that he was known and called by such a name, though he was never baptized. Per Holt, C. J. 6 Mod. 166.

(*h*) *Gordon* v. *Austin*, 4 T. R. 614. Note, that the party whose name was misdescribed as a maker of the note had been outlawed. See the observations of Buller, J. Ib. Where the name is *idem sonans*, it is no ground for a plea in abatement; but Shakpear and Shakspeare are materially different. 10 East, 83. Some names

(A) (*M'Kee* v. *Nelson*, 4 Cow. 355.)

(B) (The law knows but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name is immaterial; and it is competent for the party to show that he is known as well without as with the middle name. *Franklin* v. *Tallmadge*, 5 John. R. 84. *Roosevelett* v. *Gardinier*, 2 Cow. 463. See also *Keene* v. *Meade*, 3 Peters, 6. A defendant cannot plead in abatement, that an *alias dictus* is *added* to his *true* name. *Reid* v. *Lord*, 4 John. R. 118. The addition of Junior to a name is mere description of the person, and the omission of it does not affect any act or proceeding done by the same person. *People* v. *Collins*, 7 John. R. 549. Where the name of the obligor in the body of the bond varies by a slight misspelling from his signature, he may be sued by his name as subscribed, without an *alias dictus*. *Meredith* v. *Hensdale*, 7 Caines, 362. In a foreign name, a variance of a letter, not varying the sound according to the pronunciation of the language to which it belongs, is not a misnomer, as Petris for Petrie. *Petrie* v. *Woodworth*, 3 Caines, 219. Where, in a suit against two defendants, in assumpsit, in which one is arrested and the other returned not found, it appears on the trial that the defendant not brought in is misnamed in the declaration, being called John instead of George, the plaintiff will be nonsuited for the variance. *Waterbury* v. *Mather*, 16 Wend. 611. Had both the defendants been arrested the misnomer could only have been taken advantage of by plea in abatement. Ib.)

[1]Eng. Com. Law Reps. xi. 459. [2]*Id.* xi. 466. [3]*Id.* xi. 412. [4]*Id.* vi. 9.

*The plea of misnomer in abatement is now abolished, by the st. 3 & 4 W. c. 42, s. 11. *See* tit. ABATEMENT (*i*).

MORTGAGE.

As to proof in an action of ejectment by a mortgagor, *see* tit. EJECTMENT.

In the case of lands let for years and then mortgaged, the mortgagee is entitled to rent accruing after the mortgage, and after notice to the tenant, before any possession taken (*j*).

A mortgagor is not properly tenant-at-will to a mortgagee, for he does not pay rent; he receives the rent by tacit agreement with the mortgagee, who may put an end to it when he pleases. The mortgagor cannot be considered tenant-at-will where there is an under-tenant, for there can be no under-tenant to a tenant-at-will; in such case the mortgagor is only a receiver of the rent for the mortgagee, who may at any time countermand the implied authority by notice (*k*).

MONEY (*l*).

See ASSUMPSIT.—PAYMENT.

MURDER.

THE offence consists in the killing any person under the King's peace, with malice aforethought, either express or implied (*m*).

This definition includes, 1st, The killing of another; 2dly, Of malice: and the evidence is either direct or indirect.

1. The proof of killing another involves the proof of the death of the person, and that it was occasioned by some act done by another.

Proof of the death.

First, Of the death of the person specified in the indictment. It has been laid down by Lord Hale, as a rule of prudence in cases of murder, that to

*710 *warrant a conviction, proof should be given of the death, by evidence of the fact or the actual finding of the body (*n*). But although it be certain

may be used the one for the other indifferentiy. 2 Rol. Ab. 135; 1 Leon. 147; as Jean for John, Jane for Joan. A peer must sue by his christian name as well as name of dignity. See Com. Dig. Abatement, F. 19; E. 18, 19, 20. *R.* v. *Cooke*,[1] 2 B. & C. 871. If judgment be obtained against a person in a wrong name, and the plaintiff sue him again for the same cause of action in the right name, he may plead the judgment recovered, and prove that he is the same person. 2 Str. 1218. In some instances a defendant may, on being arrested in a wrong name, procure his discharge in a bailable action, on putting in common bail.[2] 1 Ch. R. 282. But if he put in bail in the wrong name without notice, or execute a deed in the wrong name, he will be estopped from disputing it. 3 Taunt. 504; Dyer, 279; 1 Ray. 249.

(*i*) *Irving* v. *Greenwood*,[3] 1 C. & P. 350.

(*j*) *Moss* v. *Gallimore*, Doug. 266. See *Chinnery* v. *Blackburn*, 1 H. B. 118.

(*k*) Ibid. A mortgagor is not properly tenant-at-will to the mortgagee, for he is not to pay rent; he is only *so quodam modo*. There is nothing more apt to confound than a simile. Per Lord Mansfield, in *Moss* v. *Gallimore*, Doug. 269.

(*l*) In what cases money may be followed and recovered, see *Scott* v. *Sumner*, Willes, 400. *Whitcombe* v. *Jacob*, 1 Salk. 161. If a factor sell the goods of his principal before the bankruptcy, the money cannot be followed unless he purchase the specific thing with the same money. Ib. See *Taylor* v. *Plumer*, 3 M. & S. 563; and *supra*, 176.

(*m*) Fost. 256; 4 Bl. Comm. 198; 3 Inst. 47; 1 Hale, 424. See the fourth report of the Criminal Law Commissioners. The killing is of malice aforethought whensoever it is voluntary, and is not justified, excused, or extenuated by circumstances. Ib. And it is *voluntary* whensoever death results from any act or unlawful omission done or omitted, with intent to kill or do great bodily harm to any other person; or whensoever any one wilfully endangers the life of another, by any act or omission likely to kill, and which does kill any other person. Ib.

(*n*) 2 Hale, 290; where Lord Hale said, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, for the sake of two cases; one mentioned in my Lord Coke's P. C. 104, p. 232, a Warwickshire case (vide *supra*, Vol. I. tit. CIRCUMSTANTIAL EVIDENCE): another, that happened within my remembrance in Staffordshire, where *A.* was long missing,

[1]Eng. Com. Law Reps. ix. 263. [2]*Id.* xviii. 81. [3]*Id.* xi. 412.

that no conviction ought to take place unless there be most full and decisive evidence as to the death, yet it seems that actual proof of the finding and identifying of the body is not absolutely essential. And it is evident that to lay down a strict rule to that extent might be productive of the most horrible consequences (A).

In *Hindmarsh's Case* (*o*), the prisoner, a mariner, was indicted for the murder of his captain at sea; a witness saw the prisoner throw the captain overboard, and he was not seen or heard of afterwards; and it was left to the jury, under the circumstances, to say whether the deceased had not been killed by the prisoner before he was thrown into the sea; and the jury being of that opinion, the prisoner was convicted and executed (*p*).

A variance in the proof in the name of the deceased, as alleged in the indictment, will be fatal (*q*).

Next, the act (*r*) of the prisoner which occasioned the death, is to be proved. The proof must agree in substance with the allegations on the record. But if the act of the prisoner, and the means of death proved, agree in substance with those which are alleged, the nature of the violence, and the kind of death occasioned by it being the same, a mere variance as *to the name or kind of instrument used will not be material (*s*). Neither will the variance be material, though it should appear that the party charged as a principal in the second degree was a principal in the first degree; or although it should turn out that a party, indicted as a principal in the first degree, was but a principal in the second degree (*t*). Proof of the cause of the death. *711

and upon strong presumptions *B.* was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon *B.* was indicted for murder, and convicted and executed; and within one year after *A.* returned, being indeed sent beyond sea by *B.* against his will; and so, though *B.* justly deserved death, he was really not guilty of that offence for which he suffered." The published account of the case of Ambrose Gwynnett, is a very remarkable one; after being convicted of murder, he was suspended for a considerable time in the usual course of execution, and afterwards gibbeted; and yet, in consequence of a series of singular circumstances, he survived his supposed execution, and having escaped to a foreign country, actually met and conversed with the person for the supposed murder of whom he had been condemned to die. (*o*) 2 Leach, 571.

(*p*) The conviction was unanimously approved of by the Judges. The objection, that the body had not been found, was urged by Mr. Garrow at the trial. See a case cited Russel, 683; where Gould, J. directed the acquittal of two prisoners who had been seen to strip an infant, the bastard child of one of them, and throw it into a dock at Liverpool, on account of the possibility that the tide might have carried out the living infant from the dock.

(*q*) See Starkie's Criminal Pleadings, 184, 2d edit.; and *infra*, tit. VARIANCE. An indictment for the murder of a child is bad, which neither states the name, nor alleges that the child had none. *R.* v. *Biss*, 2 Moody's C. C. 93.

(*r*) It is necessary that the death should have been occasioned by some bodily injury done to the party by force, or by poison, or by some other *mechanical means* which occasion death; for although a person may in *foro conscientiæ* be as guilty of murder by working on the passions or fears of another, and as certainly occasion death by such means as if he used a sword or pistol for the purpose, he is not the object of temporal punishment. 1 Hale, 427, 429; East's P. C. 225. But it is not essential that the hand of the party should immediately occasion the death; it is sufficient if he be proved to have used any mechanical means likely to occasion death, and which do ultimately occasion it; as if a man lay poison for another, with intent that he should take it by mistake for medicine, or expose another, against his will, in a severe season, by means of which he dies. 1 Haw. c. 31, s. 5; 1 Hale, 431, 2. So where a harlot left her newly-born child in an orchard, covered only with leaves, where it was killed by a kite, 1 Hale, 431; East's P. C. 226. So where a pauper is wilfully removed from parish to parish till he die for want of care and sustenance. Palm. 545. Or an apprentice dies from negligence and harsh usage. *Self's Case*, East's P. C. 226, 7.

(*s*) See the cases Crim. Pl. 91, 2d edit. It seems that proof of any one of the means of death stated is sufficient. Ib.; and *R.* v. *Clark*,[1] 1 B. & B. 473; Bulst. 87. *Weston's Case*, 3 Inst. 49. *Watkin's Case*, 4 Rep. 41. But where the indictment stated the death to have been by striking with a piece of brick, &c., the fact being that the prisoner struck him with his fist down upon a brick floor, and that the fall upon the brick was the cause of death; it was held, that the means were not truly stated. *Kelly's Case*, 1 Ry. & M. 113. S. P. *Thompson's Case*, Ib. 139.

(*t*) See Crim. Pleadings; and *supra*, tit. ACCESSORY.

(A) (Convictions for murder may take place, when the murdered body is not found. *United States* v. *Gibert*, 2 Sumner, C. C. R. 19.)

[1]Eng. Com. Law Reps. v. 151.

Connection between the act and the death.

Unless the death be so immediately and obviously occasioned by the violence inflicted by the prisoner, as to exclude all doubt upon the subject, the connection between the act of the prisoner and the death of the deceased must be proved by means of the judgment of persons of professional skill and experience, who have had an opportunity of forming an opinion upon the subject, or who are enabled to form an opinion from the circumstances of the case, as detailed by others (*u*).

Where there is any doubt whether the death was occasioned by the act of the prisoner, or by some other cause, it is of course a question of fact for the jury (*v*).

Where the husband and wife were charged with the murder of an apprentice to the husband, by using him in a barbarous manner, and not providing sufficient nourishment, and the opinion of the surgeon who opened the body, was, that the boy died from debility, occasioned by the want of proper nourishment, and not from the wounds, &c., it was held that the wife was entitled to be acquitted, as it was the duty of the husband and not of the wife to provide sufficient food and nourishment for the apprentice (*x*).

It is sufficient in law to prove that the death of the party was *accelerated* by the malicious act of the prisoner (*y*), although the former laboured under a mortal disease at the time of the act. And it is sufficient to constitute murder that the party dies *of the wound* given by the prisoner, although the wound was not *originally mortal*, but become so in consequence of negligence or unskilful treatment (*z*); but it is otherwise where the death arises, *not from the wound*, but from unskilful applications or operations used for the purpose of curing it (*a*).

Proof of malice.

II. Malice is either positive and *express*, or it is *implied* malice, or malice in construction of law (A). Malice of the former kind consists in an actual and deliberate intention unlawfully to take away the life of another, or do him great bodily harm (*b*); and the actual existence of such an intention is
*712 a *question of fact to be found and ascertained by the jury. Implied or constructive malice is not a fact for the jury, but is an inference or conclusion founded upon the particular facts and circumstances ascertained by them; in which case the real intention and object of the prisoner, is frequently a very material ingredient, although he did not deliberately meditate and intend actual destruction.

It is a general rule, that the law infers malice from the very fact of killing (*c*); and that all the circumstances of necessity, accident, or infirm-

(*u*) Vide Vol. I. tit. WITNESS, OPINION, and *Squire's Case*, Stafford Lent Assiz. 1799, *cor.* Lawrence, J., Russel, 621.

(*v*) *Self's Case*, East's P. C. 226, 7; where an apprentice having returned from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered state, and was afterwards ill-treated by his master, and medical evidence was given that if he had been properly treated after his return home he might have recovered, it was left to the jury to say whether the death had been occasioned by ill-treatment which the apprentice received from his master after returning from Bridewell.

(*x*) *R.* v. *Squire & Ux.*, Russel, 621. *R.* v. *Webb*, York Assizes.

(*y*) 1 Hale, 428. (*z*) Ibid. (*a*) Ibid.

(*b*) 1 Hale's P. C. 451, and 4th report of the Crim. L. Commiss., p. xxxiii, art. 14. Malice being essential to the offence, it follows that no person can incur the penalties of homicide who is of so imbecile or unsound a mind as to be incapable of malice, according to the rule of civil law, *ut nec infans nec furiosus nec qui casu fortuito occidit hac lege teneatur.* L. 12, L. 3, § 4. Heince. E. J. C. p. 7, sec. 201. Vide *supra*, tit. INFANT, 728; *infra*, tit. WILL.

(*c*) Fost. 255. That is, where, so far as appears, the act was wilful, and is not extenuated by circum-

(A) (To constitute murder in the first degree, it is not necessary that the premeditated design to kill should have existed for any particular length of time. If, therefore, the accused, as he approached the deceased and first came within view of him, at a short distance, then formed the design to kill, and walked up with a quick pace, and killed him without any provocation then, or recently received, it is murder in the first degree. *Whiteford's Case*, 6 Rand. 721.)

ity, which justify, excuse, or extenuate the act, are to be proved by the prisoner, unless they arise out of the evidence produced against him (1). It is for the jury to pronounce upon the truth of such facts; and it is for the Court to decide whether in point of law the fact of killing is justified, excused, or extenuated by those facts (*d*).

Actual intention to destroy.

Upon an indictment for murder, whenever the question turns upon the *actual* and *specific* intention of the prisoner at the time of the act which occasioned the death, the existence of that intention or disposition is a question of fact for the decision of the jury under all the circumstances of the case. And it seems, that in general, notwithstanding any facts which tend to excuse or alleviate the act of the prisoner, if it be proved that he was in fact actuated by prepense and deliberate malice, and that the particular occasion and circumstances upon which he relies were sought for and taken advantage of, merely with a view to gratify actual malice, in pursuance of a preconceived scheme of destruction, the offence will amount to murder (*e*).

Where, however *fresh provocation* intervenes between the preconceived malice and the death, it will not be presumed that the killing was upon the antecedent malice.

If *A.* and *B.* quarrel, and they are reconciled, and afterwards fall out again, and *A.* kill *B.*, it will not be presumed that they fought upon the old grudge (*f*). But if proof be given that the reconciliation was but counterfeit, and that the prisoner was actuated by the previously conceived malice, it will be murder (*g*).

The materials from which the jury are to draw their conclusion as to such an intention, are obviously the previous situation of the parties, the connection and transactions between them, the conduct and expressions of the prisoner towards the deceased, the motives by which he was probably influenced, and, above all, the facts and circumstances immediately connected with the transaction, particularly the means of destruction used, the mode in which they were procured, and the subsequent conduct and demeanour of the prisoner.

*Where malice is an inference of law from the facts, that is, as it seems, in all cases where the act does not result from actual and preconceived malice, the question still frequently depends upon the actual *intention* of the prisoner, which is to be found as a fact by the jury. They are to find the nature, extent and origin of the intention; as, whether the prisoner really intended not to destroy the deceased, but to do him some bodily injury, and to what extent, and whether this intention was preconceived, or arose upon the occasion of some sudden provocation given (*h*). *713

Intention to injure, &c.

stances. The general rule in the text has, in one instance at least, been misapprehended. A watchman employed to guard some premises and property in the night-time, being suddenly alarmed by the approach of one whom he suspected of having come for the purpose of robbing the premises, instantly fired at and killed him; and the jury being told that they ought to infer malice from the act of killing, found the prisoner guilty, but the prisoner was not executed.

(*d*) Ibid.; Ld. Raym. 1493; Str. 733. Where the motive to commit murder was to prevent the party discovering the previous murder of another, it was held that the circumstances of that case were admissible in evidence upon the trial of parties charged with the second murder. *R.* v. *Clewes and others*,[1] 4 C. & P. 221.

(*e*) East's P. C. 224; 1 Hale, 451. (*f*) 1 Hale, 451; *infra*, 621. *Mason's Case*, note (*f*).

(*g*) Ibid.; and see *Mawre's Case*, Fost. 132; East's P. C. 239.

(*h*) If *A.* intendeth to beat *B.* in anger, or from preconceived malice, and death ensueth, it will doubtless be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for the consequences of doing it. Fost. 259.

(1) [*Pennsylvania* v. *Honeyman*, Addison, 148. *Same* v. *Bell*, Ibid. 171. *Same* v. *M'Fall*, Ibid. 257. *Same* v. *Lewis & al.* Ibid. 282. *The State* v. *Zellers*, 2 Halsted, 220. *Acc.* But since the statute of 1794, in Pennsylvania, the burden of proof is on the Commonwealth; unless the circumstances of malice are *proved*, it is murder only of the second degree. *Commonwealth* v. *O'Hara*, before M'Kean, C. J., Wharton's Digest, 148.]

[1] Eng. Com. Law Reps. xix. 354.

Negligence.

Where there was no intention either to kill or injure, it seems also to be a question of fact for the jury, whether the prisoner conducted himself carelessly and negligently, and whether he might not, by using proper precaution, have prevented the death. According to the opinion of Sir Michael Foster, the law does not require the *utmost* caution to be used; it is sufficient that a *reasonable* precaution, what is usual and ordinary in like cases, be taken (*i*), and this appears to be a question of fact for the jury (*k*) (1).

Constructive malice.

By *constructive* malice, or malice in law, it is meant that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit (*l*), and carry with them the plain indications of a heart regardless of social duty, and fatally bent upon mischief (*m*). Here the law itself infers malice from the circumstances found by the jury, without their special finding of an actual intention to destroy or do great bodily harm to the deceased.

It would be manifestly inconsistent with the design of this work to enter into a discussion of those circumstances and particulars which constitute constructive malice, or malice in law. In point of practice, it is usual and proper to be prepared with evidence of all the circumstances connected with the transaction which tend to explain its real nature. In particular, it is essential to show what the real intention and object of the prisoner was, although it fell short of a deliberate design to take away the life of the deceased; that his intention was to commit some other felony, or a trespass, or some other unlawful act, or that the death resulted from carelessness and culpable want of caution; the nature and circumstances of the quarrel and provocation, where such have existed; the nature of the weapon used, and the mode of procuring it.

Malice in case of killing by accident.

Where the defence is that the death was occasioned by *accident*, the nature *of the act itself which occasioned the death, and the real motive and intention of the prisoner, are the proper subjects of evidence; but the conclusion as to the quality of the offence, as founded upon such facts, is usually a question of law. If the act was done in the prosecution of a felonious intention, it will amount to murder (*n*) (A). But it is not murder,

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(*i*) Fost. 264, 5.

(*k*) Ibid.; and the case there cited; where it was left by Mr. J. Foster as a question for the jury, to say whether the prisoner, on a charge of manslaughter, had not reasonable grounds for believing that a gun which went off accidentally in his hands, was not loaded. (*l*) Fost. 256.

(*m*) Ibid. 257. [*U. S.* v. *Conell*, 2 Mason, 91. *U. S.* v. *Ross*, 1 Gallison, 628.] This is the general inference of that most able and learned Judge, upon a consideration of the authorities and decisions on this subject. It is plain, however, that the terms of such a description are of too indefinite a nature to supply any certain rule or test for mere legal decision; and it may probably appear on inquiry that these cases turn upon the question, whether the defendant did not wilfully place the life of another in danger and jeopardy by an act or unlawful omission likely to kill, and which did kill another person. This is a question of fact rather than of law. If he did so, then the case properly falls within the description of one regardless of social duty, and fatally bent upon mischief. If, on the other hand, he were guilty of no such act or unlawful omission as was likely to produce such a consequence, it would be difficult to suppose any case which would fall under this branch of the law against murder. See the observations made on this subject in the 4th report of the Crim. Law Commissioners.

(*n*) Fost. 258. If *A.* shoot at the poultry of *B.*, and accidentally kill a man, if he intended to steal them, it is murder; but if he intended merely to kill them, it is but manslaughter; and it is not even manslaughter if the wrongful act be merely *malum prohibitum;* as, where an unqualified person uses a gun to kill game. Fost. 259. See the next note.

(1) [If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm of the patient. *Commonwealth* v. *Thompson*, 6 Mass. Rep. 134.]

(A) (On the trial of an indictment for murder, where there is no pretence that the prisoner killed the de-

but manslaughter, if the prisoner intended to commit a mere trespass when he accidentally killed the deceased (*o*).

So malice may be inferred where an act unlawful in itself is done deliberately, and with intention of mischief or great bodily harm to those on whom it may chance to light, and death is occasioned by it (*p*). And although such an original intention should not appear, but such unlawful act be done heedlessly and incautiously, the offence will amount to manslaughter (*q*).

If *A.* intend to beat *B.* in anger, or from preconceived malice, and death ensues, he is guilty of murder, or of manslaughter at the least, although he did not *intend* the death (*r*); for what he did was *malum in se*, and he is answerable for the circumstances; but the nature of the offence in such cases must depend upon the particular circumstances.

If there was an *actual intention* to kill or do great bodily harm, the offence would undoubtedly be murder, without regard to the *means* used; but if there was a mere intention, as evidenced by the act itself, to do some bodily injury, the complexion of the defence will depend upon the nature of the instrument, and the manner and circumstances of using it, and the offence will be murder or manslaughter accordingly as these facts do or do not indicate that brutal or malignant intention which constitutes malice in law (*s*).

The inference of malice frequently arises from the means used by the prisoner; as where he has used such an instrument as was likely to produce fatal consequences, and where if he had used one of a different nature, and *not likely to occasion death*, the offence, on account of the provocation previously given, or other circumstances, would have amounted to manslaughter only (A). Thus if a master or parent, in the correction of a child, exceed the bounds of moderation, either in the *measure* of it or in the *instrument* made use of, it will be murder or manslaughter, according to the circumstances of the case (*t*).

*And even in the case of homicide by a person following his lawful occupation, any degree of carelessness and negligence, through which the death was occasioned, will constitute him guilty of manslaughter, and he must show in defence that he used all due caution (*u*). If the driver of a cart *715

Negligence in a lawful occupation.

(*o*) Foster, 258. Ld. Coke seems to have doubted whether, even in the latter case, the offence would not amount to murder; but Mr. J. Foster was of opinion that it would amount to no more than manslaughter; and even in the former case the rule of law is exceedingly ambiguous and unsatisfactory, as every rule must be which is not founded upon the degree of moral guilt, or upon grounds of public convenience or necessity. Upon what ground can it be reasonably contended that a man ought to suffer death because he has from pure accident killed another, whilst he was committing an act for which he probably would not have been imprisoned for six months? The immorality of his act is not increased by a circumstance wholly unforeseen and unexpected, and the mere possibility that death may be occasioned in the course of committing a larceny, and that the punishment, when such an accident does happen, may be capital, is not likely to operate in the least degree to diminish the number of offenders.

(*p*) Fost. 261. (*q*) Ibid.

(*r*) Ibid. 259; 1 Hale, 440, 1; Kel. 127.

(*s*) See East's P. C. 257; Kel. 127. If one throw a large stone at another with a deliberate *intention to hurt*, but not to kill, it will be murder. 1 Hale, 440, 1.

(*t*) Fost. 262; Hale, 474. [*U. S.* v. *Connell*, 2 Mason, 91.]

(*u*) Fost. 262, see the 4th Report of the Crim. Law Commissioners. The crime of manslaughter includes

ceased while engaged in a riot or other misdemeanor not amounting to a felony by misadventure, but the death ensued in consequence of an intentional violence upon the person of the deceased, whether the prisoner designed to kill or not he is not entitled to have the jury instructed that they cannot convict of murder if they should come to the conclusion that the mortal wound was inflicted in committing or attempting to commit an offence which of itself is less than a felony. *The People* v. *Rector*, 19 Wend. 569.)

(A) (Malice is presumed from the nature of the instrument which caused the death and the want of legal provocation, and it is a matter of indifference whether the temper of the prisoner is mild or violent. *State* v. *Merrill*, 2 Dev. 264.)

had notice of the mischief likely to ensue, and yet drove on, he is guilty of murder; if he might have seen the danger but did not look before him, he is guilty of manslaughter, for there was a want of due circumspection; if the accident happened in such a way that *no want of due care* can be imputed to the driver, it will be but accidental death (*x*). And in general it is not sufficient that the act from which death resulted was lawful or innocent; it must be done in a proper manner, and with due caution (*y*) to prevent mischief (*z*).

If a person not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, or he may have a good one, but he has no right to hazard the consequences in a case where medical attendance may be obtained (*a*).

*716 Proof where the inference of malice re-

*Although it is, as has been seen, a general rule, that circumstances in justification, excuse, or alleviation, are to be proved by the prisoner, yet where the inference or implication of law as to malice results from the legal authority and situation of the deceased, that authority must be

all cases of voluntary and merely extenuated homicide, and also all involuntary homicide, which is not by misadventure; and homicide is by misadventure when a person doing an act without intention of bodily harm to any other person, and using proper caution to prevent danger, happens to kill another, provided the act done be either a lawful act, or be not attended with risk of hurt to the person of another. 1 East's P. C. 260. The crime of manslaughter includes all cases. 1st. Where death results from any act or unlawful omission done or omitted with intent to hurt the person of any other. 2d. Where death results from any wrong wilfully occasioned to the person of any other. 3d. Where death results from any unlawful act or unlawful omission, attended with risk of hurt to the person of any other. 4th. Where death results from the want of due caution in doing an act, or neglecting to prevent mischief, which the offender is bound in law to prevent.

(*x*) Kel. 40.

(*y*) The law does not require the utmost caution that can be used, but only such a reasonable degree of caution as is appropriate to the nature of the act and the probability of danger in the particular case. See 4th Report of the Crim. Law Commiss. p. 42; and 1 East's P. C. 265; Fost. 264.

(*z*) Fost. 262. *R.* v. *Higgins*, Dyer, 128; 9 St. Tr. 112. *R.* v. *Rampton*, O. B. 1664. See the case, Kel. 41, and Fost. 263. A man found a pistol in the street, which he had reason to believe was not loaded, he having tried it with the rammer; he carried it home and showed it to his wife, and she standing before him, he pulled up the cock and touched the trigger; the pistol went off, and killed the woman. This was ruled to be manslaughter. Mr. J. Foster, with great reason, as it seems, expressed his disapprobation of this case; and adds, that admitting the judgment to be strictly legal, it was, to say no better of it, *summum jus*.

(*a*) *R.* v. *Simpson*, cor. Bayley, J. at Lancaster,[1] 4 C. & P. 398, in the note. A mariner on board a vessel, whose wife had used opium, recommended a labourer on board the vessel, who complained of pains in his head, to take opium, and he sent for one pennyworth and gave it to the labourer, who took the whole; and it was left by Alderson to the jury, to say, whether he was not guilty of gross negligence. York Spr. Ass. 1834.

A publican administered large quantities of Morison's pills to a young man labouring under smallpox. He attended him for ten days, administering the pills (composed of gamboge, aloes, colocynth, and cream of tartar) in large quantities, which, according to the testimony of medical men, were highly diuretic and violent purgatives, and improper in reference to the disorder. Lord Lyndhurst, C. B. left it to the jury to say whether the prisoner had not, by the administration of severe medicines in a dangerous complaint, of the nature of which he was ignorant, occasioned the death of the deceased. If the opinion of the jury was, that the death was accelerated by the medicines, and that the prisoner had administered them in gross ignorance, the jury ought to find him guilty. He was convicted, and suffered six months' imprisonment.

If a person *bona fide* and honestly exercising his best skill to cure a patient, perform an operation, which causes the patient's death, he is not guilty of manslaughter, and it is immaterial whether the party be a regular or irregular practitioner. *R.* v. *Van Butchell*,[2] 3 C. & P. 629; contrary to the dictum in Coke, 4 Inst. 251. And see 1 Hale's P. C. 429; 4 Bl. Com. C. 14. The question is whether he has been guilty of criminal misconduct, arising either from gross ignorance or criminal inattention. *R.* v. *Long*,[3] 4 C. & P. 398, 423. The death having been occasioned by the application of a powerful lotion to the skin, it was held that the prisoner might show that the same lotion had been applied to other patients, and that they had been treated in the same manner. *Ib.* & 1 Hale's P. C. 429 (*a*). Where an irregular practitioner in midwifery mistaking an unusual appearance, attempted to remove it by force, and occasioned the death of the patient, it appearing that he had had considerable experience, and that there had been no want of attention, held that he could only be found guilty of manslaughter upon proof of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. *R.* v. *Williamson*,[4] 3 C. & P. 635.

[1]Eng. Com. Law Reps. xix. 445. [2]*Id.* xiv. 493. [3]*Id.* xix. 454. [4]*Id.* xiv. 497.

proved, or in default of proof the offence will in general amount to no more than manslaughter. sults from legal situation of parties.

In general, ministers of justice are specially protected by the law whilst they act in the execution of their duty, and the killing of officers so employed is deemed to be murder, because it is an outrage wilfully committed in defiance of the justice of the kingdom (*b*); such an officer is protected *eundo morando et redeundo* (*c*); and so is every man who acts in his aid, whether he be commanded to assist or not (*d*). In general, if one having *lawful authority* to arrest in either a civil or criminal proceeding, and using *lawful means*, be resisted and killed, it will be murder in all who made or aided in the resistance (*e*).

Those who have *lawful authority* are either, 1st, public officers; or 2dly, private persons.

A public officer acts either, 1st, under a warrant; or 2dly, without one.

By legal process, whether by writ or warrant, is meant a process which is not defective in the framing of it; for if the writ or warrant be legal, although the previous proceedings were irregular, it will be murder to kill the officer, for he was bound to obey it; and therefore it is sufficient in evidence to prove the writ or warrant, without showing the decree or judgment upon which it is founded (*f*). But it is not sufficient to prove the sheriff's warrant to the officer, without producing the writ of *capias*, &c. on which it is founded (*g*). Warrant.

But if the process be defective in the frame of it, or if there be any mistake *in the name or addition of the person upon whom it is to be executed, or if the name of the person or officer by whom it is to be executed be inserted without authority, and after the issuing of the process (*h*), or it be otherwise altered after it has been issued, or if the officer exceed the limits of his authority, and be killed, it is no more than manslaughter in the person whose liberty is so invaded (*i*). So it is if the court from which the process issued wanted jurisdiction (*k*). *717

Without a warrant.—A peace-officer may justify an arrest on a charge of felony, on reasonable suspicion, without a warrant, although it turn out that no felony has in fact been committed; for all that a constable can do is to inform himself of the circumstances, and it is the duty of all persons to submit to the known officers of the law (*l*). Arrest without warrant.

(*b*) Fost. 208, 370; 1 Hale, 457. It seems that in general the killing is deemed to be of malice aforethought, whensoever one unlawfully and forcibly resists any officer or other person lawfully executing, in a lawful manner, any civil or criminal process or other authority for the advancement of the law, or lawfully interposing in a lawful manner for the prevention or suppression of any breach of the peace or other offence, and in so resisting happens to kill such officer or other person. See 4th report of the Criminal Law Commissioners, p. 40; and see East's P. C. 295, where the authorities on the subject are collected.

(*c*) Fost. 309.

(*d*) Ibid.; 1 Hale, 463. If a man be lawfully arrested, and he and his party resist, and a stranger to the facts interposes, the question seems to turn principally on his *intention;* for if he interposes with intent to aid the one party against the other, he does it at his peril, and is guilty of implied malice if he lend aid to the party lawfully arrested, and the officer be killed. *Sir C. Stanley's Case*, Kel. 87. But if he merely interpose, being ignorant of the facts, with intent to preserve the peace, he certainly would not be guilty of murder. East's P. C. 296; 1 Sid. 160. See the *Sissinghurst-house Case*, 1 Hale, 461, 2, 3.

(*e*) Fost. 270, 308.

(*f*) Fost. 311, 312. *R.* v. *Rogers*, East's P. C. 310. As to proof of a writ, see Vol. I.

(*g*) 2 Starkie's C. 205.[1]

(*h*) An arrest upon a warrant in which the officer's name is inserted after it has been signed and sealed by the sheriff, is illegal. *Housin* v. *Barrow*, 6 T. R. 122. *R.* v. *Stokley*, East's P. C. 310. But where a magistrate keeps a number of blank warrants ready signed, and on being applied to, fills them up, the officer may execute the warrant, and consequently it will be murder to kill him. *R.* v. *Inhab. of Winwick*, cited 8 T. R. 455.

(*i*) Fost. 312. (*k*) East's P. C. 309; MS. Sum. 163.

(*l*) *Samuel* v. *Payne*, Dougl. 359; and vide *supra*, 601; and *R.* v. *Ford*, *supra*.

[1]Eng. Com. Law Reps. iii. 315.

By a private person.

A private person, it seems, is a trespasser (*m*), unless a felony has in fact been committed; and where a felony has been committed, and *A.* suspecting *B.* to be guilty, who is in fact innocent, attempts to arrest him, *A.* is not within the protection of the law, and the killing would amount to manslaughter only (1) (*n*); but if a felony has been committed, or a dangerous wound has been inflicted, and the party flies, it is the duty of every one to prevent an escape (*o*).

Notice.

Either a constable or private person may lawfully interpose, on his own view, to prevent a breach of the peace, or quiet an affray (*p*); but in the case of the constable, a notification of the character in which he interposes may, it seems, be implied from his office (*q*); but a private person must give express notice (*r*).

And it seems that a peace-officer has no authority to arrest after the fray is over, and peace has been restored (*s*), except for the purpose of taking an offender before a magistrate to find sureties (*t*).

No private person can justify an arrest in a civil suit (*u*).

Proof of authority.

The fact that the party killed was an officer of justice, such as a constable or other peace-officer, may be proved generally by evidence that he acted in that capacity, without strict evidence of his appointment (*x*). Although a special authority to arrest under a precept be alleged in the indictment,

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*if a legal authority to arrest, but not under the precept, be proved, the variance will not be material (*y*).

Where the deceased was killed in the execution of some authority derived from the articles of war, a copy of them, printed by the King's printer, ought to be produced (*z*). In several instances prisoners have been acquitted of the charge of murder for want of such evidence.

Notification of authority. Malice implied.

Using *lawful means.*—There must in all cases be a notification of the character and object of the party. Where a bailiff rushed abruptly into the bedchamber of a gentleman (*a*), not telling his business nor using words of arrest, and the gentleman, not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber and stabbed him, it was held to be but manslaughter at common law, &c.

Proof of lawful execution of authority.

So where a peace-officer interposes to suppress a riot; for otherwise the parties engaged in the heat and bustle may imagine that the officer takes a part in the riot (*b*). But a small notification in the case of a peace-officer is sufficient; as, if he command peace, or in any other way declare with what intent he interposes (*c*). If he announce his business, it is not neces-

(*m*) 2 Hale, 83, 92; East's P. C. 301. *Qu.* whether the finding of a bill by a grand jury be such *prima facie* evidence of a felony as to warrant the apprehension of the party by a private person. East's P. C. 301.

(*n*) Fost. 318; where Mr. J. Foster says, "This suspicion, though probably well founded, will not bring the party attempting to arrest or imprison within the protection of the law so far as to excuse him from the guilt of manslaughter if he killeth; or, on the other hand, to make the killing amount to murder. I think it would be felonious homicide, but not murder in either case; the one not having used due diligence to be apprized of the truth of the fact, and the other not having submitted or rendered himself to justice; yet in such a case *A.* might justify the imprisonment of *B.*" 1 Hale, 490; *supra*, 603.

(*o*) Fost. 271, 309; East's P. C. 298. *Jackson's Case*, 1 Hale, 464, 481, 489.

(*p*) Fost. 310; 1 Hale, 463; 1 Haw. c. 31, s. 44.

(*q*) Ibid. (*r*) Fost. 272, 311.

(*s*) 2 Inst. 52; 2 Ld. Raym. 1501; Dalt. c. 1, s. 7.

(*t*) 2 Hale, 90. If a felony be threatened the party may be arrested.

(*u*) 1 Haw. c. 28, s. 19. (*x*) *Supra*, 307.

(*y*) *Macally's Case*, 9 Co. 67; East's P. C. 345. (*z*) *Supra*, Vol. I. tit. PUBLIC DOCUMENTS.

(*a*) 1 Hale, 470; Fost. 298. See also the cases cited *supra*, 716, 717.

(*b*) Fost. 310, 311; East's P. C. 314.

(*c*) Fost. 310; 1 Hale, 460, 1. *Gordon's Case*, Leach's C. C. L. 337.

(1) [A well-grounded belief that a felony is about to be committed will extenuate a homicide committed in prevention of the felony, but not a homicide committed in pursuit, by an individual of his own accord. *The State* v. *Rutherford*, 1 Hawks, 457.]

sary that he should produce his warrant, unless it be demanded (*d*); and he is in no case bound to part with the warrant out of his possession (*e*).

An officer cannot, in the execution of civil process, justify the breaking open an outward door or window (*f*); for, in the language of the books, every man's house is his castle, for safety and repose to himself and his family; but if the officer enter by an open door, he may then lawfully remove every obstruction to the execution of his duty (*g*).

The rule is confined to the protection of the owner and his family who are domiciled there; if a stranger take refuge there, it is not his castle, and he cannot claim the benefit of sanctuary within it (*h*).

The rule is also confined to the case of arrests in the first instance; for if a man be legally arrested, and then escape and take shelter in his own house, the officer may, on fresh suit, break open doors to retake him, having first given due notice of his business, and demanded admission, which has been refused (*i*) (1).

It is also confined to civil cases; for in case of a felony committed, or dangerous wound given, or even where a minister of justice is armed with a warrant, in case of a breach of the peace, an outer door may be forced (*j*). But in no case can an outer door be legally broken, unless a previous notification and demand have been made, and a refusal given (*k*).

Indirect evidence.

Next as to indirect evidence.—Where the death has been occasioned *in secrecy*, a very important preliminary question arises, whether it has not resulted from accident, or the act of the party himself, who was *felo de se.*

It sometimes happens that a person determined on self-destruction resorts to expedients to conceal his guilt, in order to save his memory from dis-
*honour, and to preserve his property from forfeiture. Instances have also *719
occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy, by substantiating a charge of murder (*l*). On the other hand, in frequent instances, attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se.* It is well for the security of society that such an attempt seldom succeeds, so difficult is it to substitute artifice and fiction for nature and truth (*m*).

Proof of the prisoner's agency.

Where the circumstances are natural and real, and have not been *counterfeited* with a view to evidence, they must necessarily correspond and agree with each other, for they did really so co-exist; and therefore, if any one circumstance which is essential to the case attempted to be established be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true (*n*).

The question, whether a person has died a natural death, as from apo-

(*d*) 1 Hale, 458, 583; 9 Co. 69. (*e*) East's P. C. 319.
(*f*) Fost. 219; 2 Roll. Rep. 137; Palm. 52; 1 Hale, 458. *Lee* v. *Gansell*, Cowp. 1.
(*g*) *Lee* v. *Gansell*, Cowp. 1. (*h*) 5 Co. 93; 2 Hale, 117; Fost. 320.
(*i*) Fost. 320; Salk. 79; 6 Mod. 173; Ld. Raym. 1028; 2 Roll. Rep. 138; 1 Hale, 459. Laying hold of the prisoner, and pronouncing words of an arrest, is an arrest. Fost. 330.
(*j*) Fost. 320. *Curtis's Case*, Ib. 135; *supra*, 596. (*k*) Ibid.
(*l*) See the trial of *Spencer Cowper*, a barrister, for the alleged murder of Mrs. Stout, at Hertford, during the previous assizes. 5 St. Tr.
(*m*) Vide *supra*, Vol. I. (*n*) Vide *supra*, Vol. I.

(1) [Bail may depute another to take and surrender their principal; and the bail, or the person deputed by him for that purpose, may take the principal in another state, or at any time and in any place, and may, after demand of admittance, and refusal, break open the door of the principal's house, in order to take him. *Nicolls* v. *Ingersoll*, 7 Johns. 146. See also 5 Esp. C. 172. (*Day's ed.*) *note*, 2 H. B. 120.]

plexy, or a violent one from strangulation; whether the death of a body found immersed in water has been occasioned by drowning, or by force and violence previous to the immersion (*o*); whether the drowning was voluntary, or the result of force; whether the wounds inflicted upon the body were inflicted before or after death, are questions usually to be decided by medical skill.

It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted on the one hand from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict, notwithstanding strong, but merely circumstantial evidence against him.

Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion and opinion, rely partly on external circumstances. It is therefore, in all cases, expedient that all the accompanying facts should be observed and noted with the greatest accuracy: such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence, or of any object by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned.

Where it has been clearly established that the crime of wilful murder has been perpetrated, the important fact, whether the prisoner was the guilty agent, is of course for the consideration of the jury, under all the circumstances of the case. Circumstantial evidence in this, as in other criminal cases, relates principally,

Presumptive evidence.

1st, To the probable *motive* which might have urged the prisoner to commit so heinous a crime; for however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to expect

*720 *that some motive (*p*), and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, and the consequence of which is usually so fatal to the criminal.

2dly, The means and opportunity which he possessed for the perpetrating the offence (*q*).

3dly, His conduct in seeking for opportunities to commit the offence, or in afterwards using means and precautions to avert suspicion and inquiry, and to remove material evidence (*r*).

The case cited by Ld. Coke and Ld. Hale, and which has already been adverted to (*s*), is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances that a murder has been committed; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced and injudicious person, ignorant of the nature of evidence, and unconscious that the truth and sincerity of innocence will be his best and surest protection, and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to deceit and misrepresentation.

4thly, Circumstances which are peculiar to the nature of the crime; such

(*o*) See *Cowper's Case*, 5 St. Tr.
(*p*) *Supra*, Vol. I. tit. CIRCUMSTANTIAL EVIDENCE.
(*q*) *Ib.* (*r*) *Ib.*
(*s*) *Ib.*, and 2 Hale, 290.

as the possession of poison, or of an instrument of violence corresponding with that which has been used to perpetrate the crime, stains of blood upon the dress, or other indications of violence.

Upon the general nature and effect of circumstantial evidence, some observations have been already made; and it would be inconsistent with the limits of the present work to enlarge further upon the subject. It is essentially necessary to the security of mankind that juries should convict, where they can do so safely and conscientiously, upon circumstantial evidence which excludes all reasonable doubt; and that it should be well known and understood that the secrecy with which crimes are committed will not secure impunity to the criminal. In acting, however, upon circumstantial evidence, the just and humane rule upon which Lord Hale laid so much stress (*t*), cannot be too often repeated: *Tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiæ quam ex parte justitiæ.*

Evidence by the defendant.

It has been seen that the law infers malice from the act of killing, and that it is incumbent on the prisoner to prove those circumstances in his defence which *justify*, *excuse*, or *extenuate* the act.

Justification. Process of law.

1st. He may *justify* the act by proof that he acted in execution of the process of the law (*u*); that the death was occasioned by the resistance made by the deceased to the execution of a lawful authority (*v*). In such a case it is necessary to prove a lawful authority, and that the officer used legal means to enforce it (*x*), and that the death was unavoidably occasioned by the attempt to enforce the execution of the authority against the party who resisted it (*y*).

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*If a party fly to avoid an arrest for a *felony* which has been committed, or where a dangerous wound has been given, or where an officer is armed with a lawful warrant to apprehend the party for felony, although no felony has been committed, and he *cannot otherwise be taken*, the killing him will be justifiable (*z*); but in the case of any misdemeanor short of felony, and in all civil cases, if the officer kill the party, who flies in order to avoid an arrest, he will be guilty of murder or manslaughter, according to the particular circumstances of the case (*a*).

Self-defence.

The accused may also show in justification that he committed the act in self-defence. If *A.* manifestly intends to commit a felony on the property or person of *B.* by violence or surprise, *B.* is not obliged to retreat, but may pursue his adversary till he find himself out of danger, and if in the conflict *A.* happeneth to die such killing is justifiable (*b*); but in the case of mutual conflict, the party, to excuse himself, must show that he retreated as far as he could before he gave the mortal stroke, and that he killed his adversary through mere necessity to avoid immediate death (*c*) (1).

(*t*) 2 Hale, 290.
(*u*) Fost. 267; 4 Bl. Comm. 178; 1 Hale, 496, 502.
(*v*) Fost. 270.
(*x*) *Supra*, 594, *& seq.*; and 714.
(*y*) It has been said that an officer was guilty of manslaughter because he had not first given back, as far as he could, before he killed the party, who had escaped out of custody in execution for a debt, and resisted being retaken. 1 Roll. R. 189. But this case has since been disapproved of. Fost. 271; East's P. C. 307. In the case of resistance to officers of the customs and excise, see the stat. 9 Geo. 2, c. 35, s. 35, &c.
(*z*) 1 Hale, 489, 490; 1 Haw. c. 28, s. 11; Fost. 271. The pursuit is not barely warrantable; it is what the law requires, and will punish the neglect of. See the case of the *Marquis de Guiscard*, Fost. 271. *Semble*, the finding a bill of indictment by a grand jury for felony will warrant a private person in apprehending the party indicted. 1 Hale, 489, 490; East's P. C. 300, 301. So officers of justice are justified in killing rioters in endeavouring to suppress and disperse a mob (in case it cannot be otherwise suppressed), both at common law and under the Riot Act. See 1 Hale, 53, 494, 495; East's P. C. 304; 1 Geo. 1, stat. 2, c. 5. And so *semble* are private persons.
(*a*) Fost. 271; 1 Hale, 481.
(*b*) Fost. 273, 4; 1 Hale, 481, 484.
(*c*) Fost. 277.

(1) [*Granger* v. *The State*, 5 Yerger, 459. To justify a homicide on the ground of self-defence, it must clearly appear that it was a necessary act, in order to avoid death or some severe calamity. *The State* v. *Wells*, 1 Coxe, 424.]

Excuse. 2dly. *In excuse.*—Proof that the death was not wilfully and intentionally occasioned by the prisoner will not, it has been seen, enure as a defence, unless he can show that the death was an inevitable accident, occasioned by the doing of a lawful act, which he could not, by the exercise of usual and ordinary caution, have avoided (*d*).

Evidence in extenuation. 3dly. The prisoner may, in certain instances, *extenuate* his crime, and reduce it from murder to manslaughter, by proof that the act was committed during a transport of passion and resentment excited by sudden provocation, which for the time subdued his reason; for such evidence repels the inference of that deliberate malice and malignity of heart which is essential to the offence (*e*) (1).

Provocation. Whenever the defendant seeks to shelter himself under the plea of *provocation*, he must prove his case to the satisfaction of the jury (*f*); the *722 presumption *of law is against him till that presumption be repelled by contrary evidence. What degree of provocation, and under what circumstances, heat of blood, the *furor brevis*, will or will not avail the defendant, is usually a question of law arising upon the special facts of the case (A).

Where the sudden occasion is but a mere pretext and excuse to cover deliberate malice, it can never be available, even in extenuation (*g*). Where there is no evidence of any motive for the act, except the sudden provocation, upon which the defendant relies, then, although the criminal nature of the act depends upon the *malice* of the agent (that is, upon malice in its *legal sense*, as evidenced by the facts themselves), yet malice, in this sense, is a necessary legal result and inference from the facts as found by the jury.

The legal distinctions which range themselves under this head, seem to

(*d*) Vide *supra*, 715.

(*e*) Fost. 315; East's P. C. 232. It seems that the guilt of the offender is extenuated where the act being done under the influence of passion from sudden provocation, or of fear, or of alarm, which for the time suspends or weakens the ordinary powers of judgment and self-control, is attributable to transport of passion or defect of judgment so occasioned, and not to a deliberate intention to kill or do great bodily harm. See 4th Report of Crim. Law Commiss.

(*f*) Fost. 293. *Mason's Case*, ibid. 132; East's P. C. 239; 1 Hale, 451; 1 Haw. c. 31, s. 24. In *Mason's Case*, the deceased and prisoner first played at cudgels, then fought in good earnest; being parted, the prisoner left the room in anger, and repeatedly threatened to fetch something in order to stick his brother. In half an hour the prisoner returned: the deceased offered to play at cudgels, to which the prisoner assented, but dropped his cudgel as the deceased approached; the deceased then struck the prisoner two blows on the shoulder; the prisoner immediately put his right hand into his bosom, drew out the blade of a tuck sword, and immediately stabbed the deceased and killed him. The judges held that the killing was wilful murder; the prisoner returned with a deliberate intention to take a deadly revenge for what had passed, and therefore neither the circumstance of the previous blows, nor of the quarrel, made any difference; the blows were plainly a provocation sought on his part, that he might execute the wicked purpose of his heart with some colour of excuse.

(*g*) *Mason's Case*, see the last note.

(1) [*Mitchell* v. *The State*, 5 Yerger, 340. Passion arising from provocation is evidence of the absence of malice, and reduces homicide to manslaughter, but passion without provocation, or provocation without passion, is not sufficient; and where there are both provocation and passion, the provocation must be sufficient. *Pennsylvania* v. *Bell*, Addison, 162. *Same* v. *Honeyman*, ibid. 149. Drunkenness does not incapacitate a man from forming a premeditated design to murder; but as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design. *Pennsylvania* v. *M'Fall*, Addison, 257.

Where it appears, from the whole evidence, that the crime was, *at the moment*, deliberately or intentionally executed, the killing is murder. *Commonwealth* v. *Dougherty*, 1 Browne's Rep. Appx. 221. It is sufficient, if the circumstances of wilfulness and deliberation are proved, though they arose and were generated at this *period* of the transaction. *Ibid. Pennsylvania* v. *M'Fall*, *ubi sup.* See also *United States* v. *Cornell*, Mason, 91.

If the party killing had time to think, and did intend to kill for a minute, as well as an hour or a day, it is wilful and premeditated killing. *Commonwealth* v. *Smith*, and *Commonwealth* v. *O'Hara*, Wharton's Digest, 148.]

(A) (Provoking language does not justify a blow, and if an instrument calculated to produce death be used, the slayer is guilty of murder. *State* v. *Merrill*, 2 Dev. 269.)

depend principally, if not entirely, upon the question, whether, in the absence of previous malice, the act of the defendant, under all the circumstances of the case, can be attributed to the general infirmity and weakness of our nature, or, on the contrary, the facts themselves evince a wicked and vindictive disposition, and malignant spirit, fatally bent upon mischief (*h*); for, as was observed by Sir Michael Foster, "It is to *human frailty*, and that alone, that the law indulgeth in every case of felonious homicide" (*i*). All those facts, therefore, are most material which show the nature and extent of the provocation, and the return made by the prisoner as compared with that provocation, and the interval which has occurred between the provocation and the return made. It is the *nature* of the provocation, and not the *mere effect* of it on the mind of the prisoner, which the law regards; and the sufficiency of the provocation to extenuate the prisoner's guilt is a question of law (*j*).

If one kill another immediately upon a *grave and serious* provocation (*k*) likely to excite great passion, the offence will amount to no more than manslaughter, although the defendant used a deadly weapon; as, where *A.* detects a man in adultery with his wife (*l*), and in the first transport of passion kills him; but even in such a case, if he killed the adulterer deliberately upon revenge, after the fact and sufficient cooling time, it would have been murder. So a severe blow, or wound, occasioning considerable pain and effusion of blood, has been held to be a sufficient provocation to extenuate an immediate act of killing, although by means of a deadly weapon, into manslaughter (*m*).

*In cases of slight and inferior provocation, much depends upon the nature of the return made, and the instrument used. Where a boy had been assaulted, and his father ran three-quarters of a mile, and beat and killed the assailant, it was held to be but manslaughter; but this was so held (*n*) because he struck with a wand or small cudgel, and not with a deadly weapon. *723

No trespass to land or goods (1), or words of reproach, or provoking or insulting actions or gestures, short of an assault (*o*), are sufficient to free an homicide from the guilt of murder; and this rule governs all cases where the prisoner uses a deadly weapon, or otherwise manifests an intention to kill or to do some great bodily harm (*p*). But if on such a provocation by words or gestures, the prisoner strike with a stick, or other weapon not

(*h*) See Fost. Disc. 2, c. 5.

(*i*) Fost. 293.

(*j*) See Fost. Disc. 2, c. 5. Yet it is clearly a question of fact whether the killing be attributable to heat of blood occasioned by the provocation. The provocation must be such as the law recognizes, and not such a slight one that the return made is so excessive and disproportionate to the cause that the killing cannot be attributed to mere heat of blood; where, however, such excess and disproportion do not exist, then whether heat of blood was excited, and whether the act was attributable to heat of blood so excited, seem to be mere questions of fact. See 4th Report of the Crim. Law Commiss.

(*k*) See *Tooley's Case*, 2 Ld. Ray. 1296; 1 East's P. C. 325; Fost. 291; 1 Hale's P. C. 473; 1 Haw. P. C. c. 31, s. 34; 1 East's P. C. 236.

(*l*) 1 Hale 486. 1 Vent. 158. Sir T. Raym. 212.

(*m*) *Stedman's Case*, Fost. 292; where a woman struck a soldier in the face with an iron patten, which drew a great deal of blood, upon which he struck her on the breast with the pummel of his sword, and afterwards pursued her and stabbed her in the back, and it was held to be but manslaughter. But Lord Holt said, that a single box on the ear would not have been a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear. Mr. J. Foster observes upon this case, that the smart of the man's wound, and the effusion of blood, might possibly keep his indignation boiling to the moment of the fact.

(*n*) Fost. 294.

(*o*) *Brain's Case*, Hale, 435. Cro. Eliz. 778; Kel. 131.

(*p*) Fost. 290, 112; 2 Hale, 456.

(1) [No man has a right to defend his property (except his dwelling-house) against a mere trespasser, by making use of a deadly weapon. *The State* v. *Zellers*, 2 Halsted's Rep. 220. *Commonwealth* v. *Drew & al.* 4 Mass. Rep. 391.]

likely to kill, and unluckily, and against the intention of the party, death ensue, it will be but manslaughter (*q*) (1).

Where *A.* found *B.* trespassing on his land, and in the first transport of his passion beat and unluckily killed him, it was held to be manslaughter (*r*); but it would have been otherwise if he had betrayed malice by the instrument used, as if he had beaten the deceased with a hedge-stake (*s*).

In *Holloway's Case* (*t*), where a servant caught a boy in his master's grounds stealing wood, and tied him to a horse's tail, by means of which he was killed, it was held to be murder. In all cases of slight provocation the general rule is, that if it can be collected from the weapon made use of, or from any other circumstance, that the party intended to kill, it will be murder (*u*).

Conflict. Although it be a general rule that no words of reproach, or provoking
*724 *words or gestures, will reduce the offence from murder to manslaughter, yet if upon a *sudden quarrel*, and not upon *preconceived malice* (*v*), parties fight in the heat of blood upon equal terms, and no *undue advantage* be taken by the party who kills the other, the offence will be manslaughter; and it matters not who gave the first blow (*x*). But if *B.* draw his sword and make a pass at *A.*, whose sword is undrawn, and then a contest ensue, in which *A.* is killed, it will be murder in *B.*, for he sought the blood of *A.*; but if *B.* had first drawn, and waited till *A.* had drawn, it would have been manslaughter (*y*). So where *A.* threw a bottle with great force at the head of *B.* and immediately drew his sword, and *B.* returned the bottle at the head of *A.* and wounded him, and then *A.* stabbed *B.*, it was held to be murder; for *A.* in throwing the bottle manifested an intention to do some great mischief, and his drawing immediately showed that he intended to follow it up (*z*). The plea of provocation is in no case available where the offender either seeks the provocation as a pretext for killing or

(*q*) Fost. 290. In *Brain's Case*, 1 Hale, 455, it is stated that Watts came along by the shop of Brain, and distorted his mouth, and smiled at him. Brain killed him; and held to be murder. But note, it does not appear how he killed him. See *Lord Morley's Case*, 1 Hale, 455; Kel. 55.

(*r*) 1 Hale, 473.

(*s*) Fost. 291; Ibid. 94. Even if a deadly weapon be used, but not in such a way as to show malice, it will be but manslaughter. *R.* v. *Rowland Phillips*, Cowp. 830.

(*t*) Pal. 548.

(*u*) Fost. 291. See the case of *Tranter* v. *Reason*, Fost. 293, and Str. 499; where the case seems to have been erroneously reported, and where it is represented that Mr. Lutterel having struck a sheriff's officer a slight blow with a cane, the officer and his companion fell upon him, stabbed him in nine places, and shot him whilst he lay on the ground entreating for mercy; and Mr. J. Foster intimates his opinion in very strong terms, that the circumstances constitute wilful murder; but it appears that the facts were misreported. See also the case of *Willoughby & another*, East's P. C. 228, Bodmin Summ. Ass. 1791. Two soldiers were refused liquor by a publican at eleven o'clock at night; an hour and a half afterwards, when the door was opened to let out some company, one of them rushed in, and renewed his demand for beer, which was again refused, and on his refusing to depart, and offering to lay hold of the landlord, the latter at the same instant collared him, the one pushing and the other pulling, towards the outer door, where, when the landlord came, he received a violent blow on the head with some sharp instrument from the other soldier, which occasioned his death. Buller, J. held it to be murder in both, notwithstanding the previous struggle; for the landlord did no more in attempting to put the soldier out at that time of night and after the warning he had given, than he lawfully might, which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence that the prisoners came the second time with a deliberate intention to use personal violence. And see *Mason's Case*, *supra*, 721 (*f*).

(*v*) *Supra*, 721. (*x*) 1 Hale, 456.

(*y*) Fost. 295; 1 Haw. c. 31, s. 27.

(*z*) *Mawgridge's Case*, Kel. 128, 9; Fost. 295, 6. *Oneby's Case*, 2 Ld. Raym. 1485; 2 Str. 771.

(1) [The general rule is, that words are not, but that blows are, a sufficient provocation to make a homicide manslaughter. *The State* v. *Tackett*, 1 Hawks, 210. But it exists in the very nature of slavery, that the relation between a white man and a slave is different from that between free persons; and therefore many acts will extenuate the homicide of a slave, which would not constitute a legal provocation, if done by a white person. *Ibid.* And a person charged with the murder of a slave, may give in evidence that the deceased was turbulent, and that he was insolent and impudent to white persons in general. *Ibid.*]

doing great bodily harm, or endeavours to kill or do great bodily harm before provocation given (*a*).

In every case of homicide upon provocation, if there be time for passion to subside, and reason to interpose, such homicide will amount to murder (*b*). Where, however, an interval has occurred between the quarrel and the combat, and there be a doubt whether the parties when they fought were still in heat of blood, it seems to be a question of fact rather than of law, whether they acted coolly and deliberately, or under the influence of passion. It seems, in all cases of a defence of this nature, to be a question of fact, whether the prisoner yielded to sudden infirmity of temper occasioned by a provocation recognized by law, or by a malicious and deliberate artifice sought the provocation for the purpose of wounding or destroying (*c*). If a man encourage another to destroy himself, and is present whilst he does so, he is guilty of murder as a principal (*d*).

Upon a prosecution for a murder committed abroad by one subject upon another, under 9 Geo. 4, c. 31, s. 7, the jury ought to be satisfied that the prisoner was a British-born subject; but the declaration of the prisoner as to his place of birth unexplained is, as against himself, evidence to go to the jury (*e*). Where the body of the infant was found in a bed amongst the feathers, but there was also proof of the mother having sent for a surgeon and provided clothes, held that it negatived the charge of concealment (*f*).

Accessories, &c.

If *A.* require *B.* to procure some one to murder *C.*, and *B.* procure *D.* to do it, *A.* is an accessory before the fact to *D.* (*g*). So it is a general rule, that if *A.* command *B.* to do an unlawful act, he is accessory to all that ensues upon the execution of that act (1). If he command *B.* to beat *C.* and *B.* kills *C.*, *A.* is accessory to the murder, for his command naturally tended to endanger the life of *C.* (*h*). So if *A.* command *B.* to do an unlawful act, and *B.* executes the act in substance, although he deviates in particular circumstances, *A.* is accessory to the offence; as for instance, if *A.* command *B.* to poison *C.*, and he stab or shoot him (*i*). It is otherwise where *B.* departs from the command in *substance;* as where *A.* directs *B.* to beat *C.* with a small stick, and he beat him with a bludgeon, or wound him with a sword (*k*); for there was no command to do anything which would probably occasion death.

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NEGLIGENCE (*l*).

General principle.

Negligence may be considered, 1st, generally as a test of civil or criminal liability. A gross and vicious disregard of the interests of others

(*a*) See 4th Report of the Crim. Law Commiss. p. 39.

(*b*) Fost. 296, and *supra*, 721.

(*c*) As where *A.* bade *B.* take a pin out of his sleeve, with intent to take occasion to strike or wound (1 Hale, 457), or *A.* with the like intent offers *B.* a pint of ale to strike him. 1 Haw. c. 31, s. 24. *Mason's Case*, *supra*, 721.

(*d*) *R.* v. *Dyson*, Russ. & Ry. C. C. L. 523. (*e*) *R.* v. *Helsham*,[1] 4 C. & P. 394.

(*f*) *R.* v. *Highley*,[2] 4 C. & P. 366. (*g*) Fost. 125.

(*h*) 2 Haw. P. C. c. 29, s. 18; 4 Bl. Com. 37; 1 Hale, 435. So if *A.* direct *B.* to rob *C.*, and *B.* kills *C.* in the attempt; for the death is the immediate effect of an act done in the execution of a felonious command. 2 Haw. c. 29, s. 18.

(*i*) 2 Haw. c. 29, s. 20; 4 Bl. Com. 37. (*k*) 1 Hale, 436.

(*l*) As to the cases in which negligence in the performance of a contract may be set up as a defence to an action for remuneration for services performed, vide *supra*, 105, and *infra*, tit. Work and Labour.

(1) [If one commit suicide in consequence of the counsel and persuasion of another, the latter is guilty of murder, even though the *felo de se* were under sentence of death. *Commonwealth* v. *Bowen*, 13 Mass. Rep. 356.]

[1]Eng. Com. Law Reps. xix. 438. [2]*Id.* xix. 421.

is not distinguishable either in point of moral guilt, or evil results, from a malicious intention to injure; and therefore, where a man so uses even that which is his own carelessly and negligently, and without a reasonable degree of care and caution not to injure others, where injury is likely to ensue, he is usually not only civilly but even criminally responsible for the consequences (*m*). It may be regarded as an important and fundamental principle of adjudication in cases where a loss occasioned by spoliation or fraud must fall on one or other of two innocent persons, that he through whose negligence or want of caution the injury has been effected should bear the loss (*n*).

In the next place, negligence may be regarded as a species of fraud, being a breach of some undertaking, either express or implied. In this point of view its effect will at present be considered.

Particulars of proof.

Where the plaintiff complains of an injury resulting from the negligence or unskilful conduct of the defendant, in the performance of some work or duty undertaken by the latter, he must, whether the action be framed in contract or in *tort*, prove, 1st, The contract or undertaking on the ground of which the defendant acted (*o*). 2dly, The negligence of the defendant. 3dly, The loss which has resulted from it, according to the allegations in the declaration (*p*); or so much of these essentials as is put in issue by the new rules (*q*); the degree of negligence which is essential to the action varies much in reference to circumstances. According to the soundest principles of morality, the very foundation of the law itself (*r*), "whoever undertakes

*726 *another man's business, makes it his own, that is, promises to employ upon

Where the defendant acted without reward.

it the same care, attention and diligence, that he would do if it were actually his own; for he knows that the business was committed to him with that expectation, and with no more than this." This principle seems to govern all cases where one man acts *gratuitously* for another, whether the business in which he acts does or does not import particular skill and knowledge. If the party act *gratuitously*, and in a situation which does not import particular skill and experience, and act *bonâ fide* to the best of his ability, and with as much discretion as he would exercise in his own affairs, he is not liable to an action for any loss which ensues (*s*).

Thus, where a merchant voluntarily, and without reward, undertook to enter a parcel of goods at the custom-house, for the plaintiff, together with a parcel of his own, and made the entry under a wrong denomination, in consequence of which the goods were seized, it was held, that having acted

(*m*) See tit. MURDER.—NUISANCE. The maxim of the English as well as of the civil law is, *sic utere tuo ut alienum non hedas.*

(*n*) If a banker pay the money of a customer on a forged order, the banker and not the customer, who gave no authority, must bear the loss. *Hall* v. *Fuller*,[1] 5 B. & C. 750. And see *Smith* v. *Mason*,[2] 6 Taunt. 76. But where the customer draws a draft so negligently that a stranger easily alters the sum to a larger one, the loss must fall upon the customer. *Young* v. *Grote*,[3] 4 Bing. 253. The same principle applies where a negotiable security is taken without sufficient caution. See *Snow* v. *Peacock*,[4] 3 Bing. 108. *Supra*, tit. BILL OF EXCHANGE; *infra*, tit. TROVER.

(*o*) *Supra*, p. 57, 282. As to parties to the action, vide *supra*, 284, 297. Variance from allegations, *supra*, 297, *& seq.* And *Hill* v. *Tucker*, 1 Taunt. 7, and tit. PARTIES.

(*p*) As to variance, vide *supra*, 58, 284, 299; and Vol. I. tit. VARIANCE. In an action by an infant against a surgeon for mal-treatment; the allegation that the plaintiff employed him is not material, the declaration being framed as on a branch of duty. *Gladwell* v. *Steggall*,[5] 5 Bing. N. C. 733; 8 Se. 60.

(*q*) *Supra*, tit. CASE. *Infra*, tit. NUISANCE. And see the new rules, *infra*, tit. RULES.

(*r*) Paley's Moral Philosophy, 144.

(*s*) See 1 H. B. 162. Ld. Loughborough says, "I agree with Sir W. Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is liable only for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

[1]Eng. Com. Law Reps. xii. 368. [2]*Id.* i. 312. [3]*Id.* xiii. 420. [4]*Id.* xiii. 25. [5]*Id.* xxxv. 292.

bonâ fide, and to the best of his knowledge, he was not liable (*t*). But it seems that in such a case, if a ship-broker, or a clerk in a custom-house, had undertaken to enter the goods, although gratuitously, such a mistake in making the entry would have amounted to gross negligence, since his situation and employment would then have necessarily implied a competent degree of knowledge in making such entries (*u*).

Although in each of the preceding cases the agent acted gratuitously, in the former he was not liable, because he acted to the best of his ability, which was all that he engaged to do; in the latter, he impliedly undertook to exert a degree of skill and knowledge, which he failed to do.

Most then of the cases of this nature, if not all, resolve themselves into a question of understanding and compact. Lord Holt, in the case of *Coggs* v. *Bernard* (*x*), held, that the mandatory was liable, because in such a case *a neglect is a *deceit* to the bailor: for when he trusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him; and a breach of trust undertaken voluntarily will be a good ground of action. *727

Where a party receives a *reward* for the performance of certain acts, he is by law answerable for any degree of neglect on his part; the payment of the money may be considered as an insurance for the due performing of what he has undertaken (*y*). Where the defendant undertook, &c., for reward.

And it seems, that in general where a person professes himself to be of a certain business, trade or profession, and undertakes to perform an act which relates to his particular employment, an action lies for any injury

(*t*) *Shiells* v. *Blackburn*, 1 H. B. 158. [See 6 Mass. Rep. 258.]

(*u*) See Ld. Loughborough's observations, 1 H. B. 162. If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook, *gratis*, to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation, for his gratuitous assistance, who either does not exert all his skill, or administers improper medicines, to the best of his ability, such person is not liable.

(*x*) 2 Lord Ray. 809. Where a law agent in Scotland was employed to place out money on heritable security, and in preparing the heritable bond he drew it up as a public holding (as under the superior lord), although the precept of sasine made no reference to any particular manner, yet held, that as it must be necessarily referred to the manner of holding specified in the deed, and no confirmation by the lord had been obtained, the bond was, as against subsequent incumbrancers, a mere nullity, and the omission such gross negligence or ignorance that the agent was bound to make good the loss sustained by his employer. *Stevenson* v. *Rowand*, 2 Dow & C. 104.

Where the respondents, a mercantile house, received a commission from a party for whom they had before purchased stock, to sell it out when it reached to or above a certain price; held, that from such time they made the stock their own, and were liable to account to their employer for the price, with interest, allowing the dividends he had afterwards received in ignorance of the stock having ever reached the price stated. *Bertram* v. *Godfrey*, 1 Knapp, 381.

In an action by the shippers for loss of goods, against the owners, it is no defence that the owners chartered the ship to the master by an instrument which in substance amounted to nothing more than the appointment of a master, upon an undertaking by him that the ship should earn a certain sum, and all beyond should be for his own benefit, but all loss to be made good by him; and the plaintiffs are not prevented by a knowledge of that instrument from recovering. *Colvin* v. *Newberry*,[1] 8 B. & C. 166; and 2 M. & Ry. 47.

The law implies a duty in the owner of a ship, whether a general one or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course; where there had been a deviation without any justifiable cause, during which the cargo (of lime), in consequence of tempestuous weather, became heated and took fire, and the cargo and vessel entirely lost; held that the owner was liable, and that the wrongful act of the master was a sufficiently proximate cause of the loss. *Davis* v. *Garrett*,[2] 6 Bing. 716.

(*y*) See the observations of Wilson, J. in *Shiells* v. *Blackburn*, 1 H. B. 161. He adds, that where the undertaking is gratuitous, and the party has acted *bona fide*, it is not consistent either with the spirit or policy of the law to render him liable in an action.

[1]Eng. Com. Law Reps. xv. 179. [2]*Id.* xix. 212.

resulting either from *want of skill* (*z*) in his business or profession, or from negligence or carelessness in his conduct (*a*).

In some instances, as in the cases of carriers (*b*) and innkeepers (*c*), the undertaking results as a legal obligation incident to the character in which the defendant undertakes to act; and it is consequently sufficient to show that the plaintiff dealt with him in that character, without proof of any special undertaking or agreement.

Proof of negligence.

2dly. The question of negligence is usually one of fact for the jury. The question may be either one of law, where the case falls within any general and settled rule or principle; or of fact, where no such rule or principle is applicable to the particular circumstances, and where therefore the conclusion of negligence in fact must be found, or excluded by the jury (*d*).

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*In an action against a coach-owner for negligence, proof that the coach broke down, and that the plaintiff was greatly bruised, is *primâ facie* evidence that the injury arose from the unskilfulness of the driver, or the insufficiency of the coach (*e*).

Damage.

3dly. As to the proof of the damage resulting to the plaintiff, see the titles ASSUMPSIT, &c. (*f*).

(*z*) See *Shiells* v. *Blackburn*, 1 H. B. 158. *Moore* v. *Morgue*, Cowp. 480. Pnff. lib. 5, c. 4, s. 3. As to actions against attornies, vide *supra*, 112. See also tit. CARRIERS; and B. N. P. 73, where the general rule is laid down, that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie; as, if a farrier kill my horse by bad medicines, or refuse to shoe (*quære*), or prick him in the shoeing.

(*a*) *Seare* v. *Prentice*, 8 East, 348; where it was held, that case would lie against a surgeon for want of skill, as well as for negligence. (*b*) *Supra*, 282.

(*c*) It has been held, that, though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels, yet that he is still liable for the loss if the goods be stolen during the time while the plaintiff stops as a guest. *Bennet* v. *Mellor*, 5 T. R. 273. [See *Clute* v. *Wiggins*, 14 Johns. 175. *Sereider* v. *Geiss*, 1 Yeates, 34. *Quinton* v. *Courtney*, 1 Hayw. 40.]

(*d*) See the case of *Moore* v. *Morgue*, Cowp. 479, where, in an action by a merchant against his agent, for negligence in not insuring goods, Lord Mansfield directed the jury generally, that if they thought there was gross negligence, or that the defendant had acted *mala fide*, they should find for the plaintiff; if, on the contrary, they were of opinion that he had acted *bona fide*, and to the best of his judgment, then they should find for the defendant. And see *Reece* v. *Righy*,[1] 4 B. & A. 202; where it was left by Abbott, L. C. J. as a question of fact for the jury, whether the defendant, an attorney, had used reasonable care in the conduct of a cause. In the case of *Russell* v. *Hankey*, which was an action against a banker, the defendant having received bills from correspondents in the country, to whom they had been indorsed, had given them up to the acceptor, on receiving cheques for the amount, and Lord Kenyon nonsuited the plaintiff. The Court afterwards refused a rule *nisi* to set aside the nonsuit. See further as to proof of the defendant's breach of undertaking, *supra*, 101. And see 3 Taunt. 117. A broker is employed to insure goods from Gibraltar to Dublin, the principal stating, that he would take the risk from Malaga to Gibraltar Bay; the broker is guilty of gross negligence in insuring *at and from* Gibraltar. He should have stated that the goods were loaded at Malaga, and have effected the insurance at and from Gibraltar Bay. *Park* v. *Hammond*,[2] 2 Marsh. 180. If mice eat the cargo, and thereby occasion no small damage to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board his ship he shall be excused. Roccus. s. 58. Abbott on Shipping, 241. Where the master filled the boiler of a steam-engine at night, in winter, with water, and a frost ensuing, the water was frozen and a pipe burst, and water in consequence escaped into the hold and did damage there; it was held that the jury were warranted in finding that the loss was occasioned by the defendant's negligence, and not by the act of God. *Siordet* v. *Hall*,[3] 4 Bing. 107.

(*e*) *Christie* v. *Griggs*, 2 Camp. 79. *Curtis* v. *Drinkwater*,[4] 2 B. & Ad. 169. If the coach be insufficient the owner is liable although the defect be out of sight, and not apparent on an ordinary examination. *Sharp* v. *Gray*,[5] 9 Bing. 457; and see *Israel* v. *Clarke*, 4 Esp. C. 259. *Aston* v. *Heaven*, 2 Esp. C. 533. *Goodman* v. *Taylor*,[6] 5 C. & P. 410. *Supra*, tit. CARRIERS.

(*f*) See also, tit. CASE, ACTION ON. Where the defendant, a postmaster, agreed to deliver letters in a particular mode, and by mistake omitted to deliver one for two days, which contained a returned bill, but the plaintiff might have given notice of dishonour in due time by sending a special messenger for the purpose, though he might be too late to do so by the post, it was held that he was not liable in damages to the amount of the bill. *Hordern* v. *Dalton*,[7] 1 C. & P. 181.

[1]Eng. Com. Law Reps. vi. 401. [2]*Id.* i. 464. [3]*Id.* xv. 87. [4]*Id.* xxii. 51. [5]*Id.* xxiii. 331. [6]*Id.* xxiv. 385. [7]*Id.* xi. 359.

NOTICE (*g*).

General rules.

The laws and statutes of the realm, and many other matters of universal interest, are presumed to be known to all (*h*). In matters of private concern the fact of notice, or knowledge of particular facts, is often an essential and important circumstance to constitute civil or even criminal (*i*) liability; and this is, in ordinary cases, matter of proof.

It is a rule of law that every one who has an interest in land shall take notice, at his peril, of acts concerning the land (*j*) (A). It is also a general rule that notice is unnecessary where the fact lies equally within the knowledge of both parties (*k*).

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*Every one must take notice at his own peril whether his act be legal. If *A.* having a right of way over the land of *B.*, the latter stop it up and let the land to *C.*, an action lies against the latter for continuing the stoppage, though he had no notice (*l*).

It is uniformly held, in the case of executions, that an act done after notice, is done at the peril of the actor (*m*).

The want of notice is usually sufficient to rebut an inference of acquiescence or of a waver of a forfeiture; and therefore where the receipt of rent is relied on as evidence of a waver of a forfeiture, it is of importance to show that at the time the landlord had notice of the forfeiture (*n*). Notice of forfeiture in such cases is a material and issuable fact (*o*).

If several be bound under an oligation to do a particular act, notice to one is notice to all (*p*). If notice be given to the principal, notice to his agent is unnecessary, for it is the business of the principal to give notice to the agent (*q*). But it seems that in general, where it is necessary to prove

(*g*) In what case a notice by a public company amounts to the exercise of option to purchase, see *R.* v. *Hungerford Market Company*,[1] 4 B. & Ad. 327. As to notice of the appointment as constable at least, see *Fletcher* v. *Ingram*, 5 Mod. 127. As to notice of a prior deposit of title deeds, see *Plumb* v. *Fluitt*, 2 Anst. 432.

(*h*) *Supra*, Vol. I. and Index, tit. NOTICE. Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will make, and no man can tell how to confute him. Selden.

(*i*) Notice is requisite in order to make the rescuer of a felon from the custody of a private person guilty of felony. 1 Hale, P. C. 606.

(*j*) 5 Co. 113. Com. Dig. *Condition*, L. 9. If therefore a woman lessor marry, the lessee ought to take notice, and pay the rent to the husband; and if he pay it to the wife, without the husband's consent, he shall pay it again to the husband. Cro. J. 617.

(*k*) Hardr. 42. 11 Mod. 48. Chitty on Pleading, 321. As to cases where an averment of notice is necessary, see Com. Dig. tit. *Pleader*, C. 73. Where the act on which the plaintiff's demand arises is secret, and lies within his own knowledge, an action cannot be maintained without notice given. Per Holroyd, J., *Bickerton* v. *Burrell*, 5 M. & S. 383. Com. Dig. *Pleader*, C. 73.

(*l*) 1 Roll. R. 222; Ray. 424. And see *Prince* v. *Allington*, Cro. Eliz. 918. So a sheriff may become liable for the tort of his predecessor. Ray. 424. Or a gaoler for the detention of prisoner under a lawful writ, but in a place to which the writ did not extend. *Lambert* v. *Bessey*, Ray. 421; sed vid. *infra*, 745.

(*m*) Per Lord Mansfield, in *Moss* v. *Gallimore*, Doug. 269.

(*n*) See tit. EJECTMENT.

(*o*) 2 Will. Saund. 207, c. *Pennant's Case*, 3 Rep. 646. *R.* v. *Harrison*, 2 T. R. 430.

(*p*) Mo. 555.

(*q*) *Mayhew* v. *Eames*,[2] 3 B. & C. 601.

(A) (A purchaser has not by law constructive notice of all matters of record, but only of such as the title deeds of the estate refer to or put him upon inquiry for. *Dexter* v. *Harris*, 2 Mason's C. C. R. 531. A conveyance with a recital of the intent of a purchase, is a conveyance with notice, and the grantee takes the property subject to the trusts implied as well as expressed. *Cuyler* v. *Bradt*, 2 Caine, C. 326. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other, to the extent of his equity, but notice of an illegal act can have no operation. *Wilson* v. *Mason*, 1 Cranch, 451. A purchaser however for a valuable consideration, without notice, has a good title, though he purchased of one who had obtained a conveyance by fraud. *Jackson* v. *Henry*, 10 John. R. 185. See also *Fletcher* v. *Peck*, 6 Cranch, 87, 133. And one who is about to purchase land is bound to regard information given to him by one who was the agent of the vendor for renting the land, respecting the title. *Lewis* v. *Bradford*, 10 Watts, 67. So notice of a prior incumbrance to an agent is notice to the principal. *Astor* v. *Wells*, 4 Wheat. 446.)

[1]Eng. Com. Law Reps. xxiv. 68. [2]*Id.* x. 195.

notice to a man in a matter which concerns his trade or business, it is usually sufficient to prove notice to his servant or agent (*r*). A notice of prior title to the attorney is equivalent to notice to the client himself (*s*), provided it arise out of the same transaction (*t*).

The same person being co-executor and co-partner, his knowledge of a transaction in the latter capacity affects the right of the executor to sue (*u*).

Where an Act of Parliament enacts that no action shall be brought for anything done or performed in execution or under the authority of the Act, unless notice be previously given, such a notice is necessary in those cases only where the party against whom the action is brought had reasonable ground for supposing that what he did was authorized by the Act (*x*).

*730 *A particular Act of Parliament, giving further protection to magistrates, does not dispense with the necessity of giving notice under the general statute 24 Geo. 2 (*y*).

The rule in equity is, that whatever is sufficient to put a party upon inquiry is good notice (*z*) (A).

Direct proof. The proof is either direct or presumptive; direct where actual notice has been given either orally or in writing (*a*).

(*r*) *Supra*, tit. CARRIER. Facts coming to the knowledge of a party's agent or counsel, are notice to the party. *Norris* v. *La Neve*, R. T. Hardw. 329.

(*s*) *Merry* v. *Abney*, 1 Ch. C. 38. *Brotherson* v. *Holt*, 2 Vern. 594, 609; 1 Bro. C. C. 244.

(*t*) Fitzg. 207; 3 Atk. 291; Bac. Ab. Ev. A. 2.

(*u*) —— v. *Adams*, 1 Young, 117.

(*x*) *Cooke* v. *Leonard*,[1] 6 B. & C. 351, where the defendants had removed a dromedary from a private stable, and attempted to justify under a local Act, which (*inter alia*) prohibited the exhibition of any beast in the streets. So in *Lawton* v. *Miller*, cited Ib., where a custom-house officer seized a man going abroad, hinking he was an artificer. *Morgan* v. *Palmer*,[2] 2 B. & C. 729, where a justice exacted a fee from a publican for renewing his license. *Secus*, where the act is done *bona fide*, and may reasonably be supposed to be within the statute; as where a magistrate being authorized to commit a party for riding on the shafts of a cart, committed him for being on the shafts whilst the cart was standing still. *Bird* v. *Gunston*, cited by Bayley, J., 8 B. & C. 354. And see *Beechey* v. *Sides*,[3] 9 B. & C. 806; *supra*, 588 (*c*), 506 (*q*).

Where the defendant, a fenreeve of a parish, conceiving the plaintiff to be trespassing without any authority, had, after desiring him to desist, caused him to be apprehended; held, that having reason to suppose he was acting under 7 & 8 G. 4, c. 30, s. 4, he was entitled to notice of action. *Wright* v. *Wales*,[4] 5 Bing. 336. Where a scavenger, appointed by the Commissioners of Sewers for London, seized a cart and horse (supposed to contain cinders), and assaulted and imprisoned the driver (plaintiff), and beat the horse; held that it was within the section of the local Act 57 G. 3, c. 19, s. 136, requiring twenty-one days' notice of action for anything done in pursuance and by authority of that Act. *Breedon* v. *Murphy*,[5] 3 C. & P. 574. Where the treasurer of the West India Dock Company was sued in trover for goods deposited in the company's warehouses; held that he was entitled to fourteen days' notice given by 39 G. 3, c. 69, s. 185, although he had delivered over the goods upon an indemnity, it being the act of the company through him. *Sellick* v. *Smith*,[6] 11 Moore, 459. The protection under statutable provisions of this description is not confined to actions of tort. Under such provisions in a local Act, a toll-collector is entitled to notice. *Greenway* v. *Hurd*, 4 T. R. 553; *Waterhouse* v. *Keen*,[7] 4 B. & C. 200. *Secus*, in case of a contract made by an officer, to whom similar provisions are applicable under a local Act. *Fletcher* v. *Grenwell*, 4 Dowl. P. C. 166.

(*y*) *Rogers* v. *Broderip*,[8] 9 D. & R. 194.

(*z*) *Smith* v. *Low*, 1 Atk. 490. The knowledge of a practice among publicans to deposit leases with their brewers has been held to be such notice as ought to put a prudent man upon inquiry, so as to give an equitable mortgage by the deposit of the copy of a court roll a priority over a legal mortgage. *Whitbread* v. *Jordan*, 1 Young, 303. *Ex parte Warren*, 19 Ves. 202. *Winter* v. *Lord Anson*, 3 Russ. 493.

(*a*) Where a statute requires reasonable notice, it is not essential that the notice should be in writing. 5 B. & A. 539.[9]

(A) (It is a general rule that whatever is sufficient to put the party upon inquiry is good notice. Where a party has knowledge of the fact, he has notice of the legal consequences resulting from those facts. *The Ploughboy*, 1 Gallis, C. C. R. 41. Knowledge that another has a claim to land is enough to put the party on inquiry, and charge him with presumptive notice, which is where the law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. *Jackson* v. *Cadwell*, 1 Cow. 622. Knowledge of a material fact imparted by a director of a bank to the board at a regular meeting is notice to the bank. *Bank* v. *Whitehead*, 10 Watts, 397. Vague reports and rumours from strangers, and suspicion of notice, though a strong suspicion, are not sufficient ground on which to charge a purchaser with notice of a title in a third person. *Hagg* v. *Mason*, 2 Summers C. C. R. 100.)

[1] Eng. Com. Law Reps. xiii. 195. [2] *Id.* ix. 232. [3] *Id.* xvii. 502. [4] *Id.* xv. 462. [5] *Id.* xiv. 458. [6] *Id.* xiii. 66. [7] *Id.* x. 310. [8] *Id.* xxii. 387. [9] *Id.* vii. 183.

Although it be a general rule that secondary evidence shall not be admitted as to the contents of any written document in the possession of the adversary, unless notice has been given to produce it, yet notice to produce the latter notice is unnecessary, for the obvious reason, that if it were, the same necessity would extend to every successive notice *ad infinitum* (1). Doubts have sometimes occurred at *Nisi Prius* upon the question, to what notices the exception extends (*b*), and whether it applies to notices in general, such as notices of the dishonour of bills of exchange, &c. In principle, it seems to be clear that the exception is limited to the case of a notice to *produce some other document* for the purpose of evidence in the cause; all other cases of notice are within the general rule, but not within the exception. The particular contents of a notice to quit may be as essential to the cause as those of any other document, and it may therefore be as material to require the best evidence in that case as in any other. Such a document is essentially distinguishable from a mere formal notice to produce an instrument in evidence: its contents create or vary the rights of the litigant parties; it is part of the *res gestæ*; and the objection which excludes the necessity of proving a notice to produce a notice, namely, that an infinite series of such notices would be equally necessary, is wholly inapplicable, the nature and object of the two documents being entirely different. Notice to produce a notice, when unnecessary.

In an action against the surety, on an idemnity bond conditioned to pay to the plaintiffs what should be due from the principal, within six months after *notice*, Lord Ellenborough held, that in order to let the plaintiff into proof of a written notice to the defendant, of the balance due, the usual preparatory proof of notice to produce the document was necessary; for the notice to the surety to pay the money was not a mere formal notice, but *a statement of what was due (*c*). The same principle seems also to apply to notices of the dishonour of bills of exchange (*d*), notices to quit (*e*), and all other notices which are part of the *res gestæ*, upon the contents of which the legal rights and situation of the litigant parties materially and essentially depend (*f*). *731

The Judges have resolved that a written copy of a letter, giving notice of the dishonour of a bill of exchange, and made at the same time, was sufficient without proof of notice to produce the original (*g*). This case, however, seems to have been decided on the ground that the action was brought on the very bill to which the notice related; in a later case it was held (*h*), that an examined copy of a letter giving notice of the dishonour of a bill of exchange (not the subject of the action) was not receivable in evidence, without notice to produce the original. How proved.

It seems to be sufficient in all cases to prove the service of a duplicate

(*b*) Vide *supra*, 364.

(*c*) *Grove & another* v. *Ware*,[1] 2 Starkie's C. 174.

(*d*) In *Langdon* v. *Hulls*, 5 Esp. C. 157, and *Shaw* v. *Markham*, Peake's C. 165, notice to produce the letter containing notice of the dishonour of a bill was held to be necessary; in *Ackland* v. *Pearce*, 2 Camp. C. 601, the proof of the notice to produce was held to be unnecessary; so in *Roberts* v. *Bradshaw*,[2] 1 Starkie's C. 28.

(*e*) Vide *supra*, p. 417.

(*f*) And, as it seems, the same principle also applies to notices of action to justices and others required by particular statutes. It is essential that the Courts should see that the requisitions of the particular statute have been complied with, and this is best proved by means of the notice itself or by proof of a duplicate original.

(*g*) *Kine* v. *Beaumont*,[3] 3 B. & B. 288.

(*h*) By Abbott, C. J. in *Lanauze* v. *Palmer*,[4] 1 M. & M. 32.

(1) {*Eisenhart* v. *Slaymaker*, 14 Serg. & Rawle, 153.}

[1]Eng. Com. Law Reps. vii. 300. [2]*Id.* ii. 281. [3]*Id.* vii. 440. [4]*Id.* xxii. 239.

notice (*i*). Notice to produce a document may be served, as has been seen, either on the adverse party or his attorney (*k*), in criminal as well as civil proceedings (*l*). Service at the dwelling-house is sufficient, unless some statute requires personal service (*m*). Some instances of presumptive evidence of service have already been referred to (*n*). Evidence of a notice by parol is usually sufficient (*o*).

Service of an order of removal by justices must either be by the delivery of the order itself, or by leaving a copy of the order and at the same time producing the original (*p*). Where notice is alleged, it is not sufficient to *732 *prove circumstances which excuse notice (*q*); but it is sufficient to prove a notice which, under the particular circumstances, was given within a reasonable though not within the usual time (*r*).

Presumptive and constructive notice.

In some instances presumptive evidence of notice is sufficient; as by showing that the notice was contained in a newspaper which the party to be affected with the notice usually read (*s*) (A). It has been held, that a recital in a deed is constructive notice of the contents to a party to the deed (*t*). But notice of the contents of the deed cannot be inferred from the mere fact that the witness attested the execution of the deed by a surety.

(*i*) *Jory* v. *Orchard*, 2 B. & P. 41. *Gotlieb* v. *Danvers*, 2 Esp. C. 455. *Anderson* v. *May*, 2 B. & P. 237. *Philipson* v. *Chase*, 2 Camp. 110. *Supra*, Vol. I. tit. WRITTEN EVIDENCE. And (*semble*) there is no difference between a duplicate original and a copy made at the time. *Kine* v. *Beaumont*,[1] 3 B. & B. 288.

(*k*) *Supra*, Vol. I. tit. WRITTEN EVIDENCE. *Attorney-General* v. *Le Merchant*, 2 T. R. 201. *Cates* v. *Winter*, 3 T. R. 306; Peake's Ev. 115. Where there is an agent in town, notices in the course of the cause ought to be given to him, and not to the attorney in the country; per Buller, J., *Griffiths* v. *Williams*, 1 T. R. 711; and see *Hayes* v. *Perkins*, 3 East, 568. As in the case of executing a writ of inquiry. Ibid.

Service of a copy on any person resident at or belonging to the place, entered by an attorney in the book of the Clerk of Pleas of Exchequer, is good service; R. G. Excheq. M. and Tr. 1 W. 4. Service of rules, notices and orders, must be made before nine at night; R. G. Hil. 2 W. 4. It is not essential, except in cases of attachment, that the original should be shown, unless demanded. Ib.

(*l*) Ibid.

(*m*) Per Mansfield, C. J., *Waters* v. *Taylor*, Westm. June 24, 1813. *Logan* v. *Houlditch*, 1 Esp. C. 22. Where notice is to be given at the place of abode, it seems that notice given at a place of business where neither of the plaintiffs slept, but a servant only, is not sufficient. *Johnson* v. *Lord*,[2] 1 M. & M. 444. Where notice is required, proof ought to be given in the first instance as the foundation for the other evidence. Ib.

(*n*) See the case of *Champneys* v. *Peck*, *supra*, 110, 228.

(*o*) *Supra*, Vol. I. tit. WRITTEN EVIDENCE. *R.* v. *Justices of Surrey*,[3] 5 B. & A. 439. But the properest course is to serve a written notice; and Gould, J., at Exeter, held a parol notice to produce a deed to be insufficient.

(*p*) *R.* v. *Alnwick Inhab.*,[4] 5 B & A. 184. (*q*) *Supra*, 229.

(*r*) *Field* v. *Thrush*,[5] 8 B & C. 387.

(*s*) See tit. PARTNERS. Proof of notice being advertised in a county newspaper is not sufficient proof of notice to a party, without some proof that he took in the paper in question. *Norwich and Lowestoff Navigation Company* v. *Theobald*,[6] 1 M. & M. 153. Where notice was to be published in the Northampton and Cambridge newspapers, there being but one at each place, it was held to be sufficient to advertise in those, although others were afterwards established. *Tibbetts* v. *Yorke*,[7] 5 B. & Ad. 605.

(*t*) *Prosser* v. *Watts*, 6 Madd. 59. Title-deeds, as laid before a counsel or attorney, or anything which could not be supposed to make an impression on the memory, shall not be taken as constructive notice. *Ashley* v. *Bayley*, 2 Ves. 370. As to the effect of a Registry Act as notice, see Lord Redesdale's judgment in *Bushell* v. *Bushell*, 1 Sc. & Lefroy, 103.—Lord Hardwicke, in *Hide* v. *Dodd*, 2 Atk. 204, said, that the Register Act (7 Anne, c. 20) is notice to everybody, and the meaning of it was to prevent parol proofs of notice, for it was only in case of fraud that the Courts have broke in upon the statute, though one incum-

(A) Notice in the newspapers is not such a notice to consignees as will put goods discharged on the levee at their risk, unless the knowledge of that notice be brought home to them. *Koln* v. *Packard*, 3 Louis. R. 229. And the same principle applies to a notice to freighters of the departure of a vessel. *Jones* v. *Smalley*, 5 Louis. R. 31. An advertisement in a newspaper, by the drawer of a note, cautioning the public against taking it, and stating that he had a legal and just defence, is not evidence to charge an endorsee with notice, although it appears that the latter was a subscriber to the paper, that it was duly sent to him, and that no complaint was made of its not being received. *Beltzhoover* v. *Bluckstock*, 3 Watts, 20. General notice in a newspaper, printed in a place where a partnership is carried on, is notice of the dissolution of the partnership to all who had no previous dealing with the concern, but it is not sufficient notice to those who have had previous dealings with the partnership. *Watkinson* v. *Bank of Pennsylvania*, 4 Wharton, 402.)

[1]Eng. Com. Law Reps. vii. 440. [2]*Id.* xxii. 355. [3]*Id.* vii. 183. [4]*Id.* vii. 62. [5]*Id.* xv. 242. [6]*Id.* xxii. 272. [7]*Id.* xxxii. 137.

The mere fact that *A.* subscribed a paper writing as a witness, is not in itself sufficient to charge him with notice of the contents (*u*).

Where the father and uncle of the lessor of the plaintiff, being seised in tail, each granted a lease for ninety-nine years of one-third of the premises, and the jury found expressly that the lease had been confirmed by the lessor of plaintiffs, it was held that the father's lease, being only voidable by the issue in tail and not void, he could not, after ten years receiving rent from the lessee, be supposed to have acted in ignorance of his right (*x*).

General principle as to notice of legal proceedings.

It is a rule of law, founded on the first principles of natural justice, that no judgment shall be pronounced against one who has not had notice given of the proceedings, and an opportunity to defend himself (A).

Where trustees under a turnpike Act had power to turn roads through private grounds, and if they could not agree with the proprietors, to summon a jury to inquire of damages, an inquisition under the Act was set aside, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land (*y*).

Upon an appeal against a conviction upon the 5 Geo. 4, c. 83, s. 4, of a party as a rogue and vagabond for indecent exposure in a public place, it was held that a notice of appeal, stating as a ground that he was not guilty of the offence, was sufficient, and signified that all the ingredients of the offence were disputed (*z*).

*733 *As to notice of disputing the steps of bankruptcy, in an action by the assignees of a bankrupt (*a*), notice of an act of bankruptcy (*b*), of the dishonour of a bill of exchange (*c*), notice to prove value given for a bill of exchange (*d*), of non-responsibility by carriers, (*e*) of a distress by a landlord (*f*), of notice to quit by a landlord (*g*), of disputing the value, &c. in an action for goods sold and delivered (*h*), of a robbery, &c. in an action against the hundred (*i*), by the husband not to trust the wife (*k*), notice in actions against justices (*l*), constables, &c., in actions against revenue offi-

brance was registered before another; as in *Ld. Forbes* v. *Nelson*, 4 Bro. P. C. 489. *Blades* v. *Blades*, 1 Eq. Ab. 358, pl. 12; and see *Cheval* v. *Nichols*, 1 Stra. 664. There may be some cases divested of fraud, but then the proof must be extremely clear; clear notice is a proper ground for relief, but a suspicion of notice, though strong, is not sufficient to justify the Court in breaking in upon an Act of Parliament. *Hide* v. *Dodd*, 2 Atk. 204; and see *Le Neve* v. *Le Neve*, 1 Ves. 64; 1 Atk. 254; *Chandos* v. *Brownlow*, 2 Ridg. P. C. 428; *Johnson* v. *Stainbridge*, 3 Ves. 478.

(*u*) *Harding* v. *Curthorne*, 1 Esp. C. 57.

(*x*) *Doe* d. *Southouse* v. *Jenkins*,[1] 5 Bing. 469.

(*y*) *R.* v. *Bagshaw*, 7 T. R. 363. And see *R.* v. *Mayor of Liverpool*, 4 Burr. 2244.

(*z*) *R.* v. *Justices of Newcastle-upon-Tyne*,[2] 1 B. & Ad. 393. A notice of appeal against a distress for an assessment under a Highway Act may be within six days after the levy, although not within six days after the warrant granted. *R.* v. *Justices of Devon*, 1 M. & S. 411. The notice need not disclose the ground on which the appellant objects to the distress. Ib. As to notice of an appeal from a commissioner's direction in writing previous to an award, see *R.* v. *Nicholls*,[3] 1 A. & E. 245.

(*a*) *Supra*, 123.
(*b*) *Supra*, 169.
(*c*) *Supra*, 225.
(*d*) *Supra*, 221.
(*e*) *Supra*, 288.
(*f*) *Supra*, 390.
(*g*) *Supra*, 415.
(*h*) Vide *infra*, tit. VENDOR AND VENDEE.
(*i*) *Supra*, 530.
(*k*) *Supra*, 544.
(*l*) *Supra*, 580.

(*m*) *Infra*, Where, in an action against commissioners, &c. the plea was that the injury arose from so negligently making sewers running under, through, &c. the plaintiff's house, and the evidence was that the sewer did not run close to the plaintiff's house, but to five others; and that the house was damaged, and fell, in consequence of the fall of a stack of chimnies in one of those others; it was held to be sufficient. *Jones*

(A) (Wherever magistrates proceed judicially, both parties to the proceedings are entitled to be heard, and notice to both is indispensably requisite, notwithstanding there is no direction in the act by which the tribunal is constituted, that notice shall be given. *Commissioners of Kinderhook* v. *Claw*, 15 John. R. 537. But appearance is a waver of a want of notice. *Tipton* v. *Harris*, Peck. 414. *Winston* v. *Overseers of Hanover*, 4 Call, 357.)

[1]Eng. Com. Law Reps. xv. 506. [2]*Id.* xx. 509. [3]*Id.* xxviii. 79.

cers, &c. (*m*), or a dissolution of partnership (*n*), of abandonment in an action on a policy of insurance (*o*), in actions for malicious trespasses (*p*), of trial (*q*),—see those titles respectively.

NUISANCE.

Heads of proof.

UNDER the present title, the evidence relating to some *torts* or *nuisances* to persons or personal property, and 2dly, to real property, will be considered, which are unconnected with any immediate contract, but which do not amount to trespasses, the damage being purely consequential. In an action for a wrongful act, or nuisance to his person, or personal property, the plaintiff must prove (*r*), 1st, a wrongful act or omission by the defendant; 2dly, the consequential damage to his own person or property.

Proof of the nuisance.

First. The rule of common law is that of the civil law, *sic utere tuo ut alienum non lædas;* and an action is maintainable to recover damages for any injury resulting to the person or property of the plaintiff, from the carelessness *734 *and negligence of the defendant, or of his agent, in the use or management of his own property (*s*) (A).

v. *Bird*,[1] 5 B. & A. 837. A notice of action to a trustee for having lent his horses for the repair of a road, must state all the ingredients in the offence, and therefore (it has been held) must state that he was an acting trustee at the time. *Towsey* v. *White*,[2] 5 B. & C. 125.

(*n*) *Infra*, tit. PARTNERS.

(*o*) *Infra*, tit. POLICY, &c.

(*p*) *Infra*, tit. TRESPASS.

(*q*) *Infra*, tit. TRIAL.

(*r*) In an action for nuisance, either to personal or real property, as well as in all other actions on the case, the plea of the general issue operates only as a denial of the breach of duty or wrongful act, and not of the inducement; and the latter if not denied need not be proved. See CASE, ACTION ON, and the New Rules, *infra*, tit. RULES; and *Dickens* v. *Gosling*, 1 Bing. N. C. 538. *Frankum* v. *Earl of Falmouth*, 4 N. & M. 333. See *Hogan* v. *Sharpe*,[3] 7 C. & P. 755. *Underwood* v. *Burrows*,[4] 7 C. & P. 26. In case for keeping a ferocious animal, the general issue puts the *scienter* in issue. *Hogan* v. *Sharpe*,[1] 7 C. & P. 755. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. See the NEW RULES. In an action for negligent driving, the plea of not guilty admits the fact of the carriage having been driven by the defendant's servant. *Emery* v. *Clark*, 2 Mo. & R. 260. So also the fact of a cart being driven by him or in his possession, as stated in the indictment. *Taverner* v. *Little*,[5] 5 Bing. N. C. 678.

(*s*) As if he exercise unruly horses in an improper place (*Michael* v. *Alestree*, 2 Lev. 172), or entrust a dangerous instrument, such as a loaded gun, to an indiscreet agent. *Dixon* v. *Bell*,[6] 1 Starkie's C. 287. Or where his barge having been sunk by accident in a navigable river, he neglects to give proper notice of the fact, as by placing a buoy over the spot. *Harmond* v. *Pearson*, 1 Camp. 517. Or the occupier of a house neglects to fence in a dangerous area, although it has immemorially remained open. *Couplund* v. *Hardingham*, 3 Camp. 396. In an action for leaving open the area of defendant's house, it appeared that there had been a thoroughfare through an unfinished street for five years; held that the jury were warranted in presuming that it was used with the full assent of the owners of the soil, and a dedication presumed to justify the allegation that it was a common public highway. *Jarvis* v. *Dean*,[7] 3 Bing. 447. A corporate body entrusted with a power from the exercise of which mischief may result to the public, is bound to use the

(A) (Showing or exhibiting a stud horse in a town is a nuisance. *Nolin* v. *The Mayor, &c. of Franklin*, 4 Yerger, 163. And it is not lawful for an individual, without grant, to construct and moor a floating storehouse or vessel for the receiving and delivering out of goods and merchandize, in any public river, or in any port or harbour, or in its basins or docks; such permanent appropriation and exclusive occupation of a portion of a public river, &c., is an obstruction to its free and common use, and is indictable as a public nuisance. *Hart* v. *The Mayor, Aldermen, and Commonalty of Albany*, 9 Wend. 571. So a dwelling-house, cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance, and may be abated by individuals residing in the neighbourhood, by tearing it down, especially during the prevalence of a disease like the Asiatic cholera. *Meeker* v. *Van Rensselaer*, 15 Wend. 397. It is no defence to an action for a nuisance affecting the health of the plaintiff and his family, to allege that the neighbourhood was generally as much affected by the nuisance as the plaintiff, or that the defendants had been previously indicted for the same nuisance. *Story* v. *Hammond*, 4 Ohio R. 377. Every individual who suffers actual damage, whether direct or consequential, from a common nuisance, may maintain an action for his own particular injury, although there may be many others equally damnified. *Lansing* v. *Smith*, 4 Wend. 9. And the remedy by action is not barred by the act of abating the nuisance. *Pierce* v. *Dart*, 7 Cow. 609.)

[1] Eng. Com. Law Reps. vii. 277. [2] *Id.* xi. 176. [3] *Id.* xxxii. 720. [4] *Id.* xxxii. 422. [5] *Id.* xxxv. 269. [6] *Id.* ii. 392. [7] *Id.* xiii. 45.

Nuisance. Mischievous animal.

The evidence in an action for the negligent keeping (*t*) of an animal, which has, in consequence, occasioned damage to the plaintiff, must of course be governed by the pleadings. If the declaration allege that the defendant *knew* that his dog, or other animal, was accustomed to bite *sheep*, or to bite *mankind*, the allegation must be proved, although the action might have been sustained without that averment (*u*). If it be alleged that the defendant knew that the dog was accustomed to bite sheep, it is not enough to show that it had attempted to bite a man (*x*). Where the declaration alleged that the dog was accustomed to bite mankind, proof that the defendant had warned the witness to beware of the dog, lest he should *be bitten, was held to be *primâ facie* evidence of the allegation to be left to the jury (*y*); although mere proof that the dog was fierce, and usually tied up, and that the defendant afterwards promised to take some compensation, has been held to be insufficient (*z*). It must also be proved that the owner knew the propensity of the animal (*a*).

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Scienter.

The plea of not guilty puts the *scienter* in issue (*b*).

It is no answer to the action, where the defendant knew the vicious propensity of the animal, to prove that the party injured was himself guilty of some imprudence or negligence in the transaction; as that the plaintiff trod upon the defendant's dog whilst it was lying at his door, the defendant being aware that the dog was accustomed to bite (*c*). And where the owner

greatest caution. *Weld* v. *Gas Light Company*,[1] 1 Starkie's C. 189. So if a person place dangerous traps in his own ground, baited with flesh, so near to the highway, or to the grounds of another, that dogs passing along the highway, or kept in his neighbour's grounds, are likely to be attracted, and the plaintiff's dogs are in consequence injured. *Townsend* v. *Wallace*, 9 East, 277. See *Ilott* v. *Wilkes*,[2] 3 B. & A. 304. In an action against the defendant, for negligence in forming a hayrick, in consequence of which it took fire, Patteson, J. directed the jury to consider whether the defendant had acted as a man of ordinary skill and prudence would have acted, or whether, through his negligence and carelessness, the plaintiff's property has been consumed. *Vaughan* v. *Menlove*,[3] 7 C. & P. 527, [4]3 Bing. N. C. 468. The defendant, a publican, in letting down, after dark, casks into his cellar, left open the flap, and the plaintiff fell in; held, that it being for the private advantage of the defendant, he was bound to take proper care to prevent injury, and that it was for the jury to say whether the defendant had sufficiently protected the public against danger at that hour, and whether the plaintiff had himself used due caution. *Proctor* v. *Harris*,[5] 4 C. & P. 337. Where the flap of a cellar-door opening into the street, being used in letting down goods, fell against the plaintiff's leg and broke it, held that the defendants were bound to have the door secured with such precautions as, under all ordinary circumstances would prevent its falling down; and that if, whilst so secured, it fell from the improper act of a third person, over whom they had no control, the defendants were not liable, but the party injured must resort to the wrongdoer. *Daniels* v. *Potter*,[6] 4 C. & P. 262. Where trustees, under an order for stopping up a turnpike-road in order to furnish the plaintiff, an owner of land, with a new access to his field, obtained from the defendant, an adjoining owner, a license to remove part of his hedge, which he was liable to keep in order, and they prostrated it, but omitted to put up a gate, or any fence, from the new road; held, that being wrongdoers, and acting under the license of the defendant, he was responsible. *Winter* v. *Charter*, 3 Y. & J. 308.

(*t*) The harbouring a dog about a man's premises, or allowing him to be or resort there, is a sufficient keeping. *M'Cane* v. *Wood*,[7] 5 C. & P. 2, cor. Ld. Tenterden.

(*u*) *Hartley* v. *Halliwell*,[8] 2 Starkie's C. 211; 1 B. & A. 620. And see *Judge* v. *Cox*,[9] 1 Starkie's C. 285. It seems that the owner of a fierce and unruly dog is bound to secure him without notice. Ibid. and *Jones* v. *Perry*, 2 Esp. C. 482. And common report that a dog is mad renders it incumbent on the owner to confine him. Ibid. See this case differently reported, Peake's Ev. 292, 5th ed. The owner of a wild ferocious animal, such as a lion or bear, which escapes and occasions damage, is liable, without any proof of notice of the animal's ferocity. B. N. P. 76. *R.* v. *Huggins*, 2 Ld. Ray. 1583.

(*x*) Ibid. But where a dog accustomed to worry sheep was left at large, and bit a horse, the owner was held to be liable. *Jenkins* v. *Turner*, 1 Ld. Raym. 110.

(*y*) *Judge* v. *Cox*,[9] 1 Starkie's C. 285. (*z*) *Beck* v. *Dyson*, 4 Camp. 198.

(*a*) Ibid. and 12 Mod. 555. An offer on the part of the defendant to settle the matter, if it could be proved that his dog had bit the plaintiff's cattle, was held to be some evidence of the *scienter*, but of little weight. *Thomas* v. *Morgan*, 2 C. M. & R. 496. Proof that the dogs were of a savage disposition, and had bit other people's cattle, was held to be no evidence of the defendant's knowledge of their being accustomed to bite cattle. Ib.

(*b*) *Thomas* v. *Morgan*, 2 C. M. & R. 496. (*c*) *Smith* v. *Pelate*, 2 Str. 1264.

[1]Eng. Com. Law Reps. ii. 350. [2]*Id.* v. 295. [3]*Id.* xxxii. 613. [4]*Id.* xxxii. 208. [5]*Id.* xix. 411. [6]*Id.* xix. 375. [7]*Id.* xxiv. 187. [8]*Id.* iii. 318. [9]*Id.* ii. 392.

knowing that his dog had been bitten by another dog which was mad, instead of destroying the animal, as it was his duty to have done as soon as he knew him to be in danger of so dreadful a malady, fastened him up, and the child of the plaintiff coming near the dog, irritated him with a stick, upon which the dog flew at him and bit him, and the child in consequence died of hydrophobia, it was held that the plaintiff might recover from the owner of the dog the expenses of the apothecary (*d*).

A man has a right to keep a fierce dog for the protection of his property, but not to place it in the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to his house (*e*). But if the injury arise from the plaintiff's incautiously going into the defendant's yard, after it has been shut up, and being bitten by a dog accustomed to bite, let loose for the night to protect the yard, no action will lie (*f*).

Some doubt has existed on the question whether the owner of land, who places traps or spring-guns on his premises, is liable in respect of mischief which consequentially ensues to men or dogs trespassing on the property. It has been held, that at all events he is not liable if the party injured had notice of the fact (*g*).

*736 Proof of negligence.

*In an action against the owner or driver of a stage-coach for negligence, some degree of blame must of course, be proved, either in respect of the furniture and equipage of the coach itself (*h*); the skill of the driver or his knowledge of the road, or his exercise of a competent judgment and discretion under the particular circumstances (*i*). It is not sufficient merely to show that if he had kept the left side of the road the accident would not have happened; for where there is no other carriage on the road, a coachman may drive on any part of it (*k*). Nor is he bound to keep to the left side of the road, provided he leave sufficient room for other carriages which

(*d*) *Jones* v. *Perry*, 2 Esp. C. 482. See the cases on this subject, *Mason* v. *Keeling*, 12 Mod. 332; 1 Ld. Raym. 606. *Bayntine* v. *Sharp*. 1 Lutw. 90. *Buxendine* v. *Sharp*, 2 Salk. 662.

(*e*) Per Tindal, C. J.,[1] *Sarch* v. *Blackburn*, M. & M. 505. And see *Blackman* v. *Simmons*,[2] 3 C. & P. 138; *Bird* v. *Holbrook*.[3] 4 Bing. 628.

(*f*) *Brock* v. *Copeland*, 1 Esp. C. 203.

(*g*) See the case of *Dean* v. *Clayton*,[4] 1 Moore, 203; 2 Marsh, 577; 7 Taunt. 489. The defendant had placed sharp spears in his premises in such a manner that a hare would run under them, but a dog pursuing a hare would be wounded, and there were several public footpaths through the defendant's woodland not fenced off, and on the outside of the woodland notices were painted that dog-spikes were set therein; a hare was started by the plaintiff's dog in the land of *J. T.*, which adjoined the defendant's woodland, in which land of *J. T.* the plaintiff had liberty to sport; the dog started the hare in the land of *J. T.*, pursued it, the plaintiff using every means in his power to prevent such pursuit, into the woodland of the defendant, and ran against a spike and was killed. The Judges of the Court of Common Pleas were equally divided on the question, whether an action was maintainable. In the later case of *Ilott* v. *Wilkes*,[5] 3 B. & A. 304, for setting spring-guns on the defendant's lands, and negligently leaving them there, whereby the plaintiff (a trespasser) was injured, it was held to be a good defence to show that the plaintiff had *notice* that the guns were set there. In the case of *Bird* v. *Holbrook*,[3] 4 Bing. 628, it was held that a party was liable in respect of mischief occasioned by the setting of spring-guns without notice in the daytime in a walled garden. See the stat. 7 & 8 G. 4, c. 18.

(*h*) The coachman must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. Per Best, C. J., in *Crofts* v. *Waterhouse*,[6] 3 Bing. 321. The owner is liable, although the defect be not visible. *Sharpe* v. *Gray*,[7] 9 Bing. 547.

(*i*) He is blameable if he has not exercised the soundest judgment; if he could have exercised a better judgment, the owner is liable. Per Lord Ellenborough, *Jackson* v. *Tollett*,[8] 2 Starkie's C. 39. And see *Dudley* v. *Smith* 1 Camp. 167; *supra*, 208.

(*k*) *Aston* v. *Heaven*, 2 Esp. C. 533. But where the defendant was driving on the wrong side of the road (which was of considerable breadth,) and the plaintiff's servant being on horseback, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass the horse was killed; although Lord Kenyon held that he had voluntarily put himself in the way of danger, and that the injury was of his own seeking, the Court of K. B. refused to disturb a verdict found for the plaintiff. *Cruden* v. *Fentham*, 2 Esp. C. 685. In an action for running down the plaintiff's vessel, which was at the time sailing by or against the wind, the defendant's vessel sailing before the wind, and with studding-sails set, at

[1]Eng. Com. Law Reps. xix. 394. [2]*Id.* xiv. 243. [3]*Id.* xv. 91. [4]*Id.* ii. 183. [5]*Id.* v. 295. [6]*Id.* xi. 119. [7]*Id.* xxxiii. 331. [8]*Id.* iii. 233.

meet him on their proper side (*l*). But where he may adopt either of two courses, one of which is safe, the other hazardous, he adopts the latter at his peril (*m*), even although he drive on his own side of the road (*n*). And one who deviates from the proper side of the road imposes, as it seems, upon himself the necessity of using a greater degree of caution than might otherwise have been requisite (*o*).

When occasioned wilfully. *737

If in an action on the case for negligent driving or steering, it turn out that the injury was occasioned *wilfully*, the action, it has been said, cannot *be maintained; trespass is the proper remedy (*p*). But if it be occasioned by the *negligence* of the driver of the carriage, or pilot of the vessel of the defendant, although he himself be present, the proper remedy is by action on the case (*q*).

Whenever the injury is forcible and immediate, but not wilful, case will lie for the negligence (*r*). And it seems that whenever consequential damage is occasioned even by wilful violence, the trespass may be waived, and the plaintiff may recover in an action on the case, in respect of the consequential damage (*s*).

By the defendant's agent.

Where the action is brought against the defendant for the negligence of his agent, it is necessary to prove not merely that the servant or other person whose negligence occasioned the damage, was the servant of the defendant, but also that the mischief was occasioned in the transacting the business of the master; for the latter is not responsible for any substantive *tort* committed by the agent whom he employs, unconnected with the employment and the authority delegated to him (*t*). It seems to be sufficient

night; the Court, doubting the propriety of such conduct, granted a new trial, after a verdict for the defendant. *Jameson* v. *Drinkald*,[1] 12 Moore, 138. In an action for running down the plaintiff's barge, held that he could only recover upon proof that the accident arose from the want of care and caution on the part of the defendant's servants, and not if it happened from any state of tide or other circumstances which persons of competent skill could not guard against; or if the plaintiff's barge were placed so as that persons using ordinary care would be liable to run against it; or if it might have been avoided but for the negligence of the plaintiff's own servants, in not being on board whilst the vessel was in a situation liable to danger. *Lack* v. *Seward*,[2] 4 C. & P. 107. To enable a party to maintain an action for an injury to his ship by the unskilful navigating of the defendant's ship, the injury must be attributable entirely to the fault of the crew of the latter; if there has been want of care on both sides, the action cannot be maintained. *Vanderplank* v. *Miller*,[3] 1 M. & M. 169. The rule as to ships meeting at sea was found by the jury to be, that the ship which is going to windward is to keep to windward, and the ship which has the wind free is to bear away; in such cases the question is not as to which of the ships first struck, but whose negligence it was by which the injury was caused. *Handasyde* v. *Wilson*,[4] 3 C. & P. 528. A steam vessel being more under command, and having seen the other vessel, is bound to give way. *Shannon*, 1 Hag. 174.

(*l*) *Wordsworth* v. *Willan*, 5 Esp. C. 273. See also *Wade* v. *Lady Carr*,[5] 2 D. & R. 255. The Court there said, that whatever might be the law of the road, it was not to be considered inflexible and imperative; and that, in the crowded streets of the metropolis, situations and circumstances might frequently occur where a deviation from what was termed the law of the road, would not only be justifiable, but absolutely necessary.

(*m*) *Jackson* v. *Tollett*,[6] 2 Starkie's C. 37.

(*n*) *Mayhew* v. *Boyce*,[7] 1 Starkie's C. 423.

(*o*) *Pluckwell* v. *Wilson*, 3 C. & P. 528.

(*p*) *Day* v *Edwards*, 5 T. R. 648, on demurrer. *Savignac* v. *Roome*, 6 T. R. 125, in arrest of judgment. *Tripe* v. *Potter*, 6 T. R. 128, n. *Ogle* v. *Barnes*, 8 T. R. 188. *Kingston* v. *Booth*, Skin. 228. *Middleton* v. *Fowler*, 1 Salk. 282. *Bowcher* v. *Nordstrom*, 1 Taunt. 568. *Macmanus* v. *Crickett*, 1 East, 106.

(*q*) *Huggett* v. *Montgomery*, 2 N. R. 466. 2 H. B. 413.

(*r*) *Morton* v. *Hordern*,[8] 4 B. & C. 223.

(*s*) Per Holroyd, J. Ib. And see *Branscomb* v. *Bridges*,[9] 3 Starkie's C. 171.

(*t*) In *Brady* v. *Giles*, 1 Mo. & R. 494, it was left to the jury, as a question of fact, whether the servants were acting as the agents of the person hiring a carriage, or the owner. The defendant in that case was a carriage-jobber in London; he had furnished Mr. M'Kinley with a barouche and four horses, for a two days' excursion to Windsor; the horses were driven by two of the defendant's postilions. There was no evidence that the hirer or his party interfered as to the manner of driving. Lord Abinger refused to nonsuit the plaintiff. He intimated his opinion, that the Court of K. B. had taken an erroneous course in allowing such a question to be discussed as matter of law; he considered it to be matter of fact, and that it was impossible to lay down any rule of law on the subject. The jury found for the plaintiff. The legal principle

[1] Eng. Com. Law Reps. xxii. 442. [2] *Id.* xix. 298. [3] *Id.* xxii. 280. [4] *Id.* xiv. 429. [5] *Id.* xvi. 84. [6] *Id.* iii. 233. [7] *Id.* ii. 454. [8] *Id.* x. 316. [9] *Id.* xiv. 177.

to show that the agent was engaged in driving the carriage, or steering the ship, of his principal, or in the performance of any other duty in which agents are usually employed (*u*). Such evidence, however, is not conclusive; for if a servant were to take a horse out of a stable in defiance of his master's orders, the latter would not be responsible for the mischief which ensued *738 (*x*), any *more than he would be for any other act of the servant done of his own authority, and without the assent of the master (*y*). And in general, if a servant being ordered to do a lawful act, exceed his authority, and thereby commit an injury, the master is not liable (*z*). An averment that the injury was occasioned by the negligent act of the master, will be supported by evidence that it was occasioned by the negligent act of the servant (*a*), as in an action for the negligent driving of the defendant's cart. So an averment that damage was done by the driver of the waggon of *A.*, against whom alone the action is brought, is satisfied by evidence that such damage was done by a person employed by *B.* to drive the waggon; *A.* and *B.* being partners under an agreement to conduct and manage the waggon each for his own stages (*b*). The name painted on a coach is evidence of ownership (*c*).

Where there is an intermediate agent, or more than one, the maxim of law is *respondeat superior;* the maxim is founded upon the principle that he who expects to derive advantage from an act which is done by another

which governs such liabilities seems to be this, that in respect of a negligent act done by an agent, his employer is liable; the damage ought to fall rather on the party who has trusted and employed a negligent agent, than on the plaintiff, who is wholly free from blame. In the case of the hirer of a carriage and horses, to be driven by the servant of the lender, the latter, who has selected the agent, is the party really in fault; it is not to be expected that one who hires a carriage for a day should be burthened with the making inquiry as to the character and skill of the lender's servant; there is no negligence in his presuming that one of competent skill will be supplied, and where that is not done, the hirer, if liable to the party injured, would be entitled to recover over against the lender. Where, therefore, no negligence in point of selection is attributable to the hirer, it should seem to be a convenient rule that not he, but the lender only, should be considered liable. A landlord, who does not personally interfere in making a distress, is not liable for the negligence of his broker, in not delivering a copy of his charges, and of the costs, &c. to the person whose goods are levied upon. *Hart* v. *Leach*, 1 M. & W. 560. A master is liable for the negligent driving of his servant, although he was driving improperly, and in a direction different from that ordered by his master. *Heath* v. *Wilson*, 2 Mo. & R. 181. *Secus*, if the servant take out the carriage for purposes of his own, and without authority. Ib.

(*u*) In *Michael* v. *Alestree*, 2 Lev. 172, it was held, that an action was maintainable against the master for damage done by his servant in exercising his horses in an improper place, though he was absent; because it should be *intended* that the master sent the servant to exercise horses there.

(*x*) See the observations of Buller, J., 3 T. R. 762. But where a servant took a horse of another person out of his master's stable, and going on his master's business, rode over the plaintiff, and the defendant having first admitted the horse to be his, refused to tell his name, it was held that this was sufficient evidence to show that the servant was riding the horse with the master's assent; and the Court refused to disturb a verdict for the plaintiff. *Goodman* v. *Kennell*,[1] 1 M. & P. 241.

(*y*) See *Macmanus* v. *Crickett*, 1 East, 106. *Bowcher* v. *Noidstrom*, 1 Taunt. 568.

(*z*) *Kingston* v. *Booth*, Skinn. 228; *Middleton* v. *Fowler*, 1 Salk. 282. But if the master order his servant to do an act, in the doing of which a trespass is the necessary, or even the natural consequence, the master is liable even in trespass. *Gregory* v. *Piper*, K. B. after Easter Term, 1829. Even although the master limited his authority, by directing the servant not to commit a trespass.

(*a*) *Brucker* v. *Fromont*, 6 T. R. 659. And see *Waland* v. *Elkins*,[2] 1 Starkie's C. 272; *infra*, tit. PARTNERS; and *Fromont* v. *Coupland*,[3] 2 Bing. 170, and see below, tit. TRESPASS. So where a stable-keeper let horses for a day to draw the carriage of the hirer to Epsom, which were driven by the servant of the stable-keeper, it was held that the latter was liable for accidents occasioned by the postboy's negligence. *Dean* v. *Braithwaite*, 5 Esp. C. 35, cor. Lord Ellenborough; and see *Samuel* v. *Wright*, ib.; *Smith* v. *Lawrence*, 2 M. & Ry. 1. *Goodman* v. *Kennell*,[1] 1 M. & P. 241. The master is liable for damage done through the improper driving of his cart, although his servant was not driving at the time of the accident, but had entrusted the reins to a stranger who was riding with him. *Booth* v. *Mister*,[4] 7 C. & P. 76.

(*b*) *Waland* v. *Elkins*,[2] 1 Starkie's C. 272. Where one of several proprietors of a stage-coach was driving when the accident happened, it was held that all were liable for his negligence, although the plaintiff might perhaps have been entitled to sue the one who drove, in trespass. *Moreton* v. *Hardern*,[5] 4 B. & C. 223.

(*c*) It is required to be done under the st. 50 Geo. 3, c. 48, s. 7. *Barford* v. *Nelson*,[6] 1 B. & Ad. 511.

[1]Eng. Com. Law Reps. xvii. 180. [2]*Id.* ii. 387. [3]*Id.* ix. 366. [4]*Id.* xxxii. 439. [5]*Id.* x. 316. [6]*Id.* xx. 441.

for him, must answer for the injury which a third person may sustain from it (*d*); and the action ought to be brought either against the very party who committed the injury, or against the principal (*e*). Thus, where *A.* the owner of a house which he had never occupied, contracted with *B.* to repair it, and *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials, and the servant of *C.* placed a quantity of lime on the public road adjoining the house, in consequence of which the plaintiff's carriage was overturned; it was held that *A.* the owner was liable for the damage sustained (*f*). So where the owner of a house demised by lease, covenanted *to repair it, and he employed workmen for that purpose, the *739
landlord, and not the tenant, was held to be liable for a nuisance in the house, occasioned by the negligence of the workmen (*g*). The principle of responsibility is, that the agent is the mere instrument of the defendant, and that it is incumbent upon him to select an agent of competent skill and ability, and to exercise a control and authority over him, in order that others may not be injured (*h*). Hence, where the supposed agent acts under a paramount authority, and not under that of the supposed principal, the latter is not responsible. It was held that the captain of a sloop of war was not answerable for damage done in running down a vessel, the mischief occurring during the watch of the lieutenant, and whilst he had the actual management of the vessel by virtue of his office and duty as lieutenant, and so acted independently of any authority from the captain (*i*).

By the Pilot Act, 52 Geo. 3, c. 39, s. 30, an owner or master of a vessel is not liable for any damage occasioned by the incompetence of a pilot taken on board according to the provisions of the Act (*k*). But the pilot

(*d*) Per Best, C. J. in *Hall* v. *Smith*,[1] 2 Bing. 160.

(*e*) See *Stone* v. *Cartwright*, 6 T. R. 411. Per Ld. Kenyon, *Bush* v. *Steinman*, B. & P. 404. *Horn* v. *Nicholls*, 1 Salk. 289. *Jones* v. *Hart*, 2 Salk. 441; 1 Bl. Comm. 431; Inst. Lib. 4, tit. 5, s. 1; Dig. Lib. 9, tit. 3. *Littledale* v. *Lord Lonsdale*, 2 H. B. 267, 299. In an action against *A.* and *B.* for obstructing lights, it is sufficient to show that the latter, though but a mere agent, superintended the work and gave directions. *Wilson* v. *Peto*,[2] 6 Moore, 47.

(*f*) *Bush* v. *Steinman*, 1 B. & P. 404. *Matthews* v. *West London Waterworks*, 3 Camp. 403. And see *Flower* v. *Adam*, 2 Taunt. 314. [*Sly* v. *Edgley*, 6 Esp. C. 6.] And see *Weld* v. *Gas Light Company*,[3] 1 Starkie's C. 189. *Henley* v. *Mayor of Lynn*,[4] 5 Bing. 91. Where engineers were employed by the defendant to erect a steam-engine on the defendant's premises, which adjoined to the plaintiff's, and the engine exploded through the mismanagement of the defendant's servant, the engineer being present, the action was held to be maintainable. *Wilts* v. *Hague*,[5] 2 D. & R. 33. See *Bowcher* v. *Noidstrom*, 1 Taunt. 568; *infra*, note (*k*). Where defendant hired a pair of horses to his own carriage for the day, which were driven by the servant of the party letting them out, and an injury happened through his negligent driving; held, per Abbott, L. C. J., and Littledale, J., that the hirer was not liable in an action on the case for the injury sustained; *contra*, Bailey and Holroyd, Js. *Laugher* v. *Poynter*,[6] 8 D. & R. 556; 6 B. & C. 126. *Semble*, that the owner of a barge is not responsible for any injury occasioned by the negligence of a person to whom he has lent her. *Scott* v. *Scott & others*,[7] 2 Starkie's C. 438, cor. Best, J., 1818.

(*g*) *Leslie* v. *Pounds*, 4 Taunt. 649. So where the defendant employed a bricklayer to make a sewer, and the latter leaving it open, the plaintiff broke his leg. *Sly* v. *Edgley*, 6 Esp. C. 6; and see *Coupland* v. *Hardingham*, 3 Camp. 398; *supra*, 733;[8] 5 B. & C. 559.

(*h*) 1 Bl. Comm. 431. Where a man entrusted a loaded gun to a young mulatto girl, and mischief resulted from the accidental discharge of the instrument in her hands, he was held to be responsible. *Dixon* v. *Bell*,[9] 1 Starkie's C. 287. [S. C. 5 M. & S. 198.]

(*i*) *Nicholson* v. *Mouncey*, 15 East, 384. [See *Bussy* v. *Donaldson*, 4 Dallas, 206. *Snell* v. *Rich*, 1 Johns. 305.]

(*k*) *Bennett* v. *Moita*,[10] 7 Taunt. 258; 1 Moore, 4; Holt's C. 359.[11] And see *Fletcher* v. *Braddick*, 2 N. R. 182. Before the stat. a master was not discharged of his responsibility for the acts of his crew, although they acted under the direction of the pilot, who by the regulations of a statute had the temporary management of the ship. *Bowcher* v. *Noidstrom*, 1 Taunt. 568. The statutable exemption extends to damage done by the piloted ship to others. *Ritchie* v. *Bowsfield*,[12] 7 Taunt. 309. And see *Carruthers* v. *Sydebotham*, 4 M. & S. 77. But not to vessels having on board pilots appointed for other places than those expressly named in the preamble or purview of the Act. *Attorney-general* v. *Case*, 3 Price, 302.

[1]Eng. Com. Law Reps. ix. 357. [2]*Id.* xvii. 13. [3]*Id.* ii. 350. [4]*Id.* xv. 376. [5]*Id.* xvi. 67. [6]*Id.* xii. 311. [7]*Id.* iii. 420. [8]*Id.* xii. 310. [9]*Id.* ii. 392. [10]*Id.* ii. 95. [11]*Id.* iii. 129. [12]*Id.* ii. 117.

is liable for personal misconduct, although a superior officer be on board (*l*). But where damage is occasioned to another vessel, although a pilot was on board, it is a question of fact for the jury whether, at the time the accident happen, the defendant's vessel was under the direction of a pilot (*m*).

Public commissioners or their clerks, who are entrusted with the conduct of public works, are not liable for the negligence of the workmen employed *740 *by those with whom they have contracted for the execution of such works. In such cases, the action for negligence occasioning an injury ought to be brought against the contractor and his servants (*n*).

Against an occupier, &c.

In an action against the defendant for not repairing his fences, it is necessary, in addition to evidence of the obligation to repair, and of the damage which has resulted from the neglect, to prove that the defendant is the *occupier* of the estate liable to the repair (*o*). But where the owner of a house is bound to repair it, he, and not the occupier, is liable for the damage occasioned by the neglect to repair (*p*).

Proof of damage.

Thirdly. It must be shown that *damage* resulted to the plaintiff (*q*), as alleged in the declaration, from the act or omission of the defendant (*r*).

Where a public nuisance has been committed by the defendant, as by obstructing the King's highway, the plaintiff cannot support a private action without proving, as alleged in the declaration, that he has sustained some special and particular damage beyond that which is suffered by other subjects (*s*); as by a hurt to himself or his horse, from falling into a trench cut in a public highway (*t*).

(*l*) *Stort* v. *Clements*, Peake's C. 107. *Huggett* v. *Montgomery*, 2 N. R. 466. And see *Lowe* v. *Cotton*, 12 Mod. 472, 477; 5 Mod. 455; Carth. 487; Salk. 17; Lord Raym. 650; where three of the Judges, contrary to the opinion of Holt, C. J., held that the postmasters were not liable for the loss of exchequer bills lost by the default of clerks in office. [See *Bolan* v. *Williamson*, 2 Bay, 551. *Maxwell* v. *M'Hoey*, 2 Bibb. 211.] As to the personal responsibility of officers, see *Macbeath* v. *Haldimand*, 1 T. R. 172. *Unwin* v. *Wolsely*, Ib. 674.

(*m*) *Cutts* v. *Herbert*,[1] 3 Starkie's C. 12. And see Ib. as to proof of a pilot's appointment; and *qu.* whether the renewal of an appointment by sub-commissioners, when an appointment under the seal of the Trinity House has been proved, be sufficient.

(*n*) *Hall* v. *Smith*,[2] 2 Bing. 156, where the action was brought against commissioners under a lighting and paving Act, for digging a ditch in the street, and leaving the same without light or guard, &c., *per quod* the plaintiff fell in and was injured, &c. And see *Harris* v. *Baker*, 4 M. & S. 27. In *Sutton* v. *Clarke*,[3] 1 Marsh. 429, it was held that the defendant, a trustee under a turnpike Act, was not liable for an injury occasioned by the making of a drain, although he had directed it to be made in an improper manner, but had given the order after having taken the best advice he could obtain. One acting for the public (gratuitously) is not liable for the negligence of the artificer. *Hall* v. *Smith*,[2] 2 Bing. 156.

(*o*) *Cheatham* v. *Harrison*, 4 T. R. 318.

(*p*) *Payne* v. *Rogers*, 2 H. B. 349. But such an action does not lie against the inhabitants of a county for not repairing a public bridge. *Russel* v. *Devon*, *Inhab.* 2 T. R. 667.

(*q*) It is not essential that the plaintiff should be the owner of the property; it is sufficient if he have the use of it for the time. Thus a gratuitous bailee of a horse may maintain an action for negligence in not repairing a fence, which the defendant is bound to repair, by means of which the horse is injured. *Booth* v. *Wilson*, 1 B. & A. 59. *A.*, the supposed owner of a shop and goods, allows *P.* to reside there, and act as owner in the sale of the goods. *P.* may maintain an action for an injury to the goods by negligent driving whilst under the care of his servant. *Whittingham* v. *Bloxham*,[4] 4 C. & P. 597. The plaintiff was allowed to call *A.* in reply, to negative ownership in *A.* Ib.

(*r*) *Supra*, tit. Case, and tit. Libel. Where the plaintiff's horse escaped through a defect of the defendant's fences into his close, and was there killed by the falling of a haystack, it was held that the damage was not too remote to prevent the action being sustainable. *Powell* v. *Salisbury*, 2 Y. & J. 390. And see *Anon.* 1 Vent. 264. *Holbatch* v. *Warner*, Cro. Jac. 665. Where by the improper act of the defendant, in throwing packs of wool out of a loft instead of using a crane, the plaintiff was deprived of his presence of mind and ran into the danger; held, that it was for the jury to say whether the injury was not occasioned by the wrongful act of the defendant. *Wolley* v. *Scovell*, 1 Mo. & R. 105.

(*s*) 1 Inst. 56. *Hubert* v. *Grove*, 1 Esp. C. 48. *Iveson* v. *Moore*, 1 Lord Raym. 486; 12 Mod. 262; Willes, 74, n. It is said that the mere obstruction of the plaintiff's business, by merely delaying him on the road for a short time, will not support an action, the injury being but consequential. P. C. *Paine* v. *Patrick*, Carth. 91.

(*t*) Carth. 191. [See *Harrison* v. *Sterret*, 4 Har. & M'Hen. 540. *Dunn* v. *Stone*, 2 Com. Law Reps. 261. *Hughes* v. *Heiser*, 1 Binney, 463.]

[1] Eng. Com. Law. Reps. xiv. 148. [2] *Id.* ix. 357. [3] *Id.* i. 298. [4] *Id.* xix. 543.

Where the defendant had re-moored his barge across a public navigable creek, by means of which the plaintiff, who was navigating along the creek, was forced to unload his barge, and carry his goods inland at a considerable expense, it was held to be a special damage, sufficient to support the action (*u*). So where the plaintiff was obliged, in consequence of an obstruction of a public road, to carry his tithes by a longer and more inconvenient way (*v*). In such an action the proximate cause of the mischief *should be stated in the declaration; and if the remote cause alone be al- *741
leged, it will not be competent to the plaintiff to give the intermediate causes in evidence (*w*).

A defendant liable in respect of damages to the plaintiff's vessel by collision, is not entitled to deduct a sum paid by an insurer in respect of the same damage (*x*).

Evidence in defence.

In an action for an injury occasioned by the negligence of another, the defendant may show that the damage was occasioned by mere accident, no blame being imputable to the defendant or his agent (*y*). It is a good defence (*z*) to show that the injury so far arose from the negligence of the plaintiff himself, that he might, by ordinary care and caution, have avoided the injury. Thus, one who is injured by riding against an obstruction in a public highway, cannot recover damages if it appear that he was riding violently, and without ordinary care; and that with due care he might have seen and avoided the obstruction (*a*). And although the defendant's negligence be the primary cause of consequential injury to the plaintiff, yet if the proximate and immediate cause be the unkilfulness of the plaintiff, it seems that the latter will not be entitled to recover (*b*). As where *A.* placed rubbish in the highway, and the dust blown from it frightened the horse of *B.*, which carried him nearly in contact with a waggon, to avoid which *B.* unskilfully rode over other rubbish, and was overthrown and hurt (*c*). But where, in consequence of unskilful driving, a stage-coach was likely to be overturned, and an outside passenger, with a view to his own safety, jumped off, and his leg was broken, it was left to the jury to say whether he did this rashly and without sufficient cause, or from a reasonable apprehension of danger (*d*).

(*u*) *Rose* v. *Miles*, 4 M. & S. 101.

(*v*) *Hart* v. *Bassett*, T. Jones, 156. The Court said that the plaintiff had sustained a particular damage; for the labour and pains which he had been forced to take with his cattle and servants, by reason of this obstruction, might be of more value than the loss of a horse, which was sufficient to support an action. See also *Chichester* v. *Lethbridge*, Willes, 73. [See Comyn's R. 60.]

(*w*) *Fitzsimmons* v. *Inglis*,[1] 5 Taunt. 534. (*x*) *Yates* v. *Whyte*,[2] 4 Bing. N. C. 272.

(*y*) See *Crofts* v. *Waterhouse*,[3] 3 Bing. 321. *Lack* v. *Seward*,[4] 4 C. & P. 106. *Supra;* and where the plaintiff's case rests on a mere presumption of negligence from the defendant's coach breaking down, the latter may show that it had recently been examined, when no defect was discovered, and that the coachman was a skilful driver, and was driving at a moderate pace. *Christie* v. *Griggs*, 2 Camp. 81.

(*z*) As to the proper plea for admitting evidence of any particular defence, see above, tit. Case, and the rules of H. T. 3 & 4 W. 4, below, tit. Rules. As to the competency of witnesses for the defendant, see Vol. I, p. 125.

(*a*) *Butterfield* v. *Forrester*, 11 East, 60. *Chaplin* v. *Howes*,[5] 3 C. & P. 554. Although the defendant be guilty of negligence, yet if the plaintiff might by ordinary care have avoided the consequences, and did not, he is to be regarded as the author of his own wrong; per Parke, B., in *Bridge* v. *The Grand Junction Railway Co.*, 3 M. & W. 244. *Williams* v. *Holland*,[6] 10 Bing. 112; 6 C. & P. 23. So in the case of running down a ship. A plaintiff, however, may recover although he might have prevented the collision, provided he was in no degree in fault in not endeavouring to prevent it. *Vennall* v. *Ganner*, 1 C. & M. 21.

(*b*) 2 Taunt. 314.

(*c*) *Flower* v. *Adam*, 2 Taunt. 314. [See also, *Steele* v. *Ireland Western Lock Navigation Company*, 2 Johns. 283. *Town of Lebanon* v. *Olcott*, 1 N. Hamp. R. 339.]

(*d*) *Jones* v. *Boyce*,[7] 1 Starkie's C. 403, cor. Ld. Ellenborough, C. J.; the jury found for the plaintiff, damages 400*l.* And see *Cruden* v. *Fentham*, 2 Esp. C. 685. *Williams* v. *Holland*,[6] 6 C. & P. 24; 10 Bing. 112. *Woolf* v. *Beard*,[8] 8 C. & P. 373. And see above.

[1] Eng. Com. Law Reps. i. 181. [2] *Id.* xxxiii. 349. [3] *Id.* xi. 119. [4] *Id.* xix. 298. [5] *Id.* xiv. 445. [6] *Id.* xxv. 50, 261. [7] *Id.* ii. 482. [8] *Id.* xxxiv. 435.

Proof of possession, &c.

In an action for a nuisance to the plaintiff's real property (*e*) (A), he must, in *case the matter be put in issue by proper pleas, prove, 1st, his possession (*f*) of the house or land, or his reversionary interest (*g*); or if an incorporeal right be effected, his title to it (*h*). 2dly. The act of nuisance done by the defendant. 3dly. The damage resulting to the plaintiff's right (1).

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(*e*) In general, case lies for an injury to the house or land of another; as for building a house which overhangs the land of another, and causes the rain to fall upon it and injure it. (See *Penruddock's Case*, 5 Rep. 100. *Bowry* v. *Pope*, 1 Leon. 168: Cro. Eliz. 118.) *Batin's Case*, 9 Rep. 53, b. So for any injury to lands or houses which renders them useless, or even uncomfortable for the purposes of habitation, an action lies; as for the erection and use of a smith's forge (*Bradley* v. *Gill*, Lutw. 69); a privy (*Styan* v. *Hutchinson*, cor. Ld. Kenyon, Sitt. after Mich. 40 Geo. 3, cited 2 Selw. N. P. 1047); a pig-stye (*Aldred's Case*, 9 Rep. 59); a lime-kiln (Ibid. per Wray, C. J.); a tobacco-mill (*Jones* v. *Powell*, Hutt. 136). So for the corruption of water by drugs, by means of which water running through the plaintiff's premises is rendered less serviceable for the use of his cattle. In a house four things are desired: *Habitatio hominis*, *delectatio inhabitantis*, *necessitas luminis*, *salubritas aeris*. *Aldred's Case*, 9 Co. 57. Where the defendant erected a stove with a chimney, for the purpose of having a fire in a saddle-room adjoining his stables, which were situated behind the defendant's house in Spring-Gardens, and the smoke occasioned inconvenience to the plaintiff, whose house was also situated in Spring-Gardens, at the distance of forty or fifty yards from the chimney, by injuring the furniture in the drawing-room, &c., it was held to be a nuisance. *Lord Colchester* v. *Ellis*, cor. Abbott, C. J. It is otherwise where the defendant's act is attended simply with *inconvenience* to the plaintiff; as where he merely cuts off a prospect from the house by building a wall, but does not exclude the light (*Knowles* v. *Richardson*, 2 Mod. 55; 9 Rep. 586); or by opening a new window disturbs the privacy of the plaintiff (per Eyre, C. J. cited by Le Blanc, J. 3 Camp. 82). The only remedy in such a case is to obstruct the window by a wall built on the plaintiff's premises. In *Street* v. *Tugwell* (41 Geo. 3, cited 2 Selw. N. P. 1047), an action was brought for keeping a number of pointers so near the plaintiff's house that his family were disturbed in the enjoyment of it, and prevented from sleeping during the night; and the jury found for the defendant, although he adduced no evidence. A new trial is said to have been refused; and yet it seems to be difficult to distinguish between a nuisance occasioned by the establishing a dog-kennel near a man's house, and the use of a forge or mill. An action will also lie against the proprietor of tithes for not removing them from the soil within a reasonable time (8 T. R. 72), provided the tithe has been duly set out, the wheat in the sheaf (*Shallcross* v. *Jowle*, 13 East, 261), and hay in the cock, after being tedded. *Mayes* v. *Willett*, 3 Esp. C. 31. *Newman* v. *Morgan*, 10 East, 5. *Blaney* v. *Whitaker*, 23 Geo. 3, cited Ibid. *Halliwell* v. *Trappes*, 2 Taunt. 55. A plaintiff having demised a cottage without excepting mines, may maintain an action on the case against one who injures the cottage by excavating coal, although it be doubtful whether the injury was occasioned by getting the coal under the cottage or under adjoining land. *Raine* v. *Alderson*,[1] 4 Bing. N. C. 702. An action lies for erecting a hay-rick near the plaintiff's house, at the extremity of the defendant's land, with such gross negligence that, by its spontaneous ignition, the plaintiff's house is burnt. *Vaughan* v. *Menlove*,[2] 3 Bing. N. C. 468. So where a lessee overcharges his floor with weight, whereby it falls into the plaintiff's cellar below. *Edwards* v. *Hallinder*, 2 Leon. 93. Or the defendant builds a house overhanging that of the plaintiff, whereby the rain falls upon the plaintiff's house. *Batin's Case*, 9 Rep. 53, b. An action is not maintainable in respect of the reasonable use of a person's rights, although it be to the annoyance of another; as if a butcher or brewer exercise his trade in a convenient place. Com. Dig. *Action on the Case for Nuisance*, C. See *R.* v. *Cross*,[3] 2 C. & P. 483. *R.* v. *Watts*,[4] M. & M. 281. So an action does lie in respect of that which becomes a nuisance only by reason of some modern alteration made by the plaintiff himself; as where he opens a new window, in consequence of which only the nuisance exists. *Lawrence* v. *Obee*, 3 Camp. 514.

(*f*) If a prescriptive right be alleged, such right must be proved. (See tit. Prescription.) But although it was formerly held to be necessary to allege a right by prescription (*Bowry* v. *Pope*, 1 Leon. 168; Cro. Eliz. 118), it is now settled that a general averment of a right, as incident to the plaintiff's possession of house, or land, is sufficient. *Supra*, tit. Disturbance; and see the cases cited *infra*, note (*o*.)

(*g*) *Vide* tit. Reversion.

(*h*) *Supra*, tit. Disturbance.

(A) (In an action for a nuisance in flowing water back upon the plaintiff's land by means of a mill-dam, the defendant may give evidence of a parol license from a former owner of the plaintiff's land. *M'Kellip* v. *M'Ilhenny*, 4 Watts, 317. In an action for a nuisance occasioned by obstructing a stream made navigable by law, if it appear that the injury arose from causes which might have been foreseen, such as freshets and the collection of ice, he whose superstructure is the cause of the mischief, shall be liable for damages—otherwise if the injury be occasioned by act of Providence. *Bell* v. *M'Clintoch*, 9 Watts, 119. If a dam be built or a navigable stream in conformity with the provisions of the law, and the schute had been rendered innavigable by flood or accident, the owner of the dam would not be liable for damage occasioned thereby, before he had time to repair it. *Roush* v. *Walter*, 10 Watts, 86.)

(1) [Where one built a house on his own land, within two feet of the boundary line, and seven years afterwards the adjoining owner dug so deep into his own land as to endanger the house, whereupon the owner of the house left it and took it down; it was held that no action would lie for damage to the house, but that the owner was entitled to damage for the falling of his natural soil into the excavation thus made. *Thurston* v. *Hancock*, 12 Mass. Rep. 220. A person who builds a house adjoining that of another, and sinks

[1]Eng. Com. Law Reps. xxxiii. 498. [2]*Id.* xxxii. 208. [3]*Id.* xii. 226. [4]*Id.* xxii. 307.

Variance.

All actions for nuisances affecting real property, whether corporeal or incorporeal, are local in their nature, and must be proved to have been committed within the county in which the action is brought (*i*). But in general, unless the declaration contain a precise local description of the *nuisance, the local situation will be acribed to *venue*, and will not require presise proof (*k*). Where a declaration for damaging the plaintiff's wharf alleged that it was situate near the river Thames, to wit, at Kingston, in the parish of St. Saviour, Southwark, in the county of Surrey, and it appeared in evidence that there was no such place as Kingston, in that parish, it was held that the description might be referred to *venue* (*l*). *743

Proof of an incorporeal right.

The evidence to prove the right, as claimed, is either direct or presumptive: direct, as where there is an express grant of a right of way. So the title may arise by implication of law. Where, for instance, a man conveys land to another which is inaccessible except through his own lands, he grants, by implication of law, such a way for the enjoyment of the land (*m*). So if a man, who has built a private house on his land, sells the house, neither he nor any one who derives title to the adjacent land from him can obstruct the lights (*n*).

Presumptive evidence.

In an action for a nuisance to an *incorporeal* right, as for obstructing the plaintiff's lights, evidence of an uninterrupted use and enjoyment of the lights for the space of twenty years will raise *primâ facie* presumption of a legal title so to enjoy them (*o*).

(*i*) *Mersey and Irwell Navigation* v. *Douglas*, 2 East, 497. Where no local description is alleged in an action for a nuisance, the property will be presumed to be situated in the county specified in the margin (*Warren* v. *Webb*, 1 Taunt. 379). An averment, that the defendant suffered a water-spout to be out of repair at *A.*, in the county of *B.*, was held to be an averment that it was situated there (Ibid.) The general rule is, that the *venue* in the margin may aid, but cannot hurt.

(*k*) *Hamer* v. *Raymond*,[1] 5 Taunt. 789; 1 Marsh. 363; *supra*, tit. CASE; and see tit. VARIANCE.—VENUE.

(*l*) *Hamer* v. *Raymond*,[1] 5 Taunt. 789. And see tit. PENAL ACTION.

(*m*) Com. Dig. tit. *Chimin.* D. 3; 2 Cro. 170; Mod. Ca. 4. *Chichester* v. *Lethbridge*, Willes, 71. *Howton* v. *Frearson*, 8 T. R. 50. A lodger in a house has a right to the use of the knocker, door-bell, staircase and water-closet, in the use of which if the landlord obstruct him, case lies. *Underwood* v. *Burrows*,[2] 7 C. & P. 26. It was held to be no answer under the general issue, that the water-closet had become useless before the defendant removed it. But evidence was admitted in mitigation of damages, that the plaintiff and his family were bad lodgers, and that the defendant did the acts complained of in order to get rid of them. *Ib.*

(*n*) *Palmer* v. *Fletcher*, 1 Lev. 122. [See *Story* v. *Odin*, 12 Mass. R. 157. Yelv. 216, a note (1).] One who builds a new house on his own land cannot recover against the owner of adjacent land for digging in his own land, *per quod* the wall of his house is weakened and falls. *Wyatt* v. *Harrison*,[3] 3 B. & Ad. 871; and see *Wilde* v. *Minsterley*, Com. Dig. Action on Case for Nuisance (C.); 2 Roll. Ab. Trespass (I.) 1. *Palmer* v. *Fletcher*, 1 Sid. 167. *A.* being the owner of two adjoining houses, grants a lease of one to *B.* and then leases the other to *C.*, there then being in that house certain windows. *B.* accepts a new lease from *A.*; *B.* cannot alter his tenement so as to obstruct *C.*'s lights, although they have not existed for twenty years. *Couts* v. *Gorham*,[4] M. & M. 396; and see *Riviere* v. *Bower*,[5] R. & M. 24. *Swansborough* v. *Coventry*,[6] 9 Bing. 309. *Compton* v. *Richards*, 1 Price, 27.

Where a body corporate is bound to discharge an obligation for the benefit of the public, an indictment lies for the general injury to the public, and an action on the case for any special or particular injury to an individual. *Mayor, &c. of Lyme Regis* v. *Henley* (in error),[7] 3 B. & Ad. 77. Although the obligation be not an immemorial one. *Ib.*

Where a corporation held under a grant from the Crown of a borough, quay, and all tolls, immunities, &c., with a direction to repair sea-walls, it was held that a party suffering loss by the walls being suffered to fall into decay, may maintain an action against the corporation for damages. *Henley* v. *Mayor, &c. of Lyme Regis*,[8] 5 Bing. 91.

(*o*) *Cotterell* v. *Griffiths*, 4 Esp. C. 69. *Darwen* v. *Upton*, cited 2 Will. Saund. 175, a. *Lewis* v. *Price*, cited Ib. *Dougal* v. *Wilson*, cited Ib. *Hubert* v. *Groves*, 1 Esp. C. 148. *Daniel* v. *North*, 11 East, 372. *Lawrence* v. *Obee*, 3 Camp. 514. *Lord Guernsey* v. *Rodbridges*, Gil. Eq. R. 3; Com. Dig. Temps. 6; *infra*,

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the foundation lower than that of his neighbour, is not liable for any consequential damage, if he have used due diligence to prevent injury to the other's house. *Panton* v. *Holland*, 17 Johns. 92. If a surveyor of highways dig down or raise a street, discreetly and not wantonly, whereby a house contiguous thereto is endangered or injured, the owner has no remedy. *Callender* v. *Marsh*, 1 Pick. 418.]

[1]Eng. Com. Law Reps. i. 266. [2]*Id.* xxxii. 422. [3]*Id.* xxiii. 205. [4]*Id.* xxii. 338. [5]*Id.* xxi. 373. [6]*Id.* xxiii. 286. [7]*Id.* xxiii. 32. [8]*Id.* xv. 376.

*Where there is a grant of a franchise, the exercise of the right is evidence of the value and extent of the right. The owner of an ancient market may, by evidence of the constant exercise of the right, show that he is entitled to it, to the exclusion of any sale of marketable commodities by
Market. an inhabitant in his private house or shop (*p*). The lord of the market may determine in what particular place within the district it shall be held (*q*).

It is no variance that the market is alleged to be held on specified days of the week, without the exception of days on which the holding is prohibited by a general statute (*r*).

If the lord of a market permits part of the space in which the market is held to be occupied otherwise than for the sale of marketable commodities, to the partial exclusion of the vendors of marketable commodities, he cannot maintain an action for selling beyond the limits of the market, without proof of notice to the defendant that there was room for him in the market on the particular occasion (*s*).

A legal title may also be presumed from a period of enjoyment short of twenty years, if other circumstances render it probable that such a right has been acquired by grant or otherwise; on the other hand, an enjoyment for a longer period is but presumptive evidence tending to prove the right; and the presumption may be rebutted by positive evidence to the contrary, or by evidence which explains the forbearance of the other party, to interrupt the enjoyment of the privilege consistently with his right to interrupt it (*t*).

tit. PRESCRIPTION.—TIME. *Supra*, tit. DISTURBANCE. So a right of way will be presumed from an enjoyment of twenty years. *Campbell* v. *Wilson*, 3 East, 294. *Keymer* v. *Summers*, B. N. P. 74; 3 T. R. 197. So, although every person is entitled to the benefit of the water that flows over his land, without diminution or alteration, yet an adverse right may exist, founded on the occupation of another; and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it has existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right. Twenty years exclusive enjoyment of the water, in any particular manner, affords a conclusive presumption of the right of the party so enjoying it, derived from grant, or Act of Parliament; but less than twenty years' enjoyment may or may not afford such a presumption, accordingly as it is attended with circumstances to support or rebut the right. Per Lord Ellenborough, *Beeley* v. *Shaw*, 6 East, 214. [Angell on Watercourses, Chap. iv, vii, viii.] And see *Balston* v. *Benstead*, 1 Camp. 463; and see tit. WATERCOURSE, PEW, and PRESCRIPTION; and now see the stat. 2 & 3 W. 4, c. 71, by which the law on this subject is now governed. Where a nuisance is of a permanent nature, an action lies at the suit of the reversioner, as well as of the tenant in possession. *Biddlesford* v. *Onslow*, 3 Lev. 209. A reversioner cannot sue for a mere trespass, although done with a view to claim a right, if the act during the tenancy be not injurious to the reversion. *Baxter* v. *Taylor*,[1] 4 B. & Ad. 72. But the reversioner may sue for an injury to his right, although the nuisance may easily be removed. *Shadwell* v. *Hutchinson*,[2] M. & M. 350. A landlord may maintain an action against his tenant, in respect of anything done to destroy evidence of title. *Young* v. *Spencer*,[3] 10 B. & C. 152.

(*p*) *Mosley, Bart.* v. *Walker*,[4] 7 B. & C. 40; and see *The Prior of Dunstable's Case*, 11 H. B. 19, a.; 8 Co. 127; Com. Dig. *Market*, F. 2; Vin. Ab. tit. *Market*. *Bailiffs of Tewkesbury* v. *Bricknell*, 2 Taunt. 133. But *semble* that the mere right to the franchise does not, *per se*, confer such an exclusive privilege. And *semble*, that the grantee of a new right of market cannot compel persons carrying on trade there in their shops to desert them and frequent the market. 1b.

(*q*) *Curwen* v. *Salkeld*, 3 East, 538; 7 B. & C. 54.

(*r*) *Mosley* v. *Walker*,[4] 7 B. & C. 40. For where the law raises the exception, it need not be stated in pleading. *Comyns* v. *Boyer*, Cro. Eliz. 185.

(*s*) *Prince* v. *Lewis*,[5] 5 B. & C. 360. *Secus*, where the defendant, at the time of selling marketable goods in his own house adjoining to the market, had a stall in the market which he might have used; the jury finding that he had no reasonable cause for selling in his own house. *Mosley* v. *Walker*,[4] 7 B. & C. 40.

(*t*) See tit. PRESCRIPTION; PRESUMPTION, and *supra*, note (*o*). The same rule prevails in general with respect to incorporeal rights, easements, and privileges claimed in the lands of another; as in the case of a right of way. *Campbell* v. *Wilson*, 3 East, 294. *Keymer* v. *Summers*, B. N. P. 74; 3 T. R. 157. *Wood* v. *Veal*,[6] 5 B. & A. 454. In *R.* v. *Barr*, 4 Camp. 16, the way had been used for thirty years by the public, during a succession of tenancies, the owner having had notice, &c.; Lord Ellenborough held, that it was evidence that the way had been used with his assent. But see *Wood* v. *Veal*,[6] 5 B. & A. 454.

[1]Eng. Com. Law Reps. xxiv. 26. [2]*Id.* xxii. 33. [3]*Id.* xxi. 47. [4]*Id.* xiv. 13. [5]*Id.* xi. 252. [6]*Id.* vii. 158.

Thus the evidence of a title to a right of way, or to the use of lights derived from enjoyment by the claimant, and that the acquiescence of others, for the space *of twenty years, may be rebutted by proof that the adjoining property was in the occupation of a tenant under a lease; for the landlord is not bound by the *laches* of the tenant (*u*). *745

The right acquired by length of enjoyment is commensurate with the nature and extent of the enjoyment. Thus, if the plaintiff prescribe for a window to a malthouse, he cannot maintain an action for erecting a wall by means of which his window is generally darkened, if it appear that sufficient light is still admitted for the occupation of the plaintiff's building as a malthouse (*x*). But where an ancient window has been enlarged, the owner of the adjoining premises is not at liberty to obstruct any part of the original window, although the unobstructed part of the new window be larger than the old one (*y*), and although he may possess no means of reducing the new window to its original size.

Secondly. The plaintiff must of course prove some act or omission (*z*), constituting a nuisance on the part of the defendant. The evidence to prove the act to have been done by the defendant, or by his authority, is of too obvious a nature to require comment (*a*). It is sufficient to prove that the defendant either erected the nuisance, or that being the alienee of the land he continued the nuisance (*b*), or that having erected the nuisance he let the premises and received rent from his tenant (*c*). After damages have been recovered for the erection of a nuisance, another action is still maintainable for the continuance of the same nuisance by the defendant. And where the plaintiff had recovered from a tenant for years, who afterwards underlet the premises on which the nusiance was erected, to a sub-tenant, and an action for the continuance of the nuisance was brought against the former tenant, the Court held that the action was maintainable, for the defendant had transferred the premises with the original wrong, and by his demise had affirmed the continuance of it (*d*); and the plaintiff might in such case, proceed against the sub-lessee (*e*); but in such case it has been said that notice to the latter is necessary (*f*). Where the damage has re- Defendant's agency.

(*u*) *Daniel* v. *North*, 11 East, 372. There the lights had been used by the plaintiff, and enjoyed without interruption for the space of twenty years, during the occupation of the opposite premises by a tenant; and it was held that this did not conclude the landlord without knowledge of the fact. And see *Bradbury* v. *Grinsell*, 2 Will. Saund. 175, d. e. *Campbell* v. *Wilson*, 3 East, 294. *Cooper* v. *Barber*, 3 Taunt. 99. And *Infra*, tit. Prescription.—Presumption.—Time.

(*x*) *Martin* v. *Goble*, 1 Camp. 322. See the *East India Company* v. *Vincent*, 2 Atk. 83.

(*y*) *Chandler* v. *Thompson*, 3 Camp. 80, cor. Lord Ellenborough. See *Cherrington* v. *Abney*, 2 Vernon, 646. *Beeley* v. *Shaw*, 6 East, 208.

(*z*) Case for non-repair of fences is maintainable against the occupier only. *Cheetham* v. *Hampton*, 4 T. R. 318. Unless the owner, though not in possession, be bound to repair. *Payne* v. *Rogers*, 2 H. B. 349.

(*a*) *Supra*, tit. Agent. A landlord who employed workmen to do repairs in a house in the possession of his tenant, who was bound to repair, and directed the repairs, was held to be liable for a nuisance occasioned by the negligence of the workmen. *Leslie* v. *Pounds*, 4 Taunt. 649; see tit. Negligence. In an action for obstructing lights, a clerk who superintends the work complained of, and alone directs the workmen, is liable as a co-defendant. *Wilson* v. *Peto*,[1] 6 Moore, 47. Proof of the employment of an agent by *A.* to pull down the house of *A.*, which adjoins the house of *B.*, is evidence against *A.*, in an action by *B.* against *A.* for injuring his house, without calling the agent. *Peyton* v. *Governors of St. Thomas's Hospital*,[2] 4 M. & R. 625.

(*b*) *Penruddock's Case*, 5 Rep. 100.

(*c*) *R.* v. *Pedley*, 3 N. & M. 627;[3] 1 Ad. & Ell. 822.

(*d*) *Rosewell* v. *Prior*, Salk. 460; W. Jones, 272; Cro. Jac. 373, 555. [See *Hughes* v. *Mung*, 3 Har. & M'Hen. 441. *Carruthars* v. *Tillman*, 1 Hayw. 501. *Anon.* v. *Deberry*, Ibid. 248. *Staple* v. *Spring*, 10 Mass. R. 72.]

(*e*) Ibid. and *semble* against both, for one was but the agent of the other in doing the wrong.

(*f*) *Penruddock's Case*, 5 Co. 100; sed vide *supra*, 728. Where a notice to remove a nuisance had been served on the defendant's predecessor, Abbott, C. J. held that having been delivered on the premises to the occupier for the time being, it bound a subsequent occupier. *Salmon* v. *Bensley*,[4] R. & M. 189.

[1]Eng. Com. Law Reps. xvii. 13. [2]*Id.* xvii. 483. [3]*Id.* xviii. 220. [4]*Id.* xxi. 414.

sulted from an omission by the defendant, as in neglecting to repair a public road, his *obligation must be proved (*g*). Where an action is brought for neglecting to remove tithes, it seems that it is necessary to prove a notice to the defendant of their having been set out (*h*). If the injury were occasioned in part by the negligence of the plaintiff's as well as of the defendant's agent, the action is not maintainable (*i*).

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Where a house, in respect of which a nuisance has been committed, has been aliened, the alienee may maintain an action for the continuance of the nuisance, after request made to abate or remove the nuisance (*k*). And it should seem that proof of such request is unnecessary in order to enable the alienee to maintain an action against a wrong-doer, who is guilty of a continuing nuisance by neglecting to remove it (1).

The defendant's act must not only be detrimental, but wrongful, either in respect of the doing such act at all, or the doing it in an improper manner. An action does not lie against a man for pulling down his own house, by means of which the adjacent house falls for want of shoring (*l*). So if a party build a house on his own land, which has previously been excavated to its extremity for mining purposes, he has not a right to support from the adjoining land of another, unless such a right can be either expressly proved or presumed (*m*). In such cases, therefore, no action lies, for no wrong is done by the defendant in merely using his own. Yet even in such instances, if a party having a right so to use his own, do it in a wasteful, negligent, and improvident manner, so as to occasion greater injury to his neighbour than was necessary, or than would in the ordinary course of doing the work have been incurred, he is liable. As where the owner of the house injured neglects to shore it up, and the defendant by pulling down his house in a negligent and careless manner, enhances the risk to the plaintiff's premises (*n*).

(*g*) 1 Inst, 56, a. n. Hagr. ed. The action will not lie where a parish or county is bound to repair a highway. *Russell* v. *Men of Devon*, 2 T. R. 671.

(*h*) 3 Burr. 1892. But the common law does not require notice to be given in general of the intention to set out tithes, either predial or of animals. *Kemp* v. *Filewood*, 11 East, 358. 1 Roll. Ab. 643, tit. Dismes, x. pl. 1. *Body* v. *Johnson*, Somerset Summer Assizes, 1815, cor. Dampier, J. cited 2 Sel. N. P. 1052. But a special custom may render such a notice necessary. *Butter* v. *Heathly*, 3 Burr. 1891.

(*i*) *Hill* v. *Warren*,[1] 2 Starkie's C. 377, where the action was brought for negligence in taking down a party-wall, and it appeared that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. Where a canal company being bound to repair the banks, brought case against the owner of adjoining lands for digging clay-pits, whereby the plaintiff's banks gave way, &c.; held that it ought to have been presented as a question of fact to the jury, whether at the time of the alleged cause of complaint the bank was in such a state as the Act of Parliament required, and the owner of adjoining lands was entitled to expect; and not merely whether the falling of the bank was occasioned by the digging of the pits by the defendant. *Stafford Canal Co.* v. *Hallen*,[2] 6 B. & Cr. 317.

(*k*) *Penruddock's Case*, 5 Rep. 101, a; Willes, 583; Cro. J. 555; *supra*, 728.

(*l*) *Peyton* v. *Mayor of London*,[3] 9 B. & C. 725. The owner of a house not ancient, cannot recover against the owner of the adjoining land for merely, and without apparent negligence, digging away that land so that the house falls in. *Wyatt* v. *Harrison*,[4] 3 B. & Ad. 871.

(*m*) *Partridge* v. *Scott*, 3 M. & W. 220. *Semble*, after a lapse of twenty years from the time when the owner of the adjoining land first knew or had the means of knowing that the land had been excavated, a grant may be presumed.

(*n*) *Walters* v. *Pfiel*,[5] M. & M. 365. See *Trower* v. *Chadwick*,[6] 3 Bing. N. C. 334. *Dodd* v. *Holmes*,[7] 1 Ad. & Ell. 493. Where a dock company was authorized by an act to make a swing-bridge across a public highway, by the opening of which the public were delayed, held that a party seeking damages for such delay, must make out that it was unnecessary; if the company do all that can be expected of reasonable men, availing themselves of such means as they ought, they will not be liable. *Wiggins* v. *Boddington*,[8] 3 C. & P. 544. Where the plaintiff alleged his possession of a dwelling-house, belonging to and supporting which were certain foundations of a certain pine wall which he was then enjoying, and of right ought to enjoy,

(1) [*Quære de hoc.* See Willes, 583. Jenk. 260, pl. 57. 2 Chit. Pl. 333, note (*c*).]

[1]Eng. Com. Law Reps. iii. 390. [2]*Id.* xiii. 184. [3]*Id.* xvii. 483. [4]*Id.* xxiii. 205. [5]*Id.* xxii. 334. [6]*Id.* xxxii. 142. [7]*Id.* xxviii. 128. [8]*Id.* xiv. 439.

An action does not lie against trustees or commissioners, in respect of *damage occasioned by them in the execution of their powers, unless it be *747
for an *excess* (*o*), or vexatious abuse of authority (*p*), or at least a careless and negligent exercise of their authority.

Thirdly. It is sufficient to prove, that by reason of the nuisance the plaintiff cannot enjoy his right in as full and ample a manner as formerly. In an action for obstructing lights, it is not necessary to prove a total privation; it is sufficient in general to show that the plaintiff cannot (in consequence of the obstruction) enjoy the light in as free and beneficial a manner as before (*q*). Damage, &c.

So the plaintiff may prove that the stream which flows through his land is diminished in quantity, or that its quality has been affected, and that it is less wholesome for cattle, or less fit for any other purpose to which it may have been applied. Proof of an abridgement of the means and power of exercising the right is sufficient, without evidence to show that any positive damage has resulted to the plaintiff. Thus, it is sufficient to prove an obstruction of a way to which the plaintiff is entitled over the defendant's land, without showing that any special damage has been occasioned by the obstruction (*r*). Evidence of damage.

*Where a market or fair of the defendant is held on a different day from *748

and then alleged the wrongful excavating by the defendant of his soil adjoining such foundation, which was thereby weakened and sunk, and the plaintiff's house supported thereon injured; held, that such averment amounted to an averment, not of property, but of an easement on such foundations; and proof being given, and the evidence establishing such easement on the foundations of the defendant's pine wall, and showing that the excavation caused the injury through the careless mode in which it was done, the action was maintainable. *Brown* v. *Windsor*, 1 Cr. & J. 20. Where the defendants removed an adjoining building, on the footing of whose walls those of the plaintiff also in part rested, it was held, that having given previous notice, the question was, whether the defendants had used reasonable and ordinary care in the work; and if they had, that they were not answerable for any injury which the plaintiff's building had sustained. *Massey* v. *Goyder*,[1] 4 C. & P. 191. If *A.* and *B.* have lands contiguous, and after *A.* has erected a house extending to the boundary of his land, *B.* negligently, unskilfully, and improperly digs his own soil, so that *A.*'s land is injured, an action lies. *Dodd* v. *Holme*,[2] 1 Ad. & Ell. 493. But *qu.* if he be bound to protect his neighbour in making the excavation without negligence, either in the case of a new house or of one twenty years old.

(*o*) See *Leader* v. *Moxon*, 3 Wil. 461; 2 Bl. 924. There the defendants had exceeded their authority, by raising the pavement so high as to obstruct the plaintiff's windows. Per Bayley, J., in *Boulton* v. *Crowther*,[3] 2 B. & C. 708. *Harris* v. *Baker*, 4 M. & S. 27.

(*p*) *Boulton* v. *Crowther*,[3] 2 B. & C. 703, where the gravamen was that the trustees of a road had raised the highway so as to obstruct the plaintiff's entrance. The trustees had power under the Act to improve the road, and the jury found that the defendants had not acted arbitrarily, carelessly or oppressively, and it was held that the defendants were not liable. See also *The Plate Glass Comp.* v. *Meredith*, 4 T. R. 794. In *Jones* v. *Bird*,[4] 5 B. & A. 837, it was held that commissioners were liable for an act done by them in discharge of their authority, but it was expressly found that they had acted carelessly and negligently, 2 B. & C. 711. In general, one who is in the exercise of a public function, without emolument, and which he is compellable to execute, acts without malice, according to the best of his skill and diligence, is not liable in respect of consequential damage arising from his act. *Sutton* v. *Clarke*,[5] 6 Taunt. 29.

(*q*) *Cotterell* v. *Griffiths*, 4 Esp. C. 67. [See Mr. Howe's *note* to *Chandler* v. *Thompson*, 3 Camp. 82.] *Pringle* v. *Wernham*,[6] 7 C. & P. 377. *Wells* v. *Ody*,[7] 7 C. & P. 410. *R.* v. *Neil*,[8] 2 C. & P. 485. But see *Back* v. *Stacey*,[9] 2 C. & P. 465; *Parker* v. *Smith*,[10] 5 C. & P. 438. The merely preventing an excess in the use of ancient lights, beyond the extent to which they were formerly enjoyed, is not actionable. Com. Dig., Action on the Case for Nuisance, C. It seems that windows in an enlarged house, and in a different situation from the original one, are not entitled to the same privilege of protection. *Blanchard* v. *Bridges*,[11] 4 Ad. & Ell. 176.

(*r*) *Allen* v. *Ormond*, 8 East, 4. Even although such way has been used by the public for more than twelve years. [See *Angell on Watercourses*, 50 & seq.] In the case of *Taylor* v. *Bennett*, 7 C. & P. 239, which was an action for disturbing the plaintiff in the use of a well, by putting rubbish into it, it was held, that if the water was thereby rendered shallower, and the water made inconvenient for use, the plaintiff would be entitled to recover; but that if the effect merely were to make the water muddy for a time, the damage was too minute to sustain the action.

[1]Eng. Com. Law Reps. xix. 321. [2]*Id.* xxviii. 128. [3]*Id.* ix. 227. [4]*Id.* vii. 277. [5]*Id.* i. 298. [6]*Id.* xxxii. 548. [7]*Id.* xxxii. 560. [8]*Id.* xii. 226. [9]*Id.* xii. 218. [10]*Id.* xxiv. 401. [11]*Id.* xxxi. 46.

the plaintiff's, it is a question of fact for the jury, whether the former be a nuisance to the latter (*s*).

Proof in defence.

It is not only a good defence (*t*) to show that the obstruction was erected by the leave and license of the plaintiff, but even where the license has subsequently been recalled, to show that the erection was made under a parol license from the plaintiff at the defendant's expense, the expenses not having been tendered to the defendant (*u*).

But an easement in the land of another cannot (it has been held) be created but by grant (*x*).

It was held to be no defence that the window in question was to be deemed a nuisance under the stat. 14 G. 3, c. 78, having been built upon a party-wall, no conviction having taken place (*y*).

The Building Act, 14 G. 3, c. 78, s. 43, which authorizes the raising of a party fence wall, does not protect from liability in respect of any collateral damage which results, as by darkening the windows of the adjoining house (*z*).

A window which has been completely closed up with bricks and mortar for twenty years, is no longer privileged (*a*); so if a party has, by his mode of discontinuing the enjoyment of lights, evinced an intention never to resume the enjoyment, he cannot afterwards maintain an action against the defendant for a subsequent erection which prevents him from using his right, although twenty years have not elapsed (*b*).

It is no defence that the nuisance had been carried on for ten years before the plaintiff was possessed of his term in the premises, and that the noise complained of was essential to the defendant's trade (*c*).

Plea in trespass, for throwing down the plaintiff's chimnies, that they adjoined a highway, and in consequence of the destruction of the adjoining house, were in danger of falling and endangering the lives of the King's subjects passing along the said highway; held that, if made out, the plea was a good answer to the action (*d*).

An indictment lies for keeping a ruinous house adjoining to the highway (*e*).

Where a trade in its nature was a nuisance, but from the place where
*749 *carried on was not such unless it occasioned more inconvenience than before, it was held that an increase in the business, by improvements in the mode of conducting it, did not render it indictable, unless there was an increase of annoyance (*f*).

Where commissioners, for the protection of lands which it was their duty to protect, erected a groin which had the effect of exposing adjoining lands to the inroads and force of the sea, it was held that they were not

(*s*) *Yard* v. *Ford*, 2 Saund. 172; Stat. H. 4, 5 & 6. A market beyond the distance of twenty miles *non est vicinum*, Fl. 1. 4, c. 28, s. 13; Com. Dig. *Market*, C. 2; *et poterit esse vicinum, et infra predictos terminos et non injuriosum;* but if held on the same day, it is said that it will be intended to be to the nuisance. F.N. B. 184, a.; 2 W. Saund. 174, n. (2).

(*t*) As to the necessity for a special plea, see above.

(*u*) *Winter* v. *Brockwell*, 8 East, 308. The obstruction there was a sky-light over the defendant's area, which prevented the access of the light and air through a window to the plaintiff's dwelling-house. [See *Anon* v. *Deberry*, 1 Hayw. 248.]

(*x*) *Hewlins* v. *Shippam*,[1] 5 B. & C. 221, where the plaintiff claimed a right to have a gutter or drain across the defendant's land; and see Co. Litt. g. n. 42 a., 85 a, 169; 2 Roll. Ab. 62; Shep. Touch. 231; Gilb. Law of Ev. 96. *Fentiman* v. *Smith*, 4 East, 107, where Lord Ellenborough lays it down distinctly, that the title to have water flowing in the tunnel over the plaintiff's land could not pass by parol license without deed.

(*y*) *Titterton* v. *Conyers*,[2] 1 Marsh, 140.

(*z*) *Wells* v. *Ody*, 1 M. & W. 452.

(*a*) *Lawrence* v. *Obee*, 3 Camp. 514.

(*b*) *Moore* v. *Rawson*,[4] 3 B. & C. 332.

(*c*) *Elliotson* v. *Feetham*,[4] 2 Bing. N.C. 134.

(*d*) *Dewey* v. *White*,[5] 1 M. & M. C. 56.

(*e*) *R.* v. *Watt*, 1 Salk. 357.

(*f*) *R.* v. *Watts*,[6] 1 M. & M. 281.

[1]Eng. Com. Law Reps. xi. 207. [2]*Id.* i. 161. [3]*Id.* x. 99. [4]*Id.* xxix. 283. [5]*Id.* xxii. 246. [6]*Id.* xxii. 307.

liable to make compensation to such owners, but that as against a common enemy they must protect themselves (*g*).

A party is indictable for a public nuisance on a road, by the erection of building upon it, although liable to a summary conviction (*h*).

Lord Hale, *de portibus maris*, holds that the question of nuisance or no nuisance is one of fact for the jury (*i*). It seems to be no defence to an indictment, for that which is of itself a nuisance, that some collateral advantage is conferred on a portion of the public (*k*).

A plan, showing not merely the streets but supposed position of the carriages, in an action for negligent driving, was rejected, as too leading a representation of the fact in dispute (*l*).

Where, upon the accident occurring, some persons in the defendant's carriage gave their address, and said, that "any damage would be paid for;" held that the address given, but not any other statement, was admissible (*m*).

OFFICE COPY.

An office copy is admissible in evidence in the same cause and in the same court; but not in a different court, nor in a different cause in the same court (*n*).

OFFICERS (*o*).

By the stat. 7 & 8 G. 4, c. 53, which consolidates the previous statutes relative to the excise and customs, various provisions are made for the protection *of officers. Sect. 114 provides that no action shall be brought *750
against any officer, or any person acting in his aid or assistance, unless a month's previous notice (*p*) in writing shall have been delivered to such officer or person, or left at the usual place of his abode, by the attorney or agent who shall intend to sue out the writ, &c., expressing the cause of action, with the time when and place where it arose; and the name and

(*g*) *R.* v. *Commrs. of Pagham Sewers*,[1] 8 B. & C. 355.

(*h*) *R.* v. *Gregory*,[2] 5 B. & Ad. 555.

(*i*) It may however, in some instances, be a question of law arising upon the facts.

(*k*) In *R.* v. *Ward*, K. B. Mich. T. 1835, Denman, L. C. J. observed, "If it were to be held, that against the disadvantage to the public ought to be weighed an advantage to a particular part of the public from the act charged as a nuisance, it would be impossible for juries to decide the case, and it would be to desert the plain principles of law." He said, that *R.* v. *Russel*,[3] 6 B. & C. 566, had been doubted, and probably would on consideration, be further doubted.

(*l*) *Beamon* v. *Ellice*,[4] 4 C. & P. 585. (*m*) Ibid.

(*n*) Per Ld. Mansfield, in *Denn* v. *Fulford*, Burr. 1177. See *Burnand* v. *Nerot*,[5] 1 Carr. & P. 578. And see APPENDIX.

(*o*) An election to an inferior vacates a superior office, if they be incompatible. *Milward* v. *Thatcher*, 2 T. R. 81. A conviction before a recorder *de facto* is good; per Buller, J. Where by the charter the common clerk was bound to attend corporate meetings and take minutes of the proceedings, for neglect of which he might be amerced; and he also received a salary which might be varied in amount, or discontinued, at the pleasure of the mayor, aldermen and bailiffs; held, that an alderman could not hold such office, it being incompatible, and that the acceptance of the one vacated the other. *R.* v. *Tizzard*,[6] 9 B. & C. 418. Where the affidavit, on an application for a *quo warranto*, for exercising an office alleged to have been vacated by the acceptance of a second office incompatible with the first, only stated the belief that he exercised the second office, but did not show any valid appointment thereto, it was held to be insufficient. *R.* v. *Day*,[7] 9 B. & C. 708.

(*p*) The notice must state the plaintiff's place of abode at the time of delivering the notice. Where the notice stated the plaintiff's place of abode at the time when the cause of action arose, but did not state his place of abode at the time when notice was given (which was five weeks after the injury), the notice was held to be insufficient. *Williams* v. *Burgess*, 3 Taunt. 127. As to the description of the place of abode, vide *supra*, tit. JUSTICES; and *Wood* v. *Folliott & others*, 3 B. & P. 152. If the notice be not proved at the trial, the defendant will be entitled to a verdict, and no evidence can be received. See also stat. 23 Geo. 3, c. 70; 6 Geo. 4, c. 80, s. 108; and see tit. JUSTICE.

[1]Eng. Com. Law Reps. xv. 237. [2]*Id.* xxvii. 125. [3]*Id.* xiii. 254. [4]*Id.* xix. 537. [5]*Id.* xi. 479. [6]*Id.* xvii. 411. [7]*Id.* xvii. 476.

place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of such attorney or agent.

Sect. 115 limits the suit to three calendar months after the cause of action shall have arisen, requires the venue to be laid in the proper county, enables the defendant to plead the general issue, and, after a verdict, &c. for the defendant, awards treble costs.

Sect. 116 enables the defendant to tender amends, and to plead the tender in bar, if not accepted.

Sect. 119 provides that where on the trial of an information for the condemnation of any goods seized under any Act relating to the revenue of excise, the Court shall certify that there was probable cause for the seizure, the plaintiff, on action brought, shall not be entitled to more than 2*d.* damages.

The steward of a court-baron is a judicial officer, and trespass does not lie against him for the mistake of his bailiff in taking the goods of *B.* under a precept commanding him to take the goods of *C.* (*q*).

The nomination of an officer may be without deed (*r*).

OVERSEER (*s*).

See CHURCHWARDEN.

Appointment of.

IN order to justify an appointment of overseers for a subdivision of a parish, it should be shown that otherwise the parish could not reap the benefit of the statute 43 Eliz. c. 2 (*t*). But where a parish consisted of four townships, and had always, since the statute, had more than four overseers, it was held that each township was entitled to have separate overseers (*u*). And where the two districts of which a parish consisted, had from the 43d
*751 *of Eliz. down to the 13th and 14th C. 2, agreed to separate in the maintenance of the poor, and that separate overseers should be appointed, on condition that the rateable property, whether situated in the one or the other district, should be rated where the occupiers resided; and, in pursuance of this agreement, the districts had maintained their poor separately, and had separate overseers, constables, &c.; it was held, that the evidence clearly showed that the parish, at the time of the agreement, could not reap the full benefit of the statute of Elizabeth, and that the separation was valid, and the appointment of overseers for the whole parish was bad (*v*).

Whether or not a parish can have the benefit of the statute of Elizabeth is a fact which the session ought to find, and not merely evidence of the fact (*w*).

(*q*) *Holroyd* v. *Breare*, 2 B. & A. 473. It is incident to every public office, that the party should be in a situation to discharge the duties of it. And he cannot act by deputy; per Ld. Kenyon, in the matter of *Bryant*, 4 T. R. 716. See *R.* v. *Ferrand*,[1] 3 B. & A. 260.

(*r*) Salk. 467; Com. Dig., OFFICER, D. 5.

(*s*) All the overseers of a parish, &c. constitute but one joint officer; and a payment by or to one, is a payment by or to all. *R.* v. *Bartlett*, 1 Bott. 206. But one of several churchwardens cannot release or give away the funds of the church. They are *quasi* a corporation. Cro. Ja. 234; Burn's Ec. Law, 292. They may appoint a bailiff. See tit. REPLEVIN—CHURCHWARDENS. The Court will grant a mandamus to two justices to issue their warrant under the 50 Geo. 3, c. 49, at the instance of one of the succeeding overseers, although the rest refuse to concur. *R.* v. *Pascoe*, 2 M. & S. 343.

(*t*) *R.* v. *Uttoxeter*, 1 Doug. 346; Cald. 84. Although it appear that since the year 1648 the parish has constantly had more than four overseers, and though the hamlet part has immemorially had a constable of its own. Ib.

(*u*) *R.* v. *Horton*, 1 T. R. 3741.

(*v*) *R.* v. *Walsall*, 2 B. & A. 157. See also *Lane* v. *Cobham*, 7 East, 1. *R.* v. *Leigh*, 3 T. R. 746.

(*w*) *R.* v. *Watson*, 7 East, 214.

[1] Eng. Com. Law Reps. v. 274.

The appointment of an overseer may be by parol (*x*).

An order of sessions, appointing overseers, for a parish, which, though large, is able to reap the benefit of the statute, is a nullity (*y*).

Two overseers, one of whom is sole churchwarden, do not form a body corporate within the meaning of the statute 49 G. 3, c. 12, s. 17, and the parish property does not vest in them (*z*).

Where a pauper had been put in possession of a cottage forty years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired, until two years ago, when the pauper disposed of it to the defendant, and went away, and no act had been done to acquire a tenancy under the present overseers, it was held that they could not recover (*a*).

Under the 55 Geo. 3, c. 137, it is sufficient to state goods to be the property "of the overseers for the time being" (*b*).

It is the duty of overseers to keep the possession of indentures of parish apprentices, if they come into their possession, and to deposit them in the parish chest; and a presumption arises, from not being found there, that they are lost (*c*).

Action against.

In an action against an overseer for not returning the surplus arising on a distress for poor-rates, a formal demand is necessary under the statute 27 G. 2, c. 20, s. 2 (*d*). A plaintiff cannot recover against several overseers money lent to one without the concurrence of the rest, unless all the rest have expressly promised to repay the money lent; for it is contrary to the duty of an overseer to borrow money for parochial purposes (*e*). Where money has been paid by a party at the sole request of one overseer, and without the knowledge of the others, and no demand is made upon them till they are out of office, it is a question for the jury whether, under the special circumstances, the party ought not to be considered as having relied on the sole responsibility of the overseer on whose request he acted (*f*).

In an action against an overseer for refusing to permit an inspection of *the rate-book, under the statute 17 Geo. 2, c. 3, s. 2, it is necessary to show *752
that a demand was made at a reasonable time and place. Where the demand was made at a parishioner's own house, and not at the overseer's, at eight o'clock in the evening, it was held that the demand was not sufficient (*g*). Nor can the plaintiff recover unless he shows that he has been injured by the refusal (*h*).

The right to inspect churchwardens' and overseers' accounts, under 17 Geo. 2, c. 38, is not general, but a mere private right, and the applicant ought to show some public ground for desiring to inspect them, to entitle himself to the remedy by mandamus; and it is no answer to the application that a penalty is imposed for refusing, which is given not as a compensation to the party complaining, but to punish the offender, and for the relief of the poor (*i*). So a mandamus to a mayor, &c. to permit the party to have inspection of the records of a court leet, will be refused, unless good reason is assigned (*j*).

(*x*) *Anon.* Lofft, 434. And see *R.* v. *Morris*, 4 T. R. 552. *R.* v. *Walsall*, 2 B. & A. 557.
(*y*) *Peart* v. *Westgarth*, 3 Burr. 1610; Cald. 90. (*z*) *Woodcock* v. *Gibson*,[1] 4 B. & C. 462.
(*a*) *Doe* v. *Clarke*, 14 East, 488. *R.* v. *Went*, Russ. & Ry. C. C. L. 359.
(*b*) *R.* v. *Went*, Russ & Ry. C. C. L. 359. (*c*) *R.* v. *Trowbridge*,[2] 8 B. & C. 96.
(*d*) *Simpson* v. *Routh*,[3] 2 B. & C. 682. And an improper tender does not render such a demand unnecessary. Ib.
(*e*) *Massey* v. *Knowtes*,[4] 3 Starkie's C. 65. (*f*) *Malkin* v. *Vickerstaff*,[5] 3 B. & A. 89.
(*g*) *Spenceley* v. *Robinson*,[6] 3 B. & C. 658. (*h*) Ib.
(*i*) *R.* v. *Clear*,[7] 4 B. & C. 899; and 6 D. & Ry. 393. (*j*) *R.* v. *Maidstone, Mayor of, &c.*,[8] 6 D. & R. 334.

[1]Eng. Com. Law Reps. x. 379. [2]*Id.* xv. 155. [3]*Id.* ix. 219. [4]*Id.* xiv. 164. [5]*Id.* v. 235. [6]*Id.* x. 211. [7]*Id.* x. 466. [8]*Id.* xvi. 261.

Where, in an action against a guardian of the poor for having supplied the poor with provisions, against the statute 55 Geo. 3, c. 139, s. 6, it was alleged that he had the ordering and directing of the poor of one parish, and it appeared in evidence that he had the ordering and directing of the poor of that parish, and also others, united under the statute 22 Geo. 3, c. 83, s. 43, and that he had supplied goods to the master of the workhouse, who had contracted for supplying the poor, at so much per head; it was held that the evidence was sufficient (*k*). But it was held, that an overseer, who had an interest in coals supplied nominally by another for the use of the poor, was not liable without proof that they were supplied with a view to profit (*l*). And as the statute only prohibits the supplying a workhouse or the poor of a parish generally, it was held that an overseer who, under an order for the relief of the poor, paid him part in money, and the rest, with the pauper's consent, in shop goods, was not liable to a penalty (*m*).

PAROL EVIDENCE.

General principle.

The great principle which regulates the admission or rejection of parol evidence in relation to written instruments has already been adverted to (*n*).

Where written instruments are appointed, either by the immediate authority of law, or by the compact of parties, to be the permanent repositories and memorials of truth, it is a matter both of principle and of policy to exclude any inferior evidence from being used, either as a substitute for such instruments, or to contradict or alter them. Of *principle*, because such instruments are in their own nature and origin entitled to a much higher degree of credit than that which appertains to parol evidence; of *policy*, because it would be attended with great mischief and inconvenience if those instruments upon which men's rights depended were liable to be impeached and contradicted by loose collateral evidence (A).

Consistently with the principles already adverted to, it is a general rule
*753 *that oral evidence shall in no case be received as *equivalent* to, or as a *substitute* for, a written instrument, where the latter is required by law (*o*),

(*k*) *West* v. *Andrews*,[1] 5 B. & A. 77; and see 5 B. & A. 328.
(*l*) *Skinner* v. *Buckee*,[2] 3 B. & C. 6; S. C. 4 D. & R. 628.
(*m*) *Proctor* v. *Mainwaring*,[3] 5 B. & A. 145. But see *Pope* v. *Backhouse*,[4] 2 Moore, 186.
(*n*) Vol. I. tit. BEST EVIDENCE. (*o*) *Infra*, 754.

(A) (A contract in writing, in the absence of fraud, mistake, ignorance, or latent ambiguity, cannot be varied, impaired, or explained by parol evidence. *Tilghman* v. *Tilghman's Executors*, Baldwin's C. C. R. 489. *Kemmil* v. *Wilson*, 4 Wash. C. C. R. 308. A contract entered into between the parties by letter, is such a contract. *Clark* v. *Russell*, 3 Dall. 415. But the rule that parol evidence is not admissible to alter or contradict written instruments, applies only to the parties and their representatives, and not to strangers to such instruments. *Kreider* v. *Lafferty*, 1 Whart. 303. *Overseers of New Berlin* v. *Overseers of Norwich*, 10 John. R. 229. But see *Reading* v. *Weston*, 8 Conn. R. 117. So the letting in of parol evidence to prove consent in making alterations in a deed is not within the mischiefs intended to be prevented by the Statute of Frauds. *Speake* v. *The United States*, 9 Cranch, 28. It is a general rule that an agreement in writing or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument. *Hunt* v. *Rousmanier*, 8 Wheat. 174. *Baker* v. *Whiteside*, 1 Breese, 132. So subsequent admissions, or parol promises of a party to an instrument of writing, are not admissible in evidence to change its character or legal effect. *Hamilton* v. *Neel*, 7 Watts, 517. But parol evidence may be received to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed, or other written contract. *Davenport* v. *Mason*, 15 Mass. R. 85. And a written contract may be explained, but it cannot be altered, by parol testimony. *O'Harra* v. *Hall*, 4 Dall. 340. See also note (*a*), (ed. 1838.) *Thompson* v. *White*, 1 Dall. 424; and notes (*a*) & *b*), (ed. 1830.) The reasons however which forbid parol evidence to alter and explain written instruments, do not apply to contracts implied by the operation of law—therefore evidence of an agreement made between the holder and endorser of a note whereby the latter was to be discharged on the happening of a certain event, was held to be admissible. *Susquehanna Co.* v. *Evans*, 4 Wash. C. C. R. 480. So parol evidence is admissible to prove a resulting trust. *Jackson* ex dem. *Kane* v. *Stembergh*, 1 John. Ca. 153.)

[1]Eng. Com. Law Reps. vii. 118. [2]*Id.* x. 5. [3]*Id.* v. 246. [4]*Id.* iv. 87.

or to give effect to a written instrument, which is *defective* in any particular which by law is essential to its validity (*p*); or to *contradict*, *alter*, or *vary* (*q*) a written instrument, either appointed by law, or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites; for by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree.

But parol evidence is admissible to *defeat* (*r*) a written instrument, on the ground of fraud, mistake, &c. or to *apply* it to its proper subject-matter (*s*), or in some instances, as ancillary to such application, to *explain* the meaning of doubtful terms (*t*), or to *rebut* presumptions arising extrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate *at all*, or is essential in order to give to the instrument its legal effect.

Inasmuch as the rejection of parol evidence, where it is placed in competition with written evidence, usually arises from the consideration that to admit it would be to allow the weaker evidence to usurp the place of the stronger, and to render the most solemn, authentic, and permanent instruments of evidence which the law can devise, uncertain, inoperative, and ineffectual, the extent to which the principle operates, and the rules deducible from that principle, will, perhaps, be exhibited in the clearest point of view by reference to the different purposes for which parol testimony can be offered in relation to written instruments. Parol evidence, in general, may be offered for three purposes in relation to written evidence: *First*, in OPPOSITION to written evidence, where it is offered with a view to *supersede* the use of written evidence, and to supply its place, or to *contradict* it, or to *vary* its effect; or wholly to *subvert* such evidence, by showing that it has no legal existence, or no legal operation in the particular case; or *secondly*, it is offered in AID of written evidence, in order either to *establish* a particular document, or to *apply* it to its proper subject-matter, or to *explain* it, or to rebut some *presumption* which affects it; or as secondary evidence, where the original is unattainable (*u*); or *thirdly*, it is used as *original and*

Not admissible to supersede, &c., by supplying omissions (A).

(*p*) *Infra*, 755.
(*q*) *Infra*, 757.
(*r*) *Infra*, 765.
(*s*) *Infra*, 768.
(*t*) *Infra*, 775.
(*u*) *Supra*, Vol. I. WRITTEN EVIDENCE.

(A) (Parol evidence of what passed at the execution of a deed, is admissible to show that the conveyance, though nominally absolute, was in fact for the purpose of enabling the grantor to institute an ejectment, in the name of the grantee, in the Circuit Court of the United States. *Ingham* v. *Crary*, 1 Penns. R. 389. In Pennsylvania, "we seem to have settled down to this, that whatever is material to the contract, and was expressed and agreed to, when the bargain was concluded, and the writing drawn out, may, if not expressed in the writing, be proved by parol, unless perhaps, it is expressly contrary to the writing." Per Huston, J. *Bollinger* v. *Eckert*, 16 Serg. & Rawle, 424. *Contra*, *Gilpin* v. *Consequa*, 1 Peters C. C. R. 85. Where a conveyance of land does not express any consideration, parol evidence may be given of the real consideration, *White* v. *Weeks*, 1 Penns. R. 186. So where a deed is made in consideration of natural love and affection, and the further consideration of "one dollar," parol proof may be admitted of other valuable considerations. *Harvey* v. *Alexander*, 1 Rawle, 219. And in general other consideration than that expressed in a deed may be given in evidence under particular circumstances, and where it does not contradict the consideration expressed. *Steele* v. *Haines*, 2 Ohio R. 185. See also *Clark's Ex'r* v. *Farran*, 3 Mart. 250. *Berthole* v. *Mace*, 5 Mart. 593. What property was embraced within the terms of a levy on real estate, may be shown by parol evidence, when the description in the sheriff's return is not precise; but evidence of the plaintiff's directions to the sheriff on the subject, is not admissible. *Scott* v. *Sheakly*, 3 Watts, 50. Parol evidence is often admissible, in order to designate the location of the premises described in a deed. *Jackson* v. *Parkhurst*, 4 Wend. 369. Where *A.* and *B.* sign a bond, *B.* signing as security (though such fact in no way appears by the bond) in a suit on the bond, it is admissible to show by parol evidence, that *B.* signed as security. *Smith* v. *Bing*, 3 Ohio R. 185. Parol evidence is admissible to prove that through the mistake of the scrivener, a clause intended by the parties to be in an agreement for the sale of land was omitted. *Gower* v. *Sterner*, 2 Whart. 75. Parol evidence may be given to explain a written agreement, so far as to give identity and locality to the subject-matter of it, and apply the contract to it. *Bertsch* v. *Lehigh Coal Co.* 4 Rawle, 130. Parol evidence has been admitted to show the misdescription of premises in a policy of insurance against fire that arose from the mistake of the secretary of the company, to whom the premises

INDEPENDENT evidence to prove a particular fact, without regard to written evidence of the fact, not being excluded by any rule of law.

I. In the first place, parol evidence is never admissible to *supersede* the use of written evidence, where written proof is required by the law.

To supersede written evidence.

Where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself. The same observation applies where the law prescribes a certain form of written evidence; to allow a defect in the instrument to be supplied by oral evidence, would be *pro tanto*, to dispense with the law. Hence, in general, where the law requires a formal written instrument (*x*), if the document offered in evidence be *defective*, so that it cannot operate without collateral aid, the defect cannot be supplied by oral testimony. Thus, if in a will the name of *754 *the intended devisee or legatee be omitted, or a blank be left for the description of the estate, or amount of the legacy, these omissions cannot be supplied by oral testimony as to the real intention of the testator (*y*). And although different writings may, by internal reference, be connected together so as to constitute one entire instrument within the Statute of Frauds, yet they cannot be connected by mere oral testimony (*z*), neither can any defect in the writing be supplied by oral evidence (*a*).

By supplying defect, &c.

In cases where a written document is not absolutely essential in point of law to give a legal operation to that which is to be proved, as it is in cases under the Statute of Frauds and of Wills, yet if an authentic written memorial be constituted by law, parol evidence cannot, in general, be substituted for it; for being appointed by law for the purpose of evidence, it must be considered as the best evidence (*b*). Thus, in general, judgments and

(*x*) See the Stat. of Frauds, *supra*, 482.

(*y*) *Baylis* v. *Attorney-general*, B. N. P. 298; 2 Atk. 249. *Woollam* v. *Hearn*, 7 Ves. 211. Where the testatrix made a disposition in favour of Lady ———, and the will contained other provisions in favour of Lady Hort, and she was appointed a trustee in the will by the name of Dame Hort, Lord Thurlow held that the blank could not be supplied by parol evidence. *Hunt* v. *Hort*, 3 Bro. C. C. 311. In *Abbott* v. *Massey* (3 Ves. 148), where a legacy was given to Mrs. G——, Lord Loughborough referred it to the master to ascertain who Mrs. G. was, who was there described by initial letter only. But see Sir D. Evans's observations upon this case in his edition of Pothier, vol. ii. p. 204. See also *Baylis* v. *Attorney-general*, 2 Atk. 239. Where a will mentioned George the son of *George* Gord, and also George the son of *John* Gord, a bequest to George the son of *Gord*, was explained, by means of the testator's declarations, to mean George the son of *George Gord*. *Doe* v. *Needs*, 2 M. & W. 129. Where a blank was left for the Christian name, parol evidence was admitted to show who was intended. *Price* v. *Page*, 4 Ves. 680.

(*z*) *Supra*, 483.

(*a*) *Supra*, 482. So an agreement, referring to such parts of another instrument as had been read by one party to another, is not sufficient within the statute, because it is imperfect without parol evidence; but an instrument which is conformable to the statute may by reference include the contents of another which is not so. *Brodie* v. *St. Paul*, 1 Ves. jun. 326. Although parol evidence be not admissible to aid an imperfect instrument (*Halliday* v. *Nicholson*, 1 Price, 404), yet where a question arises as to which an instrument is admissible but not decisive evidence, such parol evidence is admissible for the purpose of explanation. See *R.* v. *Laindon*, 8 T. R. 379.

(*b*) *Supra*, Vol. i. tit. BEST EVIDENCE. The appellants having proved that the pauper occupied a tenement of 10*l.* per annum, and paid rent and taxes for it, the respondents attempted to prove by parol that the letting was to the pauper and two others; on cross-examination it appeared that the letting was by a written instrument; held that it was necessary to produce it. *R.* v. *Rawdon*,[1] 8 B. & C. 708.

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had been accurately described by the insured at the time of the insurance. *Moliere* v. *The Penns. Fire Ins. Co.* 5 Rawle, 342. In an action against a common carrier by a consignee, for not delivering goods in good order, the defendant will not be permitted to give evidence to contradict the bill of lading signed by him, unless it be to prove that a fraud or imposition was practised upon him. *Warden* v. *Greer*, 6 Watts, 424. A bill of parcels delivered by *I.*, stating the goods as bought of *D.* and *I.*, is not conclusive evidence against *I.*, that the goods were joint property, but the real facts of the case may be shown by parol. *Harris* v. *Johnston*, 3 Cranch, 311. On a written warranty of soundness, parol proof is admissible to show that at the time of sale, the vendor informed the vendee of a defect. *Schuyler* v. *Russ*, 2 Caines, 202. Parol proof cannot be adduced to show, that a guaranty which was addressed to one was intended to be addressed to two. *Allison* v. *Ruttledge*, 5 Yerger, 193. A letter of credit addressed by mistake to John and Joseph, and delivered to John and Jeremiah, for goods furnished by them to the bearer upon the faith of the letter of credit, is not a written contract between the parties, and parol proof cannot be admitted to make it such. It is not a case of ambiguity, fraud, or mistake on the part of the plaintiffs. *Pollard* v. *Dwight*, 4 Cranch, 421.)

[1] Eng. Com. Law Reps. xv. 329.

judicial proceedings must be proved by means of the record. The examination of a prisoner before a magistrate upon a charge of felony cannot be proved by parol, unless it has been expressly shown that the examination was not taken as the statutes require, in writing (*c*).

The same principle applies where private parties have by mutual compact constituted a written document the witness of their admissions and intentions (*d*).

Written contracts.

To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive weight and authority is given by the solemn compact of the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact; and presumption for the highest degree of legal authority; loose recollection, and uncertainty of memory, for the most sure and faithful memorials *which human ingenuity can devise, or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices. In short, the great advantages which are peculiar to written evidence would be, in a great measure, if not entirely sacrificed (*e*). *755

Where the instrument is defective.

As oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law, because to admit it would virtually be to give to oral the superior force of written evidence, and occasion that to pass by parol which by law ought not to pass but by writing, it is upon the same principle inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy, or ambiguity in its terms; for if a meaning could be assigned, by the aid of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, it is plain that the effect and result would depend, not upon the terms of the instrument, but upon the force and effect of the oral evidence, and thus the latter would virtually be substituted for the former. What degree of ambiguity and uncertainty will avoid a will, deed, or other instrument, is a question of law.

Apparent and latent ambiguities (A).

An important distinction has already been adverted to between ambiguities which are *apparent* on the face of an instrument, and those which arise merely extrinsically in the *application* of an instrument of clear and

(*c*) *Supra*, tit. Admission.

(*d*) *Supra*, tit. Assumpsit. Where a demise offered in evidence contained words struck out (of a printed blank form), it was held that the Court might look at the parts struck out in order to ascertain the meaning of the parties as to the remainder. *Strickland* v. *Maxwell*, 2 C. & M. 539; but see *Doe* v. *Pedley*, 1 M. & W. 670.

(*e*) See *Countess of Rutland's Case*, 5 Rep. 26. *Haynes* v. *Hare*, 1 H. B. 659. *Buckler* v. *Millard*, 2 Vent. 107. *Clifton* v. *Walmesley*, 5 T. R. 564; 3 Atk. 8; 1 Wils. 34. *Mease* v. *Mease*, Cowp. 47. It would be inconvenient (observes Ld. Coke) that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others in such cases, if such rude averments against matter in writing should be admitted. [See *Stackpole* v. *Arnold*, 11 Mass. R. 27.]

(A) (Parol evidence is inadmissible to explain a deed or to vary a contract in writing, unless it contain some latent ambiguity. *Richards* v. *Killam*, 10 Mass. R. 239. *Eveleth* v. *Crouch*, 15 Id. 307. See also *Jackson* v. *Still*, 11 Johns. 201. *Boardman* v. *The Lessees of Reed and Ford*, 6 Peters, 328. A latent ambiguity is that which arises from evidence dehors the instrument which may then be explained by such evidence. *Tole* v. *Hardy*, 6 Cow. 333. But if patent ambiguities exist in the contract itself, and if the language be too doubtful for any settled construction by the admission of parol evidence, you create and do not merely construe the contract. *Peisch* v. *Dickson*, 1 Mason's C. C. R. 9. There is an intermediate class of cases partaking of the nature both of patent and latent ambiguities, where the words are all sensible, and have a settled meaning, but, at the same time, consistently admit of two interpretations according to the subject-matter in the contemplation of the parties. In such case parol evidence is admissible to show the circumstances under which the contract was made, and the subject-matter to which the contract referred. *Peisch* v. *Dickson*, 1 Mason's C. C. R. 9. Parol evidence of the understanding of the parties in relation to the construction of a written agreement may be given to explain that which is otherwise ambiguous. *Telder* v. *Wil-*

definite intrinsic meaning to doubtful subject-matter. An ambiguity, apparent on reading an instrument, is termed *ambiguitas patens*; that which arises merely upon its application, *ambiguitas latens*. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence, the maxim being, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*" (*f*). On the other hand, it is a settled rule that such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument (*g*).

By *apparent* ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is, that the *intention* of parties should be construed not by vague evidence of their *intentions, independently of the expressions* which they have thought fit to use, but by the *expressions themselves*. Now those expressions which are incapable of any legal construction and interpretation (*h*) by the rules of art, are either so because they are in themselves
*756 merely unintelligible, or *because, being intelligible, they exhibit a plain and obvious uncertainty (*i*). In the first instance, that is, where the terms used are in themselves simply unintelligible to an ordinary reader, the case admits of two varieties; the terms, though at first sight unintelligible, may yet be capable of having a certain and definite meaning annexed to them by extrinsic evidence, just as if they are written in a foreign language, or if mercantile terms are used, which amongst mercantile men bear a distinct, clear and definite meaning, although others do not comprehend them (*k*): they may, on the other hand, be capable of no distinct and definite interpretation. Now it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous, are yet capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given not to any loose conjecture as to the intent and meaning of the party, independently of the expressions used, but to the *expressed* meaning; and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or being in themselves intelligible are clearly uncertain, equally capable of different applications, to give any effect to them by extrinsic evidence as to the intention of the party, would be to make the mere intention operate inde-

(*f*) See Lord Bacon's Reading on the Statute of Uses.

(*g*) *Ambiguitas patens* is never holpen by averments. Regula 25.

(*h*) It is a general rule that a patent ambiguity is always, if possible, to be removed by construction and not by averment. *Colpoys* v. *Colpoys*, 1 Jac. 451.

(*i*) As where an estate is left by will to one of the three sons of *J. S.* without specifying which.

(*k*) Thus where a creditor, together with other creditors, agreed to certain resolutions to watch a commission of bankrupt, supposed to be fraudulent, "and to contribute in the usual way," it was held that parol evidence was admissible to show that by that expression it was meant that each creditor should contribute in proportion to his claim against the bankrupt, without mutual responsibility. *Taylor* v. *Cohen*,[1] 4 Bing. 53. So to the case of a will where its characters are difficult to be deciphered, or its language is unintelligible to an ordinary reader, the testimony of persons skilled in deciphering writing, or who understand the language, is admissible for the purpose of explanation. *Goblet* v. *Beechey*, 3 Sim. 24. *Masters* v. *Masters*, 1 P. Wms. 421. *Norman* v. *Morrell*, 4 Ves. 769. So if the testator express himself in terms peculiar to a particular trade or calling. *Smith* v. *Wilson*,[2] 3 B. & Ad. 728. *Doe* v. *Watson*,[3] 4 B. & Ad. 787. *Attorney-general* v. *Plate Glass Company*, 1 Aust. 39.

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liams, 9 Watts, 9. Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful on the face of it whether it was an official or a private act, parol evidence was admitted to show that it was an official act. *Mechanics' Bank of Alexandria* v. *The Bank of Columbia*, 5 Wheat. 326. In cases of equivocal written agreements, the circumstances under which they were made may be given in evidence to explain their meaning. *Crawford* v. *Janett*, 2 Leigh, 630. *M'Mahow* v. *Spangler*, 4 Rand. 51.)

[1]Eng. Com. Law Reps. xiii. 339. [2]*Id.* xxiii. 169. [3]*Id.* xxiv. 164.

pendently of any definite expression of such intention. By *apparent* ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction, or by the application of extrinsic and explanatory evidence, which show that expressions *primâ facie* unintelligible, are yet capable of conveying a certain and definite meaning.

This distinction is an immediate result from the general principles already specified. If an instrument which is in itself wholly devoid of meaning, according to the usual and ordinary rules of legal construction, or which is so indefinite and ambiguous as to be equally capable of several different constructions and applications, might have one particular definite meaning annexed to it by means of extrinsic oral evidence, it is plain that the oral evidence, and not the writing, would produce the definite effect. On the contrary, where the oral evidence is used to annex a definite meaning to the written expressions, or to point the application to this or that subject-matter, the oral evidence does not usurp the authority of the written instrument: it is the instrument which operates; the oral evidence does no more than assist its operation by assigning a definite meaning to terms capable of such explanation, or by pointing out and connecting them with the proper subject-matter.

According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts (*l*). Thus, upon a *devise to one of the sons of *J. S.*, who has several, evidence is not admissible to show that one in particular was meant (*m*); and the devise is void for uncertainty (*n*). *757

Not admissible to vary, &c.

As oral evidence is inadmissible either as a substitute for a written instrument required by law, or to give effect and operation to such an instrument where it is defective, it follows *à fortiori* that it is not admissible to contradict, or even to vary, any instrument to which an exclusive operation (*o*) is given by law, whether that exclusive quality result from a peremptory rule of law, or from private compact

To contradict or vary a written agreement.

Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the true and proper expositor of their admissions and intentions, is the only instrument of evidence in respect of that agreement, which the law will recognize so long as it exists, for the purposes of evidence (*p*) (A). If the parties have contracted by

(*l*) *Doe* v. *Westlake*,[1] 4 B. & A. 57.

(*m*) 2 Vern. 624–5; 6 Co. 68, b.; 2 P. Wms. 137; *infra*, 763; 47 Ed. 3, 16, b. In *Harris* v. *Bishop of Lincoln*, 2 P. Wms. 135, where a man limited his estate by will to his own right heirs by his mother's side, Ld. Macclesfield held that he might mean either the heir of his mother's father, or of his mother's mother, and admitted parol evidence to prove which he meant: *qu.* (*n*) Ibid.

(*o*) As to the cases in which a written instrument has such an operation, vid. *infra*, 785 (1).

(*p*) *Supra*, Assumpsit; and see *Preston* v. *Merceau*, 2 Bl. R. 1249. *Rolleston* v. *Hibbert*, 3 T. R. 406. *Hodges* v. *Drakeford*, 1 N. R. 270. *Pym* v. *Blackburn*, 3 Ves. 34. It is a general rule, that where an agreement has been reduced to writing, evidence of oral declarations, though made at the same time, shall not be admitted to contradict or to alter it. [*Pitkin* v. *Brainerd*, 5 Conn. R. 451.] A written agreement, however, where it is not under seal, may be altered by the addition of new terms by an oral agreement, which, in fact, constitutes a new agreement, incorporating the former one; or, as has been seen, such an agreement may be wholly discharged by parol, before any breach has occurred, *supra*, p. 103; and *Lord Milton* v. *Edworth*, 6 Bro. P. C. 587. In such cases it is obvious that the evidence is adduced, not to vary the terms of an existing

(1) [In Maine, Maryland and North Carolina, parol evidence cannot be given to prove the non-payment of the purchase-money for lands, when the deed states that the consideration has been paid. *Steele* v. *Adams*, 1 Greenleaf, 1; *Dixon* v. *Swigget*, 1 Har. & J. 252; *Brocket* v. *Foscue*, Ruffin's Rep. 64. *Aliter*, in Massachusetts, New York and Pennsylvania. *Wilkinson* v. *Scott*, 17 Mass. Rep. 257; *Shephard* v. *Little*, 14 Johns. 210. *Bowen* v. *Bell*, 20 Johns. 338. *Hamilton* v. *Ex'rs of M'Guire*, 3 Serg. & Rawle, 355. *Jordan* v. *Cooper*, ibid. 564. *Weigley's Adm'rs* v. *Weir*, 7 Serg. & Rawle, 309. See Dyer, 169. Moore, 569. 1 Hayw. (Tenn.) Rep. 70. *Dow* v. *Tuttle*, 4 Mass. Rep. 414. *Thompson* v. *Ketcham*, 8 Johns. 189.]

(A) (Parol evidence is admissible to show that a deed absolute in its terms is in fact a mortgage. *Roach*

[1]Eng. Com. Law Reps. vi. 348.

deed, as the obligation under seal imports greater deliberation and more solemnity than a mere written agreement which is not under seal, no evidence, whether oral or written, which is not under seal, can be admitted to contradict or to vary it (*q*).

*758 *Where *A.* agreed to take *B.* into partnership as an attorney, no time being mentioned, it was held that the partnership commenced from the time of the agreement, and that evidence was inadmissible to show that the agreement was not to take effect until *B.*, who was not then an attorney, should be admitted (*r*).

original agreement, but to show that it has been superseded or discharged. And in *Bywater* v. *Richardson*,[1] 1 Ad. & Ell. 508, it was held that a written warranty of the soundness of a horse might be limited to twenty-four hours, by rules painted on a board at the place of sale. And see *Jeffery* v. *Walton*,[2] 1 Starkie's C. 267. What took place in Court previous to a rule being made is inadmissible, the Court can only look to rule itself. *Edwards* v. *Cooper*,[3] 3 C. & P. 277. The auctioneer's declarations, where there are printed conditions, are inadmissible. *Gunnis* v. *Erhart*, 1 H. B. 289; *Powell* v. *Edmonds*, 12 East, 6. Evidence of usage at the Navy-office is inadmissible to enlarge written terms. *Hogg* v. *Smith*, 1 Taunt. 347.

(*q*) Where a deed stated the purchase-money on the sale of land to have been paid, it was held that evidence was inadmissible to prove an agreement at the time that part should be satisfied by work to be done by the purchaser, and that the money had not in fact been paid. *Baker* v. *Dewey*,[4] 1 B. & C. 704. Where parties contract by deed, *assumpsit* will not lie; for where a man resorts to a higher security the law will not raise an *assumpsit* (*Toussaint* v. *Martinnant*, 2 T. R. 100); as where a surety takes a bond from his principal (Ib.) So a plaintiff cannot recover in *indebitatus assumpsit* upon an executed consideration, where the contract was by deed (*Atty* v. *Parish*, 1 N. R. 104). The only excepted case is that of debt for rent, which rests on peculiar grounds (Hardr. 332. *Warren* v. *Consett*, 8 Mod. 107; Com. Dig. tit. *Pleader*, O. 15. *Kemp* v. *Goodall*, 1 Salk. 277). And where a subsequent parol agreement is inconsistent with a deed, the agreement cannot be set up against the deed (see the case of *Leslie* v. *De la Torre*, cited 12 East, 583). But an action of *assumpsit* may be maintained upon an agreement subsequent to the making a deed of charter-party, the parol contract not being inconsistent with the contract by deed (*White* v. *Parkins*, 12 East, 578). Where the obligor of a *respondentia* bond promised, by indorsement upon it, to pay the amount to *any* assignee, it was held that an assignee might maintain *indebitatus assumpsit*. *Fenner* v. *Mears*, 2 Bl. 1269; {See 10 Serg. & R. 321;} but this was doubted by Lord Kenyon, in *Johnson* v. *Collins*, 1 East, 104, and by Bayley, J., in *White* v. *Parkins*, 12 East, 582.

(*r*) *Williams* v. *Jones*,[5] 5 B. & C. 109; and see *Boydell* v. *Drummond*, 13 East, 142.

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v. *Cosine*, 9 Wend. 227. *Swart* v. *Service*, 21 Wend. 36. Parol evidence is inadmissible to show, that a deed was never delivered. *Roberts, Ads.* v. *Jackson*, 1 Wend. 478. So it may be shown by parol testimony, that an assignment of a mortgage, absolute in its terms, is a mere security for the performance of a contract. *Gilchrist* v. *Cunningham*, 8 Wend. 641. See also *Livingston* v. *Ten Broeck*, 15 Johns. 14. *M'Curtie* v. *Stevens*, 13 Wend. 527. *Contra*, *Benton* v. *Jones*, 8 Conn. R. 186. If a money consideration be expressed in a deed of bargain and sale, there shall be no averment to the contrary, so as to affect its operation as such, nor is any evidence to the contrary admissible. *Allison* v. *Kurtz*, 2 Watts, 187. *Contra*, *Wilkinson* v. *Scott*, 17 Mass. R. 249. It seems according to the American cases, that the only effect of a consideration clause in a deed, is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation and may be varied by parol proof. *M'Crea* v. *Purmort*, 16 Wend. 460. See also *Brocket* v. *Foscue*, 1 Hawks. 64. *Spiers* v. *Clay's Adm'r*, 4 Hawks. 22. In ejectment against a sheriff's vendee, parol evidence that a certain tract was not included in the sale, is inadmissible to contradict the levy. *Beeson* v. *Hutchinson*, 4 Watts, 442. So where a person claimed under a deed from *Nathaniel S.*, who was alleged to have purchased the premises at a sheriff's sale, it was held, that parol evidence was not admissible to show that the acknowledgement by the sheriff was originally of a deed to *Nathaniel S.*, and that afterwards the prothonotary's clerk, at the instance of *Charles S.*, and by collusion with him, erased the name of *Nathaniel S.* and substituted that of *Charles S.*; the defendant claiming by deed from *Charles S.* *Hoffman* v. *Coster*, 2 Whart. 453. Parol evidence is inadmissible to show that in a release of all demands a particular debt was not intended to be released. *Pierson* v. *Hooker*, 3 Johns. 68. And the assignees of a bond in a suit against the assignor upon a written assignment, parol evidence is not admissible to show that the assignor had expressly guarantied the payment of the bond, this being no part of the written contract. *O'Hara* v. *Hall*, 4 Dall. 340. So if in a policy of insurance, the vessel insured be warranted as neutral, parol evidence will not be admitted to prove that such warranty was not intended by the parties. *Lewis* v. *Thacher et al.* 15 Mass. R. 431. And in an action on a valued policy, it is not competent for the underwriters to give parol evidence to show that the value of the property insured is different from that stated in the policy. *The Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206. In an action by the master of a ship for his wages against the defendant as owner of the vessel, and who held a bill of sale from *M.*, and also a register of the ship in his own name, the defendant may prove by parol, that the bill of sale was given to him merely by way of collateral security or mortgage. *Chapman* v. *Butler*, 8 Johns. 169. Parol evidence is admissible that an agreement in writing, not under seal for the delivery of goods to *A.*, was made by *A.* as agent for *C.* *Hubbard* v. *Borden*, 6 Whart. 79. Parol evidence is not admissible to prove a contract for the delivery of freight, different from that expressed in the bill of lading. *Babcock* v. *May*, 4 Ohio R. 346. Nor is parol evidence inadmissible to vary the terms or legal import of a bill of lading free from ambiguity. *Creery* v. *Holly*, 14 Wend. 26.)

[1]Eng. Com. Law Reps. xxviii. 135. [2]*Id.* ii. 385. [3]*Id.* xiv. 304. [4]*Id.* viii. 193. [5]*Id.* xi. 169.

Where the issue was on the plea of *plenè administravit*, evidence that the defendant, upon executing a bond of submission to arbitration, had agreed to pay what should be awarded to be due, was rejected, as being either contradictory of or in addition to the agreement in the bond (*s*). So, oral evidence is not admissible to show that a bond, conditioned for the payment of money to the wife in case she survived, was intended in lieu of dower (*t*). Nor is such evidence admissible to show that a clause of redemption was omitted in an annuity-deed, lest it should render the transaction usurious (*u*). So, although it is an established rule that a party may aver another consideration which is *consistent* with the consideration expressed, no averment can be made contrary to that which is expressed in the deed (*v*). Extend or limit terms of agreement.

Where the conveyance is mentioned to be in consideration of love and affection, as also for other considerations, proof may be given of any other, for this is consistent with the terms of the deed (*w*). But if one specific consideration be alone mentioned in the deed, no proof can be given of any other, for this would be contrary to the deed; for where the deed says it is in consideration of such a particular thing, it imports the whole consideration, and negatives any other (*x*) (1). The case where no consideration is expressed in the deed, is, according to Lord Hardwicke, a middle case; and he held the proof of a valuable consideration in such a case was admissible (*y*) (2). But in general, as will be seen, evidence as to the real consideration is in all cases admissible with a view to prove fraud (*z*).

Where *A.* granted an annuity for his own life to *B.*, which was secured by *a bond and warrant of attorney, and judgment was entered, the Court would not, after the death of *B.*, permit the attorney of *B.* to prove a *759

(*s*) *Pearson* v. *Henry*, 5 T. R. 6: the evidence was rejected at the trial; and upon motion for a new trial the propriety of the rejection was not disputed. 1 Bro. C. C. 54, 93. And see the Observations of Blackstone, J., in *Preston* v. *Merceau*, Bl. 1250; and *infra*.

(*t*) See *Mascall* v. *Mascall*, 1 Ves. 323; and *infra*, 762, note (*f*).

(*u*) *Ld. Irnham* v. *Child*, 1 Bro. C. C. 92. *Ld. Portmore* v. *Morris*, 2 Bro. C. C. 219. *Hure* v. *Shearwood*, 3 Bro. C. C. 168; 1 Ves. J. 241. But where a man and woman, being about to marry, conveyed their lands to trustees, in trust, to dispose of the rents as the wife, without the consent of the husband, should appoint; notwithstanding which the husband received the rents during his life, and the wife after his death filed a bill in equity for an account, the Court admitted parol evidence to prove, that before the settlement was made, the husband and wife agreed that the premises should be in trust for them during their joint lives, and that they were settled otherwise merely to protect them from sequestration by Cromwell; and on that ground relieved against a covenant in the settlement, by which the trustees were bound to pay the rents as the wife should appoint. *Harvey* v. *Harvey*, 2 Ch. C. 180; Fitz. 213. But where articles were reduced to writing, and signed by the parties, and afterwards drawn up at length, and executed, Reynolds, B. held that the articles could not be restrained by the memorandum, there being no reference from the articles to the memorandum. *Lloyd* v. *Wynne*, 5 G. 2; 1 Ford. 136.

(*v*) *Mildmay's Case*, 1 Rep. 176. *Bedell's Case*, 7 Rep. 39; 2 Roll. Ab. 786. [*Quarles* v. *Quarles*, 4 Mass. R. 680.]

(*w*) Per Lord Hardwicke, *Peacock* v. *Monk*, 1 Ves. 128. And see the case of *Villers* v. *Beaumont*, 2 Dyer, 146, a. *Vernon's Case*, 4 Rep. 3.

(*x*) Ibid. And see *Green* v. *Weston*, Say. 209; and *Stratton* v. *Rastall*, 2 T. R. 366. [*Shermerhorn* v. *Vanderheyden*. 1 Johns. 139. *Maigley* v. *Haner*, 7 Johns. 341.]

(*y*) *Peacock* v. *Monk*, 1 Ves. 128. (*z*) *Infra*, 765.

(1) [Where a deed, after stating a certain consideration, adds "and for other considerations," parol evidence is admissible to show what those other considerations were. *Benedict* v. *Lynch*, 1 Johns. Ch. Rep. 370. In Virginia, where a deed was made "in consideration of natural love and affection, and of one dollar," parol evidence was held admissible to show that *other* valuable consideration passed. *Harvey* v. *Alexander*, 1 Randolph, 219. So either party may, in that state, aver and prove a consideration different from that stated in the deed—but not to the prejudice of a *bona fide* purchaser without notice. *Duval* v. *Bibb*, 4 Hen & Mun. 113. So a deed may, in equity, be proved to have been made in consideration of a marriage, though not so expressed in the deed. *Eppes & al.* v. *Randolph*, 2 Call, 125. It is said in the case of *Garret* v. *Stuart*, 1 M'Cord, 514, that a *different* consideration from that expressed in the deed cannot be shown in a court of *law*, but that a less or greater consideration of the same character may be shown.]

(2) [If a deed conveying land contains nothing respecting the consideration, parol evidence concerning it is admissible. *Davenport* v. *Mason*, 15 Mass. Rep. 92.]

parol agreement that *A.* should be at liberty to redeem the annuity on terms (*a*).

Where the agreement was, that *A.* for certain considerations, should have the produce of Boreham Meadow, it was held that he could not prove by parol that he was to have both the soil and produce of Millcroft and Boreham Meadow (*b*). One who executes an instrument in his own name cannot defeat an action by showing that he did so merely as agent for another (*c*). So in an action on a bond conditioned for payment absolutely, the defendant cannot plead an agreement that it should operate merely as an indemnity (*d*). Where a modern lease uses the term Michaelmas, evidence is inadmissible to show that *Old* Michaelmas was meant (*e*).

In an action of trespass, where the defendant insists upon a release executed by the plaintiff, and in terms including the trespass in question, the plaintiff cannot defeat the effect of the release by proof that the arbitrators who awarded the release have not taken into their consideration the particular trespass (*f*).

Upon the same principles evidence is inadmissible of a parol agreement prior to or contemporary with the written instrument, and which varies its terms; as to show that a note made payable on a day certain was to be payable upon a contingency only (*g*), or upon some other day (*h*), or not until the death of the maker (*i*).

Where a policy was on an adventure from Archangel to Leghorn, the defendant was not allowed to prove an agreement, previous to the signing of the policy, that the adventure should begin from the Downs only (*k*).

*760 *Where a ship was chartered to wait for convoy at *Portsmouth*, it was held that evidence could not be received of an agreement to substitute *Corunna* for Portsmouth (*l*).

In general, where a contract has been reduced into writing, nothing

(*a*) *Haynes* v. *Hare*, 1 H. B. 659; and per Ld. Thurlow, nothing can be added to a written agreement, unless there be a clear subsequent independent agreement varying the former; but not where it is matter passing at the same time with the written agreement. *Rich* v. *Jackson*, 4 Bro. C. C. 519. *Ld. Portmore* v. *Morris*, 2 Bro. C. C. 219.

(*b*) *Meres* v. *Ansell*, 3 Wils. 275. And see *Hope* v. *Atkins*, 1 Price, 143.

(*c*) *Magee* v. *Atkinson*, 2 M. & W. 440. But in an action on a written contract between the plaintiff and a third party, evidence on the part of the plaintiff is admissible to show that the contract was in fact made by the third party, not on his own account but as the agent of the defendant. *Wilson* v. *Hart*,[1] 7 Taunt. 295.

(*d*) *Mease* v. *Mease*, Cowp. 47; 2 N. R. 597.

(*e*) *Doe* v. *Lea*, 11 East, 312. Where a written agreement stipulates that goods are to be taken on board *forthwith*, it cannot be shown by parol that in *two days* was meant. *Simpson* v. *Henderson*,[2] M. & M. 300.

(*f*) *Shelling* v. *Farmer*, Str. 646.

(*g*) *Rawson* v. *Walker*,[3] 1 Starkie's C. 361; 1 C. M. & R. 703. Where a note was on the face of it absolute, it was held that parol evidence to show that it was only to be paid on certain terms, which had not been complied with, was inadmissible. *Moseley* v. *Hanford*,[4] 10 B. & C. 729. And see *Adams* v. *Woadley*, 1 M. & W. 374. It is not, it seems, competent to a party who appears on the face of a promissory note to be a principal, to show that he is merely a surety. *Price* v. *Edmunds*,[5] 10 B. & C. 578. See *Fentum* v. *Pocock*,[6] 5 Taunt. 192. Where a note was given by the defendant's wife, *dum sola*, expressed to be, "for value received by my late husband," held that it was not competent to the defendant to give in evidence that it was executed only by the wife as an indemnity, being inconsistent with the terms of the note itself. A party, although he may show a failure of or an illegal consideration, cannot show that it was a different one. *Ridout* v. *Bristow & Ux*, 1 C. & J. 231; and 1 Tyr. 84. And see *Rawson* v. *Walker*,[7] 1 Starkie's C. 361.

(*h*) *Free* v. *Hawkins*,[8] 1 Moore, 28; 7 Taunt. 278. [*Erwin* v. *Saunders*, 1 Cow. 249; *Rose* v. *Learned*, 14 Mass. R. 155.]

(*i*) *Woodbridge* v. *Spooner*,[9] 3 B. & A. 233. Or till certain estates had been sold, the defendant being the payee and but a security; or to show that a transfer of a ship, which was absolute on the bill of sale, was intended as a security only. *Robinson* v. *M'Donnell*, 2 B. & A. 134.

(*k*) *Kaimes* v. *Knightly*, Skinn. 54. *Uhde* v. *Walters*, 3 Camp. 16. *Weston* v. *Emes*, 1 Taunt. 115. *Note*, the case of *Kaimes* v. *Knightly*, is cited in *Bates* v. *Graham*, 2 Salk. 444, but misstated.

(*l*) *Leslie* v. *De la Torre*, cited 12 East, 583. *Note*, that the charter-party was *under seal*.

[1] Eng. Com. Law Reps. ii. 112. [2] *Id.* xxii. 313. [3] *Id.* ii. 427. [4] *Id.* xxi. 156. [5] *Id.* xxi. 135. [6] *Id.* i. 72. [7] *Id.* ii. 427. [8] *Id.* iv. 31. [9] *Id.* v. 268.

which is not found in the writing can be considered as part of the contract (*m*).

Where a contract is entered into for the sale of goods, and a bill of sale is afterwards executed, the bill of sale is the only evidence of the contract which can be received (*n*) (1), and parol evidence of the agreement cannot be received, even although the written instrument of sale be inadmissible for want of a stamp (*o*).

The same rule applies if such parol agreement *add* to the terms expressed. Thus in the case of *Preston* v. *Merceau* (*p*), the landlord, in an action for use and occupation, under a written agreement for rent at 20*l.* per annum, was not allowed to show, *in addition*, by parol evidence, that the tenant had also agreed to pay the ground-rent. Mr. J. Blackstone is said in that case to have observed, that although the Court could neither alter the rent, nor the terms which were expressed in the agreement, yet that with respect to collateral matters it might be different; the plaintiff might show who was to put the house in repair, or the like, concerning which nothing was said. The question, how far collateral matter may be proved by parol, will be considered hereafter (*q*); at present it may be observed, that to permit terms to be engrafted by mere parol evidence upon a written agreement, would be attended with all the danger, laxity and inconvenience, which the general rule is calculated to exclude; for an agreement might by such additional terms be as effectually altered as if the very terms of the agreement had been changed by the operation of parol evidence (2).

By addition, &c.

(*m*) P. C. in *Kain* v. *Old*,[1] 2 B. & C. 634. *Note*, that the first agreement was in writing, but void for not reciting the certificate of the ship's registry. And see *Meyer* v. *Everett*, 4 Camp. 22. *Gardner* v. *Gray*, 4 Camp. 144. *Powell* v. *Edmonds*, 12 East, 6. *Hope* v. *Atkins*, 1 Price, 143. *Pickering* v. *Dowsing*, 4 Taunt. 779; and *Countess of Rutland's Case*, *supra*. And tit. WARRANTY.

(*n*) *Lano* v. *Neale*,[2] 2 Starkie's C. 105. The previous contract there was for a ship, forty tons of iron kintlage, &c.; the bill of sale was of a ship, together with all stores, &c. in the usual form, and silent as to kintlage; and held that the vendee could not recover for non-delivery of kintlage.

(*o*) Per Ld. Kenyon, in *Rolleston* v. *Hibbert*, 4 T. R. 413. And see *Drakeford* v. *Hodges*, 1 N. R. 270; where it was held, that if a parol warranty or agreement to assign be reduced to writing, and the assignment be afterwards legally executed, the warranty cannot be proved by parol.

(*p*) *Preston* v. *Merceau*, 2 Bl. 1249. So in *Rich* v. *Jackson*, 4 Bro. C. C. 515, where an agreement specified the rent and the term, but was silent as to taxes, the Court refused to receive parol evidence on the part of the lessor, that previous to the drawing up of the memorandum it had been agreed and understood by the parties that the rent was to be paid clear of all taxes.

(*q*) *Infra*, 781, 787, &c.

(1) [A bill of parcels delivered by *A.* stating the goods as bought of *B.* and *A.* is not conclusive evidence against *A.* that the goods were the joint property of *B.* and *A.*; but the real circumstances may be explained by parol. *Harris* v. *Johnston*, 3 Cranch, 311. Where *A.* sold to *B.* several bags of hops, and gave a bill of parcels, stating the number of bags, the weight, price, &c., with these words, "the hops are warranted to be first quality;" in an action by *B.* against *A.* for a false warranty, it was held that *A.* was not precluded by the bill of parcels from showing that the hops were warranted only in case they were carried by *B.* to a particular place. *Wallace* v. *Rogers*, 2 N. Hamp. Rep. 506. In *Schuyler* v. *Russ*, 2 Caines, 202, in an action on a written warranty of soundness, parol proof was held to have been rightly admitted that the vendor at the time of sale, informed the vendee of a defect, which was visible, and called his attention to it. The defect was held not to be within the purview of the contract. See *Smith* v. *Williams*, cited in the next note.]

(2) [Parol evidence is not admissible to prove an agreement between mortgagor and mortgagee, that the former should remain in possession of the mortgaged premises. *Colman* v. *Packard*, 16 Mass. Rep. 39. Nor to prove that a lessor, in consideration of the rent reserved, promised to make any other repairs than those which are stipulated in the lease. *Bringham* v. *Rogers*, 17 Mass. Rep. 571. Nor to prove a warranty of the soundness of a slave, when there is a written instrument conveying the slave, and containing a warranty of title only. *Smith* v. *Williams*, 1 Car. Law Repos. 263. 1 Murphey, 426. See *Barber* v. *Brace*, 3 Conn. Rep. 9. In debt on a bond conditioned for payment of an indent for 1,200*l.* evidence of a parol agreement between the parties, that if the indent was not returned on the day mentioned in the condition, it should be converted into a special debt, was held to be inadmissible. *Atkinson* v. *Scott*, 1 Bay, 307. So where property is pledged by a written contract as security for a certain sum advanced, parol evidence is not admissible to prove an agreement that the property shall be held until certain sums, afterwards advanced,

[1] Eng. Com. Law Reps. ix. 205. [2] *Id.* iii. 267.

Where an agreement specifies only the rent and the term, but is silent as to repairs, it is obvious that such an agreement may be as completely varied by proof of an additional stipulation that the landlord should lay out a specific sum in alterations, as by evidence that the rent shall be diminished, without any stipulation as to repairs. Cases in which the additional terms constitute in fact a new agreement, incorporating the
*761 fomer written terms (*r*), or continuing the former *contract (*s*), or amount to a substantive collateral agreement (*t*); those also, where certain terms are engrafted upon an agreement, which is silent on the point, by some known custom, or general understanding (*u*); and lastly, those where the instrument offered as evidence to prove a collateral fact, has, in the particular instance, no exclusive operation (*x*), fall, as will be seen, under a different consideration.

At present, assuming the particular instrument to be that which the parties have agreed upon as the evidence of their intentions in respect of the particular transaction, the only question is, whether the parol evidence, which is adduced to superadd something to the written agreement, does not vary that agreement; if it does, it is inadmissible.

Where the conditions of sale described only the number and kind of timber-trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not permitted to prove that the auctioneer had, at the sale, warranted the timber to amount to a certain weight; for if that representation induced him to become the purchaser, he ought to have had it reduced to writing at the time (*y*) (1). Lord Ellenborough, in that case,

(*r*) Where one written instrument refers to another, from which it requires explanation, with sufficient certainty, the latter is virtually incorporated with the former, and may be said to give effect to it. But it is a general rule of law, that an instrument properly attested, in order to incorporate another instrument not attested, must deseribe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake. Per Lord Eldon, C. *Smart* v. *Prujean*, 6 Ves. 565.

(*s*) *Supra*, 757; and see *Warren* v. *Stagg*, 3 T. R. 591; *Cuff* v. *Penn*, 1 M. & S. 21; *Lord Milton* v. *Edworth*, 6 Bro. P. C. 587.

(*t*) *Granville* v. *Duchess of Beaufort*, 1 P. Wms. 114; 2 Vern. 648; and *supra*, 757.

(*u*) *Infra*, 786. (*x*) *Infra*, 787.

(*y*) *Powell* v. *Edmonds*, 12 East, 6. And see *Buckmaster* v. *Harrop*, 13 Ves. 471; *Shelton* v. *Livius*, 2 C. & J. 411; *Higginson* v. *Clowes*, 15 Ves. 516; *Jenkinson* v. *Pepys*, cited 6 Ves. 330; *Meres* v. *Ansell*, 3 Wills. 275; *Rich* v. *Jackson*, 4 Bro. C. C. 515; *Gunnis* v. *Erhart*, 1 H. B. 289. But where previous to the sale of a leasehold estate by auction, the purchaser promised the vendor to indemnify him against the cove-

are paid. *Hamilton* v. *Wagner*, 2 Marsh. 333. Where the defendant gave the plaintiff a writing acknowledging the sale of a note of hand, and the receipt of part payment, and that the balance was to be paid when the money should be collected on the note; parol evidence was held to be inadmissible to prove that the defendant, at the time of the contract, promised to commence an action within ten days against the maker of the note. *Clark* v. *M'Willan*, 2 Car. Law Repos. 65. {So it is inadmissible to prove, that at the time when a note of hand was transferred by an indorsement in blank, the indorser agreed to be responsible at all events, without demand of the maker, and notice of non-payment. *Barry* v. *Morse*, 3 N. Hamp. Rep. 132.} Parol evidence that seller of land agreed, at the time of sale, to extinguish an interfering claim, is not admissible. *Machir* v. *M'Dowell*, 4 Bibb, 473. Nor to enlarge or diminish the quantum of articles for which a receipt is given: nor to show that a further sum, not mentioned in the writing, was to be paid on a contingency. *Querry* v. *White*, 1 Bibb, 271. In an action by an assignee of a bond against the assignor, upon a written assignment in general terms, parol evidence cannot be received to show that the defendant expressly guaranteed payment of the bond. *O'Harra* v. *Hall*, 4 Dallas, 340, *Circuit Court of U. S.* In this case, Peters, J. thought such evidence would be admitted by the Courts of Pennsylvania, where there is no Court of Equity—and in the case of *Field & al.* v. *Biddle*, 1 Yeates, 132; 2 Dallas, 171, S. C. parol evidence was held admissible to show that when a bond was executed, it was agreed that it should be void on a particular contingency. So in *Birchfield* v. *Castleman*, Addison, 181, in an action of covenant against a vendor of land, who had covenanted "to make good the land against all persons claiming"—where the vendee had been ejected in consequence of a judgment which had been irregularly entered it was held that parol proof was admissible to show that when the deed was executed, the vendor agreed to defend all suits. See also *M'Meen* v. *Owen*, 2 Dallas, 173. 1 Yeates, 132, S. C. *Wallace* v. *Baker*, 1 Binney, 616. *Zantzinger* v. *Ketch*, 5 Dallas, 132. *Hurst's Lessee* v. *Kirkbridge & al.*, cited 1 Yeates, 139.]

(1) [The general rule of law is, that parol evidence of declarations of an auctioneer is not admissible to

observed, that if such evidence were admissible, in what instance might not a party by parol testimony, superadd any term to a written agreement? which would be setting aside all written contracts, and rendering them of no effect. In such cases it is to be presumed that the parties, in expressing their intention, have expressed the whole of it, subject to those incidents and consequences which the law annexes to the terms which they have used.

Where no date is inserted in a deed, date is construed to mean delivery; but where a date is given, and an act is to be done at a certain time from the date, the party bound cannot allege a different time of delivery (*z*).

Where a written agreement for the sale of goods is silent as to the time of delivery, the law implies a contract to deliver them within a reasonable time, to be judged of according to the circumstances. In such a case evidence is inadmissible of a contemporaneous oral contract by the purchaser to take them immediately (*a*) (2).

Intention to alter the legal operation of an instrument.

Parol evidence is also inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an *intention* to that effect, which *is not expressed in the instrument (*b*). Thus the defendant cannot be admitted to prove that at the time of making a promissory note it was agreed, that when the note became due payment should not be demanded, *762 but that the note should not be renewed (*c*) (3).

So also parol evidence is inadmissible to show that a bond, purporting to be absolute, was *intended* merely as an indemnity, and that the plaintiff has not been damnified (*d*) (4); or to show that the directions of a will were

nants entered into by the lessee, a specific performance was decreed, although the terms of the sale were silent as to such indemnity. *Pember* v. *Mathers*, 1 Bro P. C. 54.

(*z*) *Styles* v. *Wardle*,[1] 4 B. & C. 908; Co. Litt. 46, b.; Com. Dig. *Fait.* b.; 2 Cro. 264; and *supra*, tit. Deed. *Armit* v. *Breame*, 2 Ld. Raym. 1076. But where a lease dated Lady-day, 1783, purported to commence on Lady-day *last past*, evidence was admitted to show that the lease was in fact executed after the date, and consequently that the term commenced Lady-day 1782, not 1783. *Steele* v. *Mart*,[2] 4 B. & C. 272.

(*a*) *Greaves* v. *Ashlin*, 3 Camp. 426. *Halliley* v. *Nicholson*, 1 Price, 404.

(*b*) In equity, however, it seems that parol evidence is admissible to show that the testator intended that specific legacies should be paid out of particular funds (*Cliff* v. *Gibbons*, Ld. Raym. 1524). But not to show that a testator intended to exempt his personal estate from debts. See *Reeves* v. *Newenham*, 2 Ridg. 21, 35, 44.

(*c*) *Hoare* v. *Graham*, 3 Camp. 57. *Hogg* v. *Snaith*, 1 Taunt. 347. *Supra*, 241, 242.

(*d*) *Mease* v. *Mease*, Cowp. 47.

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vary the written terms of sale. *Wright's Lessee* v. *Deklyne*, 1 Peters' Rep. 204. But where an advertisement stated that a certain farm would be sold, without stating that the whole would be sold at one time, evidence of declarations by the sheriff, at the time of sale, that a particular part of the farm would not be sold, was received. Ibid. Parol evidence was held admissible to show that a slave, sold at auction, was sold subject to every defect except that of title, though the auctioneer's advertisement described the slaves as "prime negroes." *Limehouse* v. *Grey*, 1 Const. Rep. 73.]

(2) [Where there was a memorandum for the hire of a slave at a certain sum for the first year, and a larger sum for two succeeding years, it was held that parol evidence was admissible to prove that the money was to be paid quarterly. *Stone* v. *Wilson*, 1 Const. Rep. 68.]

(3) {But in *Pennsylvania*, it has been decided, that under the plea of payment to a suit on a bond against a surety, parol evidence is admissible to show, that he executed the bond under a declaration by the obligee that his signing was mere matter of form, and that he never should be called upon for payment. *Miller* v. *Henderson*, 10 Serg. & Rawle, 290. Unless, however, the obligor was induced by such declaration to execute the bond, the evidence would be inadmissible, although the declaration were made at the time of its execution. *Hain* v. *Kalback*, 14 Serg. & Rawle, 159. And see *Moies* v. *Bird*, 11 Mass. Rep. 436.}

(4) [Parol evidence is admissible to prove that a deed was delivered as an escrow. *Pawling & al.* v. *United States*, 4 Cranch, 219. *Fairbanks* v. *Metcalfe*, 8 Mass. Rep. 230. *Couch* v. *Meeker*, 2 Com. Rep. 302. {*Raymond* v. *Smith*, 5 Conn. Rep. 555.} But it is not admissible {at law} to prove that a deed, absolute on the face of it, was intended for a mortgage. *Flint* v. *Sheldon*, 13 Mass. Rep. 443. *Streator* v. *Jones*, 1 Murphey, 449. Nor that a deed, absolute on the face of it, was given in trust. *Dickerson* v. *Dickerson*, 1 Car. Law Repos. 262. *M'Teer* v. *Sheppard*, 1 Bay, 461. *Goodwin* v. *Hubbard*, 15 Mass. Rep. 218. *Flint* v. *Sheldon*, ubi sup. {But in equity, as between the original parties to a transaction, parol evidence is admis-

[1] Eng. Com. Law Reps. x. 468. [2] *Id.* x. 332.

intended to operate in satisfaction of a bond (*e*); or that a bond given by the husband before marriage, conditioned to secure 400*l.* to the wife, in case she survived the husband, was given in lieu of dower (*f*).

To extend or limit, &c. (A).

Where a man gave a bond that his executors should, within six months after his death, pay 5,000*l.* to trustees, in trust, to apply the interest to the maintenance of his natural son till he should attain the age of twenty-one, and then to pay him the principal, but in case he should die before the father, or under the age of twenty-one, then in trust over; and by his will directed his trustees to lay out 15,000*l.* in trust, to pay 200*l.* a year to his said son till twenty-five, and then to pay him the principal, with remainder over if he died before that age, the Chancellor refused to admit parol evidence of declarations alleged to have been made by the testator, for the purpose of explaining the will, and showing it to be in satisfaction of the bond (*g*).

Where a man conveyed his estate to certain uses, reserving to himself the power of changing or revoking them, and afterwards conveyed it to trustees, in trust to pay his debts, and then in trust to re-convey, it was held that a proof of a declaration by one of the trustees under the latter deed, that the party did not intend to revoke the former by the latter, was inadmissible (*h*).

Intention of a testator

Parol evidence of the *intention* of the testator is in no case admissible to contradict the express terms of a will (*i*) (B).

(*e*) *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

(*f*) *Finney* v. *Finney*, 1 Wils. 34. But where a man who had agreed to settle 100*l.* a year on his intended wife, finding himself ill, made his will, and afterwards left her 100*l.* a year, and recovering, married her, Clarke, B. held, that evidence was admissible to show that he intended her one of the annuities only. *Mascall* v. *Mascall*, 1 Ves. 323.

(*g*) *Jeacock* v. *Falkener*, 1 Bro. C. C. 295.

(*h*) By Reynolds, B. and by the Chancellor and Master of the Rolls. *Fitzgerald* v. *Fancomb*, Fitz. 207.

(i) A testator having copyhold estates in North C. and South C., devises to his wife all his wines, &c., in addition to the settlement made her on his copyhold estate; to his niece *M.* the rents and profits of his new inclosed freehold cow-pasture close in North C. during the life of his wife; and after the decease of his wife,

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sible to show, that a deed, absolute on its face, was intended as a mere security or mortgage, the attempt to treat it as an absolute deed being a fraud. *James* v. *Johnson*, 6 Johns. Cha. Rep. 417. *Strong* v. *Stewart*, 4 Johns. Cha. Rep. 167. *Todd* v. *Rivers*, 1 Desauss. Cha. Rep. 155. Accident or mistake by which a deed is drawn and executed as an absolute deed when the parties had agreed it should be executed as a mortgage, is a ground for the admission of parol evidence to control the deed (*Washburn* v. *Merrils*, 1 Day's Rep. 139), as is a difference existing between a deed as expressed, and the admitted intention of the parties, when application is made to a Court of Equity, founded upon, and with a view to enforce the real object of the parties. *Moses* v. *Murgatroyd*, 1 Johns. Cha. Rep. 119. Such evidence, however, would not be received to prejudice the rights of third persons, who have, without notice and for valuable consideration, acquired interests upon the faith of a deed purporting to be absolute on its face. *James* v. *Johnson*, *Mills* v. *Comstock*, 5 Johns. Cha. Rep. 214.} And where the grantor remained till his death in possession of lands conveyed by an absolute deed, and the grantee did not call for an account of rents and profits; parol evidence was admitted to benefit of the grantor, and his heirs. *Gay* v. *Hunt*, 1 Murphey, 141. See *St. John* v. *Benedict*, 6 Johns. Ch. Rep. 111.

In Pennsylvania, {where the Courts proceed upon Equity principles,} it has been decided that parol evidence may be given to prove that a mortgage given to *A.* was in fact intended for the security of *B.* *Peterson* v. *Milling*, 3 Dallas, 506. {But in New York such evidence has been rejected in a Court of Law to prove the same fact. *Jackson* v. *Foster*, 12 Johns. 488.}

In Kentucky, parol evidence is held admissible to prove that a bill of sale of a slave was to be cancelled, and the slave revest in the maker of the bill. *Trambo* v. *Cartwright*, 1 Marsh. 582. See *Dabny & al* v. *Green*, 4 Hen. & Mun. 101. *Ross* v. *Norvell*, 1 Wash. 14.

See other cases collected by Mr. Norris, in his edition of Peake on Evidence, 178.]

(A) (Parol evidence is admissible to show the time at which a specialty was actually executed. *Battles* v. *Fobes*, 21 Pick. 239. And to enlarge the time for performing a condition of an agreement, or to show a waver of the performance of the condition of a bond. *Fleming* v. *Gilbert*, 3 John. R. 528.)

(B) Parol evidence of the declarations of the testator cannot be received to explain the intention of the bequest, but such evidence may be received to prove the situation of the property. *Puller's Ex'rs* v. *Puller*, 3 Rand. 83. Nor is it competent to receive the evidence of the scrivener as to the meaning of the testator in his will. *M'Cay* v. *Hagas*, 6 Watts, 345. So parol evidence of the intention of the testator is inadmissible to vary the express terms of a will. *Avery* v. *Chappell*, 6 Conn. R. 270.)

*Where a legacy was given to *A. B.*, and in case of his death to his wife, and the wife after his death received the legacy, and the question at law was, whether she received the legacy in her own right, or as her husband's representative, it was held that evidence was inadmissible to prove that the testator when he was in *extremis* had declared his intention to be, that the husband should have the interest only during the life of the wife, and that if she survived him she should have the principal (*k*). to vary the terms of a will.

Where a father by his will made his three brothers, who were presbyterians, together with a clergyman, guardians of his children, in general terms, King, Chancellor, on a bill filed by the three against the clergyman, to have the children delivered up to them, rejected parol evidence of directions alleged to have been given by the testator, that the children should be educated as presbyterians; and he said, that as that was not expressed in the will, parol evidence was no more admissible in the case of a devise of a guardianship than in the case of a devise of land (*l*).

Oral declarations of the testator cannot be received for the purpose of explaining his intention (*m*), even where it is apparently ambiguous on the face of the will. Where the testator, after mentioning his wife and niece in his will, afterwards gave a particular estate to *her* for life, the Lord Chancellor refused to receive parol evidence to show which was meant (*n*).

So such extrinsic evidence is inadmissible to prove the *legal construction* of words, or to effect a legal presumption arising from the construction (*o*).

Where a legacy was given *A. B.* who was dead at the time, it was held, that evidence was not admissible to show the intent of the testator that the legacy should be transmissible (*p*).

Where a devise was to the son of the devisor, and the heirs of his body, on condition that he, they, or any of them, should not aliene, discontinue, &c.: parol evidence was held to be inadmissible to show the *intention* of the devisor, that the condition should extend to the son and his heirs (*q*).

So it was held to be inadmissible to show that the testator did not intend to pass the reversion and remainder in fee of certain settled lands, by a devise of all lands, tenements and hereditaments out of settlement (*r*).

An estate was devised in trust to receive the profits for three years, and if the heiress of the devisor should marry Lord *G.* within that time, in trust

to two nephews, his furniture, &c. and all his copyhold estates in North C. and South C. It was held, that as there was no ambiguity on the face of the will, or in the application of it, the testator having copyhold estates in North C. and South C. which answered the description, extrinsic evidence was not admissible to show that the description in the settlement included a freehold close, which was mistakenly enumerated there as a *copyhold;* and that by all his copyhold estates in North C. and South C., this freehold passed, although the settlement was referred to in the will; and that other documents not referred to were inadmissible for that purpose. *Doe* d. *Brown* v. *Brown*, 11 East, 441. A testator gave one of his debtors certain messuages, and after other legacies and devises gave all the rest of his estate, not thereby devised, to his executors, or such of them as should act, and made that debtor and *J. S.* his executors. They both acted, and *J. S.* filed a bill against the debtor for a proportion of his debt; the debtor offered parol evidence to show that the testator meant that the debt should be extinguished, and that he gave the attorney who drew the will instructions to release it, but that the attorney, and a counsel whose opinion was taken, were of opinion that the debt would be released by implication. But Lord Talbot said that the cases went no further than to let in parol evidence to rebut an equity or resulting trust; but as the residuary clause directed the property not before disposed of by the will to be divided between the executors, and as the debt in question had not been previously disposed of by the will, the evidence contradicted the express words of the will. *Brown* v. *Selwin*, Ca. Temp. Talbot, 240; 7 Bac. Ab. 337, 6th edit.

(*k*) *Lowfield* v. *Stoneham*, Str. 1261.

(*l*) *Storke* v. *Storke*, 3 P. Wms. 51. But see 2 Ves. 56.

(*m*) 2 Vernon, 624. [*Richards* v. *Dutch*, 8 Mass. R. 506. *Sword* v. *Adams*, 3 Yeates, 34. *Torbert* v. *Twining*, 1 Yeates, 432.]

(*n*) *Castleton* v. *Turner*, 3 Atk. 258. *Humpshire* v. *Pearce*, 2 Ves. 216.

(*o*) Per Ld. Talbot, 2 Bro. C. C. 821.

(*p*) *Maybank* v. *Brookes*, Bro. C. C. 84.

(*q*) *Cheney's Case*, 5 Co. 68. 2 Bro. C. C. 821.

(*r*) *Strode* v. *Falkland*, 2 Vernon, 621; but it is stated by Salkeld that the decree was reversed; according to Vernon, it was compromised.

for her, for life, with remainder to her children in strict settlement; and if the marriage should not happen, in trust for Lord *F.*; the marriage did not
*764 *take place; and it was held that parol evidence was inadmissible of a declaration by the testator that Lord *G.*'s refusal should not disinherit his heir-at-law (*s*).

To vary legal construction, &c.

Upon a question of legal construction upon the terms of a will, whether the devisor gave an estate for life, or an estate in fee, Lord Holt was of opinion that the intention of the devisor must be collected, not from collateral matters, but from the will itself; but the other Judges were against him, and their opinion was confirmed in the exchequer chamber (*t*). And in some other instances the Courts have taken into consideration the state and circumstances of the family, in order to enable them the better to construe the testator's real intention as to the *personal* estate (*u*) (1).

Where, however, extrinsic evidence is allowed to operate so far as to give to the terms of a will a different construction from that which the terms abstractedly imply, the rule seems to be carried farther than is warranted by principle or analogy (*x*).

Where evidence was offered of the value of an estate charged with sums of money payable to the sisters of the devisee, as an argument in favour of a particular construction, the Court of King's Bench held that it was nugatory and inadmissible as matter of proof, although it might have been of

(*s*) *Bertie* v. *Falkland*, Salk. 231; Vern. 333.

(*t*) *Cole* v. *Rawlinson*, Salk. 234. See *Doe* v. *Fyldes*, Cowp. 833. *Doe* v. *Dring*, 2 M. & S. 455. *Bootle v. Blundell*, 1 Merivale, 316. *Richardson* v. *Edmonds*, 7 T. R. 640. *Standen* v. *Standen*, 2 Ves. jun. 593. Vin. Ab. tit. *Devise*, Y. 2, pl. 10. *Pepper & ux.* v. *Winyeve*, Bac. Ab. tit. *Wills*, 367, 6th edit.

(*u*) See the cases cited in the preceding note; and see *Baldwin* v. *Karver*, Cowp. 312; where Lord Mansfield observed, that all cases upon the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate; and in the case of *Jones* v. *Morgan*, (cited in *Lytton* v. *Lytton*, 4 Bro. Ch. 1,) the same learned Judge observed, that to construe a will the *intent* is to be taken from the whole will together, applied to the subject-matter to which the will relates. Sir D. Evans, 2 Pothier, 212, remarks also, that Lord Loughborough, in quoting the opinion of Lord Mansfield, took notice of different cases in which certain words were held to apply to a failure of issue at a certain period, although taking the words strictly, and construing them without considering the circumstances, would have imported a general failure of issue. (Vide *Lytton* v. *Lytton*, 4 Bro. Ch. 1.) In the case of *Masters* v. *Masters*, (1 P. W. 420,) the testator, after bequeathing a legacy to two particular hospitals in Canterbury, by his codicil bequeathed another sum "*to all and every the hospitals.*" As the testator had by his will taken notice of two hospitals in Canterbury, and as it appeared *in evidence* that he lived there, it was held, that the intention sufficiently appeared to apply the latter bequest to the hospitals in Canterbury. And see the distinction taken by Lord Thurlow in *Jeacock* v. *Falkner*, 1 Bro. C. C. 296.

(*x*) See Lord Hardwicke's observations in *Blinkhorne* v. *Feast*, 1 Ves. 28. *Strode* v. *Russell*, 2 Vern. 624. *Castleton* v. *Turner*, 3 Atk. 258. *Petit* v. *Smith*, 1 P. Wms. 9. *Brown* v. *Langley*, 2 Barn. 118. *Brown* v. *Selwin*, C. Temp. Talbot, 240. *Jeacock* v. *Falkener*, 1 Bro. C. C. 296. The doctrine once prevailed that a Court might receive evidence which was inadmissible before a jury; that, however, has since been denied, per Buller, J. 2 H. B. 522.

(1) [In *Sargent & al.* v. *Towne*, 19 Mass. Rep. 303, it was held that a devise, which, by the terms used, would carry only a life estate, might be extended to carry an estate in fee, by showing by parol that the subject of the devise was wild land, from which a tenant for life could derive no benefit. Where a tract of land, conveyed by deed, was described as *the farm on which the grantor resided*, parol evidence was admitted that a particular piece of land, claimed under the deed, was at the time of the grant in a state of nature, unenclosed and separate from the rest of the farm, and that the grantor remained in possession, and occupied it as his own until his death—to show that it was not within the grant. *Doolittle & ux.* v. *Blakesley*, 4 Day, 265. See also *Foster* v. *Wood*, 16 Mass. Rep. 116. *Leland* v. *Stone*, 10 ib. 461. *Richards* v. *Dutch & al.* 8 ib. 506. Parol testimony of the testator's circumstances, situation, connection with the legatees, and his transactions between the making of his will and the time of his death, is admissible to discover his intention, by explaining things or persons denoted by doubtful words. *Reno's Ex'rs* v. *Davis & ux.* 3 Hen. & Mun. 283. *Shelton & al.* v. *Shelton*, 1 Wash. 53. Where a plaintiff in an execution gave to an officer who had the defendant in custody on a *ca. sa.* a writing stating that he wished the officer to show the prisoner as much indulgence as could be shown with safety to himself, and without hazarding in any way the debt; it was held that the writing being in itself ambiguous, parol evidence of the conversation between the plaintiff and the officer at the time, and of collateral extraneous facts relating to the prisoner's situation, was admissible, to ascertain the nature and extent of the indulgence which was to be shown to him. *Ely & al.* v. *Adams*, 19 Johns. 313.]

great weight had the Court been called upon to make a will for the testator (*y*).

*In the late case of *Doe* d. *Oxendon* v. *Sir A. Chichester* (*z*), it was observed by Sir V. Gibbs, that courts of law had been jealous of extrinsic evidence for the purpose of explaining the intention of a testator; and that he knew of one case only in which it is permitted, that is where an ambiguity is introduced by extrinsic circumstances. *765

Admissible to disprove, &c.

The objection does not apply where evidence is offered not for the purpose of *contradicting* or *varying* the effect of a written instrument of admitted authority, but where on the contrary it is offered in order to *disprove* the legal existence, or rebut the *operation* of the instrument. To do this, is not to substitute mere oral testimony for written evidence, the weaker for the stronger, but to show that the written ought to have no operation whatsoever; an object which must usually be accomplished by oral evidence.

Fraud.

As a written instrument in general derives its authenticity from the aid of external evidence, it may in like manner be defeated. Thus a written instrument may be impeached by extrinsic evidence, on the ground of fraud, even in the case of a record (*a*) (A).

So also in the case of a private agreement oral evidence is admissible to prove a fraudulent omission (*b*). Where there was an agreement for a lease, evidence was admitted of a parol agreement that the rent should be clear of all taxes, but that the plaintiff reduced the agreement to writing without mentioning that point, and that the defendant could not read (*c*). In order to impeach a will, and to show that it had been fraudulently submitted to a testator for his signature, parol evidence was admitted, that at the time of signing the will he asked whether the contents were the same with those of a former will, and that he was answered in the affirmative (*d*). So it may be shown that one will was substituted for another (*e*). So in general it may be shown that fraud and imposition were practised upon a

(*y*) *Doe* v. *Fyldes*, Cowp. 833. In *Oates* v. *Brydon*, 3 Burr. 1895, Lord Mansfield went into an inquiry as to value, in order to found an argument upon the result, as to the construction of a will, and in order to show that property of such small value could not be intended to be the subject of particular limitations; but the same learned Judge seems to have been of a different opinion in the case of *Doe* v. *Fyldes*, just cited, where he concurred with the other Judges; and in *Goodtitle* v. *Edmonds*, 7 T. R. 635, Ld. Kenyon intimated that the case of *Oates* v. *Brydon* had not been satisfactory to the profession, and that he believed that Lord Mansfield had afterwards doubted whether he had proceeded upon substantial grounds. In the case of *Bengough* v. *Walker*, (15 Ves. 514,) the Master of the Rolls said, "You cannot refer to extrinsic evidence to construe a will, but you may to show with reference to what a will was made."

(*z*) 4 Dow. 65; *infra*, 774.

(*a*) B. N. P. 173. *Paxton* v. *Popham*, 9 East, 421. *Doe* v. *Allen*, 8 T. R. 147. *R.* v. *Mattingley*, 2 T. R. 12. *Supra*, tit. Fraud; and see tit. Forgery. But such evidence is not admissible to defeat a record by showing a rasure, &c.; as that a rasure was made in a precept since it was issued. *Dickson* v. *Fisher*, Burr. 2267; and tit. Judgment, Vol. II.

(*b*) *Lord Irnham* v. *Child*, 1 Bro. C. C. 92; 3 Atk. 389.

(*c*) *Jones* v. *Statham*, 3 Atk. 388. Note, the agreement was executory.

(*d*) *Doe* d. *Small* v. *Allen*, 8 T. R. 147. (*e*) Ibid.

(A) (Parol evidence is admissible to contradict the written return of an officer which has been obtained by fraud practised upon him. *Commonwealth* v. *Bullard*, 9 Mass R. 270. And in an action on a charter party to recover the price agreed upon for the use of the vessel, the defendant may give evidence of fraudulent representation by the plaintiff as to the burden or capacity of the vessel in mitigation or satisfaction of the plaintiff's demand. *Johnson* v. *Miln*, 14 Wend. 195. So parol evidence is admissible to show fraud in the formation of a written instrument, or a fraudulent use of it afterwards. *Oliver* v. *Oliver*, 4 Rawle, 141. See also *Erwin* v. *Saunders*, 1 Cow. 250. *Roberts* v. *Jackson*, 1 Wend. 478. *Badon* v. *Badon*, 6 Louis. R. 258. The declarations of the testator before and at the time of making a will, and afterwards, if so near as to be a part of the res gestæ, are admissible to show fraud in obtaining the will, but not declarations at any distance of time after the will has been executed, especially where the will has always been in the testator's possession. The declarations of the testator as to his intention to alter his will, and being prevailed upon not to do so, are not admissible to show that the will was fraudulently prevented from being revoked, there being no act or attempt shown to revoke the will, &c. *Smith* v. *Fenner*, 1 Gallis, C. C. R. 170.)

party to an instrument, by a fraudulent omission, or misrepresentation of the contents, especially if the party were illiterate (*f*).

And it is a general principle of law, that where a statute makes a deed void, as for a charitable or superstitious use, or where it is void at common law, as being *contra bonos mores*, the proof of invalidity may be collected not only from the instrument itself, but from circumstances which, though they do not appear on the face of the deed, may be taken into consideration (*g*).

Again, in the case of all covenants to stand seised to uses, a party is at liberty to prove other considerations than those mentioned in the deed (*h*).

In the case of *Filmer* v. *Gott* (*i*), where the considerations mentioned in
*766 *the deed were 10,000*l.*, and natural love and affection, the lords commissioners of the great seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates being worth 30,000*l.* On appeal to the House of Lords, it was held that the commissioners had done right; and the jury finding that natural love and affection formed no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.

Although a party, in order to prove fraud, may adduce extrinsic evidence to show the inadequacy of the consideration when compared with the value of the estate, the party who claims under the deed cannot be admitted to show a consideration in support of it, different from that which is expressed. Upon a bill to set aside a conveyance of an estate of inheritance worth 40*l.* a year, conveyed to the defendant by an infirm old man of the age of seventy-two, in consideration of an annuity of 20*l.*, it was held, that the defendant was not at liberty to show blood and kindred to have been the real consideration of the conveyance, and to prove that the grantor had often declared that he had rather that his kinsman (one of the defendants) should have the estate for this annuity than any other person for a valuable consideration (*j*).

In cases also where the public have an interest in the real nature of a transaction between two parties, they are not bound by the representation made in the private agreement, but may impeach it *pro tanto*, as to any misrepresentation; for this misrepresentation may properly be considered as a species of fraud upon the public. Thus, although the private deed of conveyance of an estate expressed 28*l.* to be the purchase-money, it was held, that as between two contending parishes, it was competent to one of them (*k*) to show that the real consideration was 30*l.*, in order to establish a settlement under the statute (*l*). And, in general, extrinsic evidence is admissible for the purpose of avoiding a particular instrument, on the ground of a fraud attempted to be practised on the revenue; as by proof that under the particular circumstances the instrument ought to have been differently stamped (*m*).

Parol evidence is also, in general, admissible for the purpose of showing

(*f*) 3 Atk 389. As where a mortgagee draws the mortgage deed and omits the covenant for redemption. So where there were to be two mortgage deeds, an absolute one and a defeasance, it was held that the mortgagor might prove an agreement to execute the latter. Ibid.

(*g*) Per Holroyd, J., in *Doe* d. *Welland* v. *Hawthorn*, 2 B. & A. 96. And therefore a lease to trustees may be avoided by a subsequent declaration of trust by some of the trustees. 2 B. & A. 96. See as to superstitious uses, 4 Ed. 6, *Carey* v. *Abbott*, 7 Ves. 490.

(*h*) Per Ld. Kenyon, 3 T. R. 475.

(*i*) Cited by Ld. Kenyon, in *R.* v. *Scammonden*, 3 T. R. 474; 7 Bro. P. C. 50.

(*j*) *Clarkson* v. *Hanway & al.*, 2 P. W. 203.

(*k*) *R.* v. *Scammonden*, 3 T. R. 474; see also *R.* v. *Laindon*, 8 T. R. 379. *R.* v. *Mattingley*, 2 T. R. 12; and *infra*, 791. [*Overseers of New Berlin* v. *Overseers of Norwich*, 10 Johns. 229.]

(*l*) 9 Geo. 1, c. 7. s. 5.

(*m*) *Supra*, 254, and *infra*, tit. Stamp.

that an instrument is void on the ground of some illegality committed by the parties; as that it is void for usury, or because it is given to secure a gaming debt, or founded upon some illegal consideration (*n*). And, in general, where a statute avoids an instrument which does not fully state the consideration on which it is founded, extrinsic evidence is admissible to show that the directions of the statute have not been complied with. To avoid, &c., illegality (A).

Oral evidence is also admissible for the purpose of correcting a mistake (*o*); a practice more frequent in courts of equity than of common law (*p*). In such cases, especially where recourse is had to equity for relief, *the extrinsic evidence is not offered to contradict a valid existing instrument; but to show, that from accident or negligence the instrument in question has never been constituted the actual depository of the intention and meaning of the parties (B) (1). Mistake. *767

(*n*) An agreement, varying from the condition of the bond, may be pleaded, to show that the bond was founded on an illegal agreement. *Greville* v. *Atkins*,[1] 9 B. & C. 462. *Supra*, 101, 245. So that it has been obtained by *duress*, 765.

(*o*) A contract, apparently usurious, may be shown to be legal by evidence of a clerical error. *Anon.* 1 Freem. 253. *Booth* v. *Cooke*, ib. 264.

(*p*) The usual, and certainly the safer course, in case of a mistake, is to apply to a court of equity for relief, in the first instance; but a party is not obliged to resort to equity for relief; and there seems to be no reason why such evidence should not be received by way of defence in a court of law.

(A) (Parol evidence is admissible to prove the object of a written contract to be illegal, if such evidence do not contradict the terms of the contract. *Russell* v. *De Grand*, 15 Mass. R. 35. So in ejectment it is competent to prove that the patent under which the plaintiff claims was obtained contrary to law, although upon the face it appears to have been regularly issued. *Hambleton* v. *Wells*, 4 Call. 213. And it may be proved by parol that the will was executed under duress. *Jackson* v. *Kniffen*, 2 John. R. 31.)

(B) (*A.* seised of a lot in Fourth street, Philadelphia, in the occupation of *R. H.* and having no lot in Third street, devised his "lot in Third street in the occupation of *R. H.*" Held that parol evidence was admissible to explain the mistake. *Lessee of Allen* v. *Lyons*, 2 Wash. C. C. R. 475.)

(1) [Where a contract in writing is made and signed, but the name of the party contracted with is omitted by mistake, the omission may be supplied by parol evidence. Per Parker, C. J. *Brown* v. *Gilman*, 13 Mass. Rep. 161. Parol proof, however, is generally inadmissible, in a court of *law*, to show a mistake in a written agreement. *Fitzhugh* v. *Runyon*, 8 Johns. 375. See *Jackson* v. *Sill*, cited *post*.

The rules of evidence are the same in a court of chancery as those of common law. It will not, therefore, receive parol evidence tending to prove an agreement different from one made by the same parties under seal. *Dwight* v. *Pomeroy & al.* 17 Mass. Rep. 303. When a party applies to a court of chancery to enforce specific performance of a written contract, the adverse party is allowed to show by testimony, that the instrument relied on does not contain the true agreement of the parties, or the whole of it; and in such case, the court will withhold the exercise of its powers, unless the party seeking relief will do full justice to the other party according to the facts which are made to appear to the court. Ibid. Per Parker, C. J.

The name of one of the children of a testator being *omitted* in the will, the court of chancery permitted parol evidence to be given that the omission was through mistake, and corrected it. *Geer* v. *Winds*, 4 Desauss. 85. But where the scrivener was offered to support, by parol evidence, an allegation of a mistake in a will, and to prove that the testator intended to dispose of his property *in a manner* not apparent on the face of the will, he was not permitted to be heard. *Rothmaler* v. *Myers*, ibid. 215. So where the grantor in a deed of gift, gave a certain sum to trustees to be invested in property for the use of his brother "*J. P.*'s lawfully begotten children," the court refused to admit parol evidence that the grantor intended to confine the grant to the children of a first marriage, and that he gave instructions to the scrivener accordingly. *Holmes* v. *Simonds*, 3 Desauss. 149. Parol evidence to prove that certain property was intended to have been comprehended in a deed of settlement, was rejected. *Barrett* v. *Barrett*, 2 Desauss. 447. So parol evidence was rejected which was offered to extend the meaning and operation of receipts given to an administrator by the heirs of the intestate for their shares of the estate to prove a mistake; as that their interest in the real estate was intended to be included. *Harris* v. *Denkins*, 4 Desauss. 60. So where a wife joined her husband in conveying her real estate in fee to a third person, and he conveyed it back to the husband, who afterwards conveyed certain lands and slaves to trustees for the use of the children, and then died insolvent; it was held, on a bill by the trustees against the executors of the husband, that parol evidence was inadmissible to prove a mistake in drawing the deed of conveyance of the wife's land, and that it was intended to settle the land in trust for their children. *Lloyd* v. *Ingle's Ex'rs*, 1 Desauss. 333. Parol evidence is not inadmissible (in order to vary the effect of the dispositions of a will,) to show that a scrivener, in drawing it, inserted words of which he did not know the meaning. *Iddings & al.* v. *Iddings*, 7 Serg. & Rawle, 111. See *Christ* v. *Diffenbach*, 1 Serg. & Rawle, 464. *Cozen* v. *Stevenson*, 5 ib. 421. *Ross* v. *Norvell*, 1 Wash. 14. *Montague & al.* v. *Smith*, 13 Mass. Rep. 396.

Assuming that a mistake in drawing articles of agreement may be proved by parol, yet in an action of

[1] Eng. Com. Law Reps. xvii. 421.

Where parties covenanted to convey an estate, in trust, to raise 30,000*l.* to pay off debts and incumbrances, with remainder over, parol evidence was admitted to show that it was the concurrent intention of all the parties to raise that sum in addition to the sum of 24,000*l.*, with which the estate was encumbered (*q*).

In cases also of marriage settlements, where mistakes have been committed, and, in consequence, the deeds have varied from the instructions of the parties, they have been rectified by a court of equity (*r*). The same has also been done in instances of mercantile and other contracts (*s*). Where two persons entrust a third to draw up minutes of their intention, a mistake of his may, it has been held, be relieved against (*t*). Cases of this nature are nearly of kin to those of fraud; it is, in point of conscience and equity, an actual fraud to claim an undue benefit and advantage from a mere mistake, contrary to the real intention of the contracting parties.

Where a party at the time of executing a deed pointed out a mistake, which the other agreed to rectify, but afterwards refused to do so, parol evidence of the fact was held to be admissible, on the ground of fraud (*u*).

Such evidence ought not, for obvious reasons, to be allowed to prevail, unless it amount to the *strongest possible proof* (*x*). The most satisfactory evidence for this purpose consists of the written materials and instructions which were intended by the parties to be the basis and ground-plan for the construction of the intended instrument (*y*).

Where a mistake was alleged to have been made in a settlement by an attorney's clerk, the Court would not allow it to be corrected by the mere testimony of the attorney himself, who had received oral instructions for the preparation of the deeds; nothing appearing in the hand-writing of the parties to show that a mistake had been committed (*z*).

In general, where a written document is given in evidence as containing
*768 *an admission by the adversary, parol evidence is admissible to explain it, or to show that it originated in mistake (*a*).

The principle on which evidence is received to explain mistakes in matters of contract between private persons, does not extend to the admission

(*q*) *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 338. The evidence, however, proved to be insufficient, and no more than 30,000*l.* was ordered to be raised. The decree was affirmed in the House of Lords. See also *Baker* v. *Paine*, 1 Ves. 457. *Towers* v. *Moore*, 2 Vern. 98. [13 Mass. R. 402.]

(*r*) *Barstow* v. *Kilvington*, 9 Ves. 59; *Randal* v. *Randal*, 2 P. W. 469.

(*s*) See *Henkle* v. *Royal Exchange Assurance Comp.* 1 Ves. 317. *Thomas* v. *Fraser*, 3 Ves. jun. 399; 10 Ves. 227. And see 1 Atk. 545. *Baker* v. *Paine*, 1 Ves. 456.

(*t*) 1 Bro. C. C. 350. [*Hamilton* v. *Asslin*, 14 Serg. & R. 448.]

(*u*) Per Ld. Talbot, 1 Bro. C. C 54. *South Sea Co.* v. *Oliffe*, 2 Ves. 374. *Pitcairne* v. *Ogbourne*, Ibid. {*Christ* v. *Diffenback*, 1 Serg. & R. 464.} [See Nelson's R. 7.]

(*x*) Per Ld. Hardwicke, in *Henkle* v. *The Royal Exchange Assurance Co.*, 1 Ves. 318. In that case, upon a bill to rectify a mistake in a policy of insurance, the principal evidence consisting in the deposition of an agent of the company, who had transacted business for them, the Court held that it was not sufficiently certain to be relied on. Ld. Hardwicke, C. J., in that case observed, that the Court of Chancery had jurisdiction to relieve against plain mistakes in contracts in writing, as well as against fraud; so that if reduced into writing, contrary to the intention of the parties, that, on *proper proof*, would be rectified. Ld. Eldon, C., in a subsequent case, observed on the loosenesss of this expression, as it left it to every Judge to say, "whether the proof was that *proper proof* which ought to satisfy him."

(*y*) *Baker* v. *Paine*, 1 Ves. 457.

(*z*) *Hardwood* v. *Wallis*, cited 2 Ves. 195. Hence it seems that the Court, in such cases, will not rely on mere parol evidence alone. And see the *dictum* of Sir Thomas Clark to that effect, 1 Dickenson, 295. And see *Shergold* v. *Boone*, 13 Ves. 373, 376.

(*a*) *Holstein* v. *Jumpson*, 4 Esp. C. 189; and see 1 T. R. 182.

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covenant on written articles, the plaintiff cannot prove by parol evidence an agreement different from that on which he has declared. *Barndoller* v. *Tate*, 1 Serg. & Rawle, 160.

A mistake in one writing referring to another may be corrected in a court of equity, by the writing referred to. *Argenbright* v. *Campbell & ux.* 1 Hen. & Mun. 144. See also *Vance* v. *Walker*, ibid. 288.]

of evidence to show that a mistake or alteration has been made in records: those memorials having been made and kept under the immediate authority of the law, and by officers in whom confidence is for that purpose reposed, it is to be concluded that they have been correctly made, and faithfully preserved (*b*). But such evidence is admissible to show a mistake in a memorial not of record; as a court-roll (*c*).

Fraud. Such extrinsic evidence is also admissible for the purpose of proving fraud. Thus, although a buyer of goods under a written contract cannot show a previous parol contract for the purpose or varying the terms of the written one, he may show by extrinsic evidence that the seller, by some fraud, prevented him from discovering a defect which he knew to exist (*d*).

To discharge, &c. It is obvious that the general exclusive principle is also inapplicable in all cases where the party admits that the deed or other instrument did once legally exist as such, but offers extrinsic proof to show that it has been discharged by some subsequent instrument or agreement (*e*), or by the receiving payment or satisfaction (*f*).

To give effect to a written instrument. II. In the next place, extrinsic parol evidence is admissible generally to *give effect* to a written instrument, by *establishing* its authenticity, *applying* it to its proper subject-matter, and also, as ancillary to the latter object, for the purpose, in some instances, of *explaining* expressions capable of conveying a definite meaning by virtue of that explanation, and of annexing customary incidents, and also, in other instances, for the purpose of removing *presumptions* arising from extrinsic facts which would otherwise obstruct such application.

To establish, &c. Whenever an instrument is not proved by mere production, it must necessarily derive its credit and authenticity from extrinsic evidence (*g*).

To apply. In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter, the existence of which is also matter of proof. A difficulty in this case occurs, where, although the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it be not equally applicable to several distinct objects.

Latent ambiguity. The general rule has already been adverted to, that a *latent ambiguity* (that is, an ambiguity arising from extrinsic evidence) may be removed by *extrinsic evidence. The illustration most usually given of the operation of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons, or two estates, of the same name and description. Where the testratrix devised an estate to her cousin John Cluer, and there were two persons, father and son, of that name, evidence was admitted to show that John Cluer, the son, was meant (*h*). *769

(*b*) *Reed* v. *Jackson*, 1 East, 355. In *Hall* v. *Wiggett*, 2 Vern. 547, an entry in the steward's book, and parol proof by the foreman of the jury of copyholders, was admitted to show that a feme covert had surrendered the whole of her copyhold estate, although the surrender on the roll, and admission, were but of a moiety. And see *Towers* v. *Moore*, 2 Vern. 98. Amendments in records are, in numerous instances, made by the Courts themselves, on proper application.

(*c*) 1 Leon. 289. *Kite* v. *Quentin*, 4 Co. 25. *Towers* v. *Moore*, 2 Vern. 98. *Hill* v. *Wiggett*, Ib. 547, and *supra*, 767. *Walker* v. *Walker*, Barnard, 215. Scriven on Copyholds, 378.

(*d*) *Kain* v. *Old*,[1] 2 B. & C. 634, citing *Pickering* v. *Dowson*, where it was so laid down by Gibbs, C. J.

(*e*) *Supra*, tit. Deed, Assumpsit; and *supra*, 757, note (*p*).

(*f*) *Supra*, Accord and Satisfaction. (*g*) *Supra*, Vol. I. Written Evidence.

(*h*) *Jones* v. *Newsam*, 1 Bl. 60. Yet if there be father and son of the same name, it is usually to be presumed that the father is meant by the name used simply, and without the addition of 'the younger.'

[1] Eng. Com. Law Reps. ix. 205.

So in Lord *Cheney's* case (*i*), it was held, that if a testator, having two sons of the same name of baptism, and supposing the elder, who had long been absent, to be dead, devise his land to his son generally, the younger son may be permitted to prove the intent of the father to devise to him, and to show that, at the time of the devise, he thought that the other son was dead, or that at the time of making his will, he named his son John *the younger*, and the writer left out the addition.

According to Lord Coke, no inconvenience can result if an averment be taken in such a case, for he who sees the will by which the land is devised cannot be deceived by any secret averment; when he sees the devise to the testator's son generally, he ought at his peril, to inquire which son the testator intended, which may easily be known by him who wrote the will, and by others who were privy to the intent; and if no direct proof can be made of his intent, then the devise is void for uncertainty (*k*).

So if a person grant his manor of *S.* generally, and it appear that he has two manors of *S.* (south *S.* and north *S.*), parol evidence is admissible to show what was intended (*l*).

Where the testator gave 100*l.* to the four children of Mrs. Banfield, and it appeared that she had four children by Mr. Banfield, her latter husband, and two children by Mr. P. her first husband, a declaration by the testator that he had provided for the four children of Mrs. B., but would give nothing to B.'s children, was admitted in evidence to show who were meant by the description of the four children in the will (*m*).

So if a man, having two manors of the same name, levy a fine of one, without distinguishing which, parol evidence is admissible to show which was meant (*n*).

Parol evidence is admissible for the purpose of raising such an ambiguity (*o*). And in the case of a will &c., the declarations made by the testator *at the time* of making the will are admissible in order to explain an ambiguity of this nature.

Where the testator devised to his grand-daughter, *Mary Thomas*, of *Llechloyd*, and it appeared that he had a grand-daughter of the name of *Ellenor Evans*, at *Llechloyd*, and a grand-daughter, *Mary Thomas*, who lived elsewhere, evidence on the part of *Ellenor Evans* was admitted to prove, that when the will was read over to the testator, he said that there was a mistake in the name of the woman to whom he intended to give the
*770 *house, but that there was no occasion to alter it, as the place of abode and the parish would be sufficient (*p*). But in the same case it was held that evidence was properly rejected of declarations made by the testator at *other times* previous to the making of his will, of his great regard for the defendant *Mary Thomas*, and of his intention to give the house to her (*q*).

As an ambiguity arising from too great generality of description may be removed by oral evidence, which restrains and confines, and applies that description to a single object, although on the mere comparison of the terms with several objects, they may be equally applicable to more than one; so it is a rule that a redundant and superfluous description, which is inappli-

(*i*) *Lord Cheney's Case*, 5 Rep. 58, b. See also *Careless* v. *Careless*, 1 Merivale, 354.
(*k*) 5 Rep. 58. (*l*) Bac. El. Rule 23.
(*m*) *Humpshire* v. *Pearce*, 2 Ves. 216; and note, that in the same will, the testator having subsequentl given 300*l.* to the children of Mrs. *B.*, Sir John Strange, the Master of the Rolls, held that the declaration was inadmissible as to the 300*l.*, being contradictory of the will.
(*n*) *Partridge* v. *Stracye*, Plow. 85, b. *Mears* v. *Ansell*, 3 Wilson, 376.
(*o*) 6 T. R. 671; 1 Bro. C. C. 85, 342, 350.
(*p*) *Thomas* v. *Thomas*, 6 T. R. 671.
(*q*) Ibid. by Lawrence, J. at the trial; the admission of the evidence was afterwards approved of by the Court of K. B. And see 8 Vin. Ab. 312, pl. 29; 2 Ves. 216.

cable to an object *well ascertained* by previous or subsequent description, will not prevent such application. Thus, where property was given to *A.* and *B.* legitimate children of *C. D.*, it was held that *A.* and *B.* the illegitimate children of *C. D.* were entitled to take (*r*). So if a grant be made to *William*, bishop of Norwich, the name of the bishop being *Richard*, the grant will be good, the intention being sufficiently clear and apparent (*s*). So if a devise be made to John, the son of *J. S.*, and *J. S.* has but one son, whose name is James (*t*).

Upon the same principles, if the description in the instrument apply *partially* to each of two persons, but to neither of them entirely, so that a doubt arises which was intended, oral evidence is admissible to remove it. For as an erroneous and superfluous description will not prevent the application of the description which in part is certain, and as a description equally applicable to two objects may be ascertained and fixed by external evidence, it seems to follow, that where the description, although redundant and partially erroneous, is still limited to two or more objects, to whom it is equally applicable, then the generality may be further limited by means of extrinsic evidence (*u*).

It is observable that in the case of a will, evidence for the purpose of giving effect to the maker's intention, has been more liberally admitted than in the case of any other instrument, and in some instances to a greater extent than is strictly warranted by any general principle. Some authorities on this subject have been already referred to, and others will be cited under the head of WILLS. It will however be proper in this place briefly to refer to the general principles and rules which govern this large class of cases, either in common with others of a similar nature, or as peculiar to the class.

First, then, evidence of the facts and circumstances in respect of which *the terms of a will are to be applied are necessarily admissible for the purpose of applying them in the strict and primary sense (*v*); and it is an inveterate rule founded on plain and obvious principles, that where the terms *771

(*r*) *Standen* v. *Standen*, 2 Ves. jun. 589; see 2 Pothier, by Sir D. Evans, 210. Where a woman made a will in favour of a person whom she described to be her husband, and it appeared that he had another wife, Arden, Master of the Rolls, held that the disposition was void; but this was founded not on any defect in the description, but on the principle, that where a legacy is given to a person in a character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it. Where the description is true in part, but not true in every particular, parol evidence is admissible provided there be enough to justify the reception of the evidence. *Millar* v. *Travers*,[1] 8 Bing. 248. See *Careless* v. *Careless*, 1 Meriv. 384. *Beaumont* v. *Field*, *supra*.

(*s*) Co. Litt. and Evans's Pothier, vol. 2, 209.

(*t*) *Dowsett* v. *Sweet*, Amb. 175. *Bradwin* v. *Harper*, Amb. 174. See also *Parsons* v. *Parsons*, 1 Ves. 166. *Fonnereau* v. *Pointz*, 1 Bro. C. C. 472.

(*u*) See the case of *Thomas* v. *Thomas*, 6 T. R. 671, above cited.

(*v*) That is where such primary sense is not limited or confined by the rules of legal construction. The great principle is to give effect to the testator's intention in the first place, and within certain limits, by using the words not in their strict primary sense, but in that which was manifestly intended by the testator. See *Hoyle* v. *Hamilton*, 4 Ves. 437; 2 Eden. 196, n. (*a*), and the cases there cited; and Wigram's Examination, &c., p. 14. And where the sense is not so limited and confined by the context, although the terms are to be applied in the first instance according to their primary sense and acceptation, yet where they are, upon the evidence, incapable of such application, then in furtherance of the same principle of effectuating the testator's intention, they may, if capable, and within certain limits, be applied in a secondary sense. Where however the sense in which a term is used is determined by the context, or by the testator's own exposition of his meaning, the term can no longer be applied as evidence in a popular or secondary sense, for this would be to use his words in a sense different from that intended by the testator. Thus where the testator by his use of the word *close* showed that he meant to use it in its ordinary sense of inclosure, it was held that it could not afterwards be applied by the aid of extrinsic evidence to comprehend several inclosures, as meaning, in the popular sense in which the word was used in that part of the country, a *farm*. *Doe* v. *Watson*,[2] 4 B. & Ad. 799.

[1]Eng. Com. Law Reps. xxi. 288. [2]*Id.* xxiv. 164.

of the instrument are capable of application in their strict and primary acceptation, they must be applied in that sense and no other (*w*). But, secondly, where it appears from evidence of the material facts, that the terms of a will are incapable of application in their strict primary acceptation, evidence is admissible to show that they are still capable of application in a secondary sense, in order so to apply them. In other words, evidence of material extrinsic facts and circumstances (*x*) is admissible simply in aid of
*772 the *construction of a will. And, thirdly, it is a general rule that not only material facts, but also declarations made by the testator are under certain circumstances admissible, when necessary in order to ascertain the person or thing intended, that is, the object of the testator's bounty, or the subject of disposition, where the terms are applicable indifferently to more than one person or thing (*y*): of the operation of this rule several instances have already been given. The authorities go still further: it has been held that difficulties arising in the application of the terms of a will from defect in the description of the person or thing intended, may be removed by the aid of extrinsic evidence, even although no part of the description be perfectly correct. One of the strongest instances to this effect is the case of *Beaumont* v. *Fell* (*z*). A will was made in favour of *Catherine Eardley*, and evidence was allowed to show that *Gertrude Yardley* was the person meant; no such person as Catherine Eardley appearing to claim the legacy. Evidence was admitted to prove that the testator's voice, when he made his will, was very low and scarcely intelligible; that the testator usually

(*w*) In the case of a demise of "my real estate," property subject to a power will pass if the devisor have no real estate; but if there be any real estate on which the words can operate, it is otherwise. *Napier* v. *Napier*, 1 Sim. 28. *Lewis* v. *Lewellyn*, 1 Turn. 104. Sugden on Powers, c. v. s. 56, *a*. The word *child* may be applied by evidence to an illegitimate child, where an application, according to the strict legal meaning of the word, is of necessity excluded; but if no such necessity exist, the word must be used in its strictly legal sense. *Godfrey* v. *Davis*, 6 Ves. 43. *Cartwright* v. *Vawdrey*, 5 Ves. 530. *Swain* v. *Kennerley*, 1 V. & B. 469. *Harris* v. *Lloyd*, 1 Turn. & R. 310. And see Wigram's Examination, &c., p. 16, 2d edition. *Miller* v. *Travers*,[1] 8 Bing. 244; *infra*, tit. WILL. A power over a personal estate will not pass under the words "my personal estate," whether the testator at the time of making the will had any personal estate or not, because the words are applicable to such personal estate as *may* possibly be afterwards acquired. *Andrews* v. *Emmett*, 2 Bro. C. C. 297. *Nannock* v. *Horton*, 7 Ves. 391. *Jones* v. *Tucker*, 2 Mer. 533. Wigram's Examination, &c., 2d ed. p. 16, and the cases there cited. In *Druce* v. *Dennison*, 6 Ves. 385, it was indeed held that, for the specific purpose of raising a case of election, extrinsic evidence was admissible to show that the testator by the words "my personal estate," meant personal estate subject to a power. This case, however, as is observed by Mr. Wigram, p. 27, stands opposed to a strong current of authorities. In further illustration of the general rule above stated, the case of *Doe* d. *Richardson* v. *Watson*,[2] 4 B. & Ad. 799, may be cited. The question was whether two closes of land passed under the word *close*, and it was held that they did not; and Parke, J. observed, "Generally speaking, evidence may be given to show that the testator used the word *close* in the sense which it bore in the country where the property was situate, as denoting a farm, but here such evidence was not admissible, because it is manifest that in this will the testator used the word *close* in its ordinary sense, as denoting an inclosure; for the word *closes* occurs in other parts of the will. See also *Roys* v. *Williams*, 3 Sim. 573. *Doe* d. *Westlake* v. *Westlake*, 4 Dow. P. C. 65. *Doe* v. *Bower*,[3] 3 B. & Ad. 453. *Doe* d. *Templeman* v. *Martin*,[4] 4 B. & Ad. 771. Lord Bacon, in his comment on his 13th maxim, *Non accipi debent verba in demonstrationem falsam quæ competant in limitationem veram*, states the rule thus, "If I have some land wherein all the demonstrations are true, and some wherein part of them are true, and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true."

(*x*) It seems to be a general rule that all facts relating to the subject and object of the devise, as to the possession of the testator or other person, the mode of acquisition, local situation, and distribution of the property, are admissible to ascertain the meaning of a will. See the observations of Parke, J., *Doe* v. *Martin*,[4] 4 B. & Ad. 785.

(*y*) See note (*w*). Thus the word child may be construed to mean an illegitimate child. *Gill* v. *Shelley*, Wigram's Examination, &c., p. 31; and see *Steede* v. *Berrier*, 1 Freem. 292, 477. The words "my real estate," may be shown to mean a power. *Lewis* v. *Lewellyn*, 1 Turn. 104. *Denn* v. *Roake*,[5] 5 B. & C. 720; Sug. on Powers, c. 5, ss. 5, 6. And see in further illustration of this rule, Wigram's Examination, &c., p. 29. *Napier* v. *Napier*, 1 Sim. 28. *Wilkinson* v. *Adam*, 1 V. & B. 422. *Beachcroft* v. *Beachcroft*, 1 Mad. 436. *Bayly* v. *Snelham*, 1 Sim. & Stu. 78. *Woodhouslie* v. *Dalrymple*, 2 Mer. 419.

(*z*) 2 P. Wms. 141. See also Ld. Thurlow's *dictum* in *Maybank* v. *Brooks*, 1 Bro. C. C. 85. And see *Brown* v. *Langley*, 2 Barn. 18.

[1]Eng. Com. Law Reps. xxi. 288. [2]*Id.* xxiv. 164. [3]*Id.* xxiii. 118. [4]*Id.* xxiv. 159. [5]*Id.* xii. 363.

called Gertrude Yardley by the name of Gatty, which the scrivener who made the will might easily mistake for Katy; and that the testator referred the scrivener to his wife for the name of the legatee, and she afterwards declared that Gertrude Yardley was the person intended.

Where the testator gave a legacy to John and Benedict, sons of John Sweet, and John Sweet the father had two sons only, viz. James and Benedict, evidence was admitted to prove that the testator used to address James Sweet by the name of "Jackey" (*a*). Where a legacy was given in moieties, one to Ann, the daughter of Mary Bradwin, the other to the children of Mary Bradwin, another daughter of the first-named Mary Bradwin, and it appeared that when the will was made Ann Bradwin was dead, having left two children, but that Mary Bradwin the daughter was living, and single, the Master of the Rolls held that evidence was admissible to explain the legacy (*b*).

The apparent impossibility of reconciling upon principle the giving effect to a description inapplicable to any subject with the undisputed law that even in the case of a legacy evidence is inadmissible to fill up a blank (*c*), seems to induce the necessity of at once placing the reception of such evidence upon the footing of a peremptory and arbitrary exception to general rules and principles, and to exclude all attempts at reconciliation. In the case of a blank, the effect of the evidence might simply be to supply a name mentioned by the testator: in the case of a total misdescription, evidence is necessary *not simply to *supply* but to *substitute* a description. The *773
distinction between a latent mistake and one which is patent is at best but technical, and it seems to be very questionable whether Lord Bacon's rule, as to ambiguities, be applicable to the case not of a double meaning but to simple deficiency of description (*d*).

It has been said, that as before the statute a nuncupative will would have been good, the Courts might, notwithstanding the statute which required a will to be in writing, use extrinsic evidence as before. This is an argument which, carried to its full extent, would go far to repeal the statute altogether, and which is wholly at variance with several decisions on other branches of the Statute of Frauds. It has also been (*e*) urged, that the admission of such evidence is no violation of the statute, for this reason, that the names of persons having no intrinsic meaning, the will is rectified without any addition to the sense. Were this argument well founded, it would warrant the reception of extrinsic evidence to supply a blank. As the main purpose of a will is to ascertain *what* the testator meant to give, and to *whom*, it would certainly be singular that, under a statute requiring such meaning to be expressed in writing, it should be unnecessary that either the person or thing should be so described; neither does the case seem to be properly within the scope of the principle that an ambiguity created by evidence may be removed by evidence (*f*). There is a wide distinction between evidence which raises an ambiguity by showing that the words are capable of several applications, and that which shows that it is incapable of any application either in a primary or secondary sense; and there is an equally wide distinction between evidence which applies words in their

(*a*) *Dowsett* v. *Sweet*, Ambl. 175; and see 1 Bro. C. 31, 85. See also *Masters* v. *Masters*, 1 P. W. 421.

(*b*) *Bradwin* v. *Harper*, Ambl. 374.

(*c*) In the case of *Beaumont* v. *Fell*, the Master of the Rolls, although he admitted the evidence, said, "If this had been a grant, nay, had it been a devise of land, it had been void by reason of the mistake both of the christian and surname."

(*d*) See Wigram's Examination, &c. 98, 135.

(*e*) Roberts on the Satute of Frauds, 16, 17.

(*f*) See 1 W. Bl. 60; 7 T. R. 148; 1 Bro. C. C. 350; Sug. Ven. 137; 1 Phill. Ev. 531, 7th ed.; 2 Roberts on Wills, p. 13.

natural sense to one of several objects, one or other of which must certainly have been intended, and evidence to annex a meaning to terms of themselves inapplicable.

To prove whether parcel or not.

In general, where there is any doubt as to the extent of the subject devised by will, or demised or sold, it is matter of extrinsic evidence to show what is included under the description as parcel of it (*g*) (1). The question *774 being *whether a description in a lease (*inter alia*) of a piece of ground, late in the occupation of *A.* (the piece of ground being a yard, then in the occupation of *A.*), a cellar and certain wine-vaults under it, passed, evidence was admitted to prove, that at the time of the lease the cellar and vaults were not in the occupation of *A.* but were under a lease to *B.* another tenant of the lessor, and that the defendant never claimed them until the expiration of *B.*'s lease. But where a subject-matter exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity; and no evidence can be admitted for the purpose of applying the terms to a different object (*h*). In the case of *Doe* d. *Sir A.*

(*g*) *Doe* v. *Burt*, 1 T. R. 701. Buller, J. said, whether parcel or not of the thing demised, is always matter of evidence. See *Kearslake* v. *White*,[1] 2 Starkie's C. 508, where it was held, that the demise of a messuage, with all rooms and chambers thereto belonging and appertaining, included all that was occupied together as the entire messuage at one and the same time, and that the demise did not include a room which had once formed part of the messuage, but which had been separated from it for many years anterior to the demise. *Herbert* v. *Reid*, 16 Ves. 481. In *Doe* d. *Beach* v. *Earl of Jersey*,[2] 3 B. & C. 270, under a demise by the testator of all his Briton Ferry estate, it was held, that accounts of deceased stewards of former owners, in which they charged themselves with the receipt of various sums of money on account of the owners, were admissible in evidence to show that particular lands had gone by the name of the Briton Ferry estate. See *Goodtitle* v. *Southern*, *infra*. So in the case of a written agreement to convey all those brickworks in the possession of *A. B.*, parol evidence is admissible of what passed at the time of the agreement, to show what was intended to pass. *Paddock* v. *Fradley*, 2 C. & J. 90. Where a fine was levied of twelve messuages in Chelsea, and it appeared, that the cognisor had more than twelve messuages in Chelsea, parol evidence was admitted to show which were meant. *Doe* v. *Wilford*, R. & M. 88. There being a devise of Trogues Farm, in the occupation of *M.*, it may be shown that *M.* was not tenant. *Goodtitle* v. *Southern*, 1 M & S. 299. Where a deed purported to grant all the coal mines in the lands in the occupation of widow *K.* and son, and the grantor had not at that time any lands in the occupation of widow *K.* and son, and the deed was founded upon a contract of sale executed some months before, to which the grantor's land steward was the subscribing witness; held that, for the purpose of explaining the latent ambiguity in the deed, letters written by the latter to the grantees respecting the sale to them by the grantor of the coal mines in the deed, and purporting to be written by his directions, were admissible evidence, without showing an express authority from the grantor to write them. *Beaumont* v. *Field*, 1 B & A. 247. Devise to *S. H.*, second son of *T. H.*, when in fact he was the third son, evidence of the state of the testator's family and other circumstances was admitted to show the mistake in the name. *Doe* v. *Huthwaite*,[3] 3 B. & A. 632.

(*h*) See *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138, and the observations of Sir D. Evans, 2 Evans's

(1) [In trover for the sails of a vessel, brought by the owner of the vessel against the vendee of an officer who was directed by the precept to sell her "together with her tackle, apparel and furniture, or so much thereof as might be necessary, the same being in his custody and possession," and who returned that he sold the vessel, "her tackle, apparel, &c." to *A.* for a certain sum; it was held that it might be shown that the sails were in *A.*'s possession at the time of the inventory and sale, and were expressly excepted at the time of sale, and not sold. *Dolan* v. *Briggs*, 4 Binney, 496. But parol evidence is not admissible to prove that part of the premises, included in a deed, was not intended to be so included. *Jackson* v. *Croy*, 12 Johns. 427. S. P. *Barret* v. *Barret*, 4 Desauss. 447. *Lessee of Snyder* v. *Snyder*, 6 Binney, 413: (Unless in case of *fraud*. See 2 Dallas, 172. 1 Yeates, 140; 4 ib. 281. 1 Binney, 616.) Nor to show that a deed, stating a course for thirty-six chains, was intended to express twenty-nine. *Jackson* v. *Bowen*, 1 Caines, 358.—See cases collected by the reporter, in his note to that case, 2d edition. Nor to explain what land was intended to be conveyed by a deed, which describes the lands by courses and distances. *Hamilton* v. *Cawood*, 3 Har. & M'Hen. 437.

Where the courses, distances and lines are found to correspond with the deed, parol evidence is not admissible to show that any other was intended. *Milling* v. *Crankfield*, 1 M'Cord, 261. But where there was a plain mistake in a deed, such evidence was admitted to explain the situation of the land, though contrary to the description in the deed. *White* v. *Eagar*, 1 Bay, 247. *Middleton* v. *Perry*, 2 Bay, 539. See also *Francis* v. *Hazlerig*, 1 Marsh. 96. *Marshall & ux.* v. *Currie*, 4 Cranch, 172. *Baker* v. *Seekright*, 1 Hen. & Mun. 177. *Dinkle* v. *Marshall*, 3 Binney, 587. *Patton & al.* v. *Goldsborough*, 9 Serg. & Rawle, 47. *Richardson* v. *Lessee of Stewart*, 2 Ib. 84.]

[1]Eng. Com. Law Reps. iii. 452. [2]*Id.* x. 253. [3]*Id.* v. 406.

Chichester v. *Oxenden* (*i*), the question was, whether parol evidence could be admitted to show that the testator, by a devise of his *estate at Ashton*, intended to devise all his maternal estate, consisting of two manors in the parish of Ashton, and one in the adjoining parish; the Court, after hearing two arguments, decided against the evidence. Sir J. Mansfield, C. J., in giving judgment, referred to the cases of *Beamont* v. *Fell* (*k*), and *Dowset* v. *Sweet* (*l*); and distinguished the present case, on the ground that in those *the will would have had no operation unless the evidence had been received;* whereas in the present the will would have an *effective operation to pass all the estate within the parish of Ashton*, without the evidence proposed: that in the other cases the evidence was admitted to explain that which otherwise would have had no operation, and that it was safer not to go beyond that line. The same question was afterwards brought before the House of Lords (*m*), where judgment was given corresponding with that of the Court of Common Pleas (1).

Pothier, 210. And see *Carruthers* v. *Sheddon*, 6 Taunt. 14. So where words have acquired a precise and technical meaning, Ib. Per Lord Kenyon, 6 T. R. 352. *Mounsey* v. *Blamire*, 4 Russ. 384. And although the mere name of a devise in a will be applicable to several, parol evidence of application is not admissible if it can be collected from the will who was intended. *Doe* v. *Westlake*,[1] 4 B. & A. 57.

(*i*) 3 Taunt. 147; 4 Dow, 65.

(*k*) 2 P. Wms. 140; and also to the case of *Whitbread* v. *May*, 2 Bos. & Pull. 593, where the question was as to the effect of a codicil, by which the testator revoked a former general devise of all his estates, so far as it related to his estate at Leeshill in the county of Wilts, and *Hearne* and Buckband in the county of Kent. The testator had lands in *Hearne*, and several other parishes, all of which he had purchased by one contract from one person; evidence was offered to show that the testator meant to revoke the devise, not only as to the lands in the parish of *Hearne*, but also as to all the lands in other parishes purchased at the same time; the evidence was received at the trial, subject to the opinion of the Court of C. B., which was equally decided upon the question. See *Doe* d. *Brown* v. *Brown*, 11 East, 441. See also *Doe* v. *Lyford*, 4 M. & S. 550.

(*l*) Amb. 175; *Supra*, 772.

(*m*) *Doe* d. *Oxenden* v. *Sir A. Chichester*, 4 Dow, 65, in an action brought by the devisee against the heir-at-law. The question on the admissibility of the evidence having been referred to the Judges, Sir V. Gibbs, C. J. of C. P., delivered their unanimous opinion, that the evidence ought not to be admitted. In delivering that opinion, he observed, "The Courts of Law have been jealous of extrinsic evidence to explain the intention of a testator, and I know only of one case in which it is permitted; that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity. For example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant. So if one devises to his son John Thomas, and he has two sons of that name. So if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant, by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance; and the admission of evidence to explain the ambiguity is necessary to give effect to the will; and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of extrinsic evidence should be avoided, where it can be done, that a purchaser or heir at law may be able to judge from the instrument itself what lands are or are not to be affected by it. Here the devise is of all the devisor's estate at Ashton, for there is no difference between the words 'Estate of Ashton' and 'Estate at Ashton,' and he has an estate at Ashton which satisfies the description." And see *Doe* v. *Morgan*, 1 C. & M. 235.

(1) [*A.* by a written contract, agreed to receive of *B.* sixty shares of the Hudson Bank, on which ten dollars per share had been paid, and to deliver *B.* his note for 667 dollars, and pay him the balance in cash; and also to pay five per cent. advance: here is a latent ambiguity, and the nominal value of each share being fifty dollars, parol evidence was held to be admissible to show whether the five per cent. advance was to be paid on the sum paid in on each share only, or on the nominal amount. *Cole* v. *Wendell*, 8 Johns. 146. A patent was granted to *David H.* without any other words of description; parol evidence was admitted to show that *Daniel H.* and not *David H.* was the patentee intended. *Jackson* v. *Stanley*, 10 Johns. 123. *Quære;* and see *Jackson* v. *Hart*, 12 Johns. 77. *Lucy* v. *Pumfrey*, Addison's Rep. 380.

In Pennsylvania, parol evidence was held admissible to prove that a legacy, given to *Samuel P.*, was intended for *William P.*, though there were persons of both names. *Powell* v. *Biddle*, 2 Dallas, 70. If there be a devise of a lot "on *Third Street*, in the occupation of J. P.," and the lot lies on *Fourth Street*, and was in the occupation of J. P., this is a latent ambiguity, and may be explained by parol evidence. *Allen's Lessee* v. *Lyons*, Circuit Court, Jan. 1811, Wharton's Digest, 258.] {Reported, 2 Wash. C. C. Rep. 475. So when lands are described in a deed as bounded on a river, the centre of the stream is to be considered as the

[1] Eng. Com. Law Reps. vi. 348.

To explain a charter, &c.

*In the next place, extrinsic evidence is admissible for the purpose of constructing ancient charters, explaining the meaning of the terms of contracts, to which a peculiar and technical sense has been annexed, by custom and usage. Also, for the purpose of showing the consequences and incidents, which, by virtue of a known and established custom, are by presumption of law appurtenant to the general terms of a contract.

When it is said that oral evidence shall not be admitted to explain an ambiguity or uncertainty apparent on the instrument, this must be understood of such defects as render the instrument in point of law inoperative; for it is not every species or degree of doubt or uncertainty which may occur upon the reading of an instrument, that will thus wholly avoid it; on

boundary, and if an island be situated in the river, and is nearest that bank where the premises lie, it passes to the grantee, but it is competent to show by parol evidence, that the quantity of water was such on each side of the island, as to be called by the name of the river; and then as a latent ambiguity it may be explained by other testimony showing what the parties probably meant by the expression in the deed. *Claremont* v. *Carlton*, 2 New Hamp. Rep. 369.}

In the case of a devise of "the farm which I now occupy," parol evidence was held not to be admissible to show that the testator intended to devise the whole of his real estate at *W.* including a farm of ninety acres in the tenure of *A.* under a lease, and that he gave instructions for that purpose to the scrivener who drew the will. *Jackson* v. *Sill*, 11 Johns. 201. Where the grantor in a deed described the premises as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence, *aliunde*. *Doolittle & ux.* v. *Blakesly*, 4 Day, 265. Parol evidence was held admissible to show what was meant by a devise of "a tract of land called the Beaver Dam." *Hatch* v. *Hatch*, 2 Hayward, 32. Where the word *convey* was used in a devise, it was held that parol proof was not admissible to show that the testator intended to give only a life estate, it being, if any ambiguity at all, one apparent on the face of the instrument, which it is the exclusive province of the court to interpret. *Denn* v. *Cornell*, 3 Johns. Cas. 174. See also *M'Dermot* v. *U. States Insurance Co.* 3 Serg. & Rawle, 607. *Duncan* v. *Duncan*, 2 Yeates, 302. *Stith* v. *Barnes*, 1 Car. Law Repos. 491. *Dupree* v. *M'Donald*, 4 Desauss. 209. Where a charter-party stipulated that the freighters should pay a certain sum per pound, &c., "British weight," it was held that as the word weight had two meanings, gross and neat, this was such a latent ambiguity as to warrant the introduction of parol testimony. *Goddard* v. *Bulow*, 1 Nott & M'Cord, 45. And where the words of a will are susceptible of reference to two objects, viz. a freehold in the lands, or rents which had previously accrued, parol evidence may be admitted to show to which they apply. *Ellsworth* v. *Buckmeyer*, 1 Nott & M'Cord, 431. The identical monument or boundary referred to in a deed is always a subject of parol evidence: there may be two trees of a similar species and with similar marks: two similar stakes not far distant from each other, or two rivers of the same name; and which was intended by the deed is to be settled by parol evidence, on the ground that it is a latent ambiguity. Per Woodbury, J., *Proprietors of Claremont* v. *Carlton*, 1 N. Hamp. Rep. 373. {So a collateral fact as to the situation of the premises at the time of a grant, may be proved by parol evidence. *Baker* v. *Sanderson*, 3 Pick. 348.}

In *Peish* v. *Dickson*, 1 Mason's Rep. 11, Story, J. says he had found himself unsuccessful in every attempt which he had made to reconcile all the decisions upon the subject of latent and patent ambiguities. "The difficulty," he remarks, "lies not in the rule itself (than which nothing can be clearer), but in applying it to particular cases, where the shades of distinction are very nice. There seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject-matter in the contemplation of the parties. In such a case, I should think parol evidence might be admitted to show the circumstances under which the contract was made, and the subject-matter to which the parties referred. For instance, the word *freight* has several meanings in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made to ascertain whether it referred to goods on board of the ship, or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term." Accordingly, in that case, (which was assumpsit for a balance alleged to be due on consignments), parol evidence was received of the circumstances under which a contract was made, which contained this clause relating to the plaintiff's goods, viz. "On which goods Mr. *D.* [the defendant] has advanced me $5833, for which amount he will hold for reimbursement on the amount and net proceeds of the sales of said goods, *which are only considered answerable* for said amount advanced, as per our agreement"—for the purpose of showing whether it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security, for the re-payment of the advance, to the goods only—or was meant merely to exempt the goods of the shippers on freight from being included as a security for the advance on the plaintiff's goods.

Ellsworth, C. J. in a note to *Clarke* v. *Russel*, 3 Dallas, 421, suggested a distinction in principle between solemn instruments and loose commercial memoranda. "I will, for instance," said he, "state this case: —*A.* and *B.* being at a wharf, the former says to the latter, 'I will sell you my ship John.' *B.* asks an hour to think of the proposition; goes home; and shortly after sends a note to *A.* in these words— 'I will take your ship John.' May not the party go beyond the note, to explain, by existing circumstances, the word *take*, which, according to existing circumstances, will equally embrace a purchase, a charter-party, and a capture?"]

the contrary, many difficulties of this nature may be removed by legal construction, acting upon certain settled rules and maxims, and there are some kinds of obscurity and doubt which may be dispelled by the aid of extrinsic evidence, as in the instances of ancient charters and mercantile contracts. In *ancient charters* words are often to be found of doubtful import from their antiquity; the particular terms may have become obscure, or even obsolete; but it would be highly unreasonable, as well as inconvenient, that on this account the whole should perish; the terms were probably understood when the instrument was made; and it is also probable that the usage and practice then conformed, and that they have since continued to conform, with the real meaning and sense of those expressions; and hence such ancient and continuing usage may with reason and prudence be resorted to as the expositors of such doubtful terms (*n*) and phrases; more *especially where the charter concerns the public interests of a large body, *776
who would not, it may be presumed, have acquiesced in an illegal interpretation and application of its terms. Such evidence may be considered as somewhat analogous to the practice of the Courts, in considering the usage supplied by the precedents as to the construction of a doubtful statute, except that in the latter case the Courts themselves notice the contemporaneous and subsequent construction put upon the statute (*o*); but in the case of a charter, the usage, if not admitted, must be ascertained as a fact by a jury.

Such evidence in aid of the construction of a doubtful charter is also founded in part upon considerations of legal policy and convenience, for the purpose of quieting litigation, and supporting long-continued and established usages (*p*).

In the case of *Withnell* v. *Gartham* (*q*), Lawrence, J. observed, "if there be any ambiguity in this deed, usage is admissible to explain it; and the argument of convenience or inconvenience from this or that construction of a deed creates that sort of ambiguity that should be explained by usage (1)."

(*n*) In the case of *The Attorney-general* v. *Parker* (3 Atk. 576), Lord Hardwicke observed, that in the construction of ancient grants and deeds there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by. In *R.* v. *Varlo*, (Cowp. 248), Lord Mansfield observed, "supposing the terms of the charter doubtful, the usage is of great force; not that usage can overturn the clear words of a charter; but if they are doubtful, the usage under the charter will tend to explain the meaning of them." Lord Coke, in his comment on the Stat. of Glo'ster, 2 Inst. 282, observes, that "ancient charters, whether they be before the time of memory or after, ought to be construed as the law was when the charter was made, and according to ancient allowance;" and again, "when any claimed, before the justices in eyre, any franchises by an ancient charter, though it had express words for the franchises claimed, or if the words were general and a continual possession pleaded of the franchises claimed, as if the claim was by old and obscure words, and the party in pleading, expounding them to the Court, and averring continual possession according to that exposition, the entry was ever, '*Inquiratur super possessionem et usum*,' &c. which I have observed in divers records of those eyres, agreeable to that old rule, '*Optimus interpres rerum usus*.'" However general the words of ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which they have been possessed and used. Per Ld. Ellenborough, in *Weld* v. *Hornby*, 7 East, 199. Long user may serve to explain an ambiguous act of Parliament. *Stewart* v. *Lawton*,[1] 1 Bing. 377. To explain what is meant by "tithes" in a crown grant, contemporaneous leases and other extrinsic evidence and testimony are admissible to show the kind of tithes intended to be conveyed. *Linton School* v. *Scarlett*, 2 Y. & J. 330.

(*o*) See 1 T. R. 728.

(*p*) See the observations of Buller, J. 3 T. R. 288.

(*q*) 6 T. R. 388. Where the nomination of a curate was, by a deed of 1656, given to the "inhabitants," it was held that the word was properly explained by past usage to mean "all housekeepers."

(1) [In patents of great antiquity, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. *Jackson* v. *Wood*, 13 Johns. 346.]

[1]Eng. Com. Law Reps. viii. 353.

In the case of *The King* v. *Osborn* (*r*), by the terms of the charter the power of electing aldermen was committed to the mayor and *commonalty*. According to the *usage*, the term *commonalty* included aldermen; and the Court were of that opinion and construed the charter accordingly (*s*). Usage was, on the same principle, admitted as explanatory evidence as to the mode of presentation, where a presentation to a curacy had been given by deed ninety years before to the *parishioners* and *inhabitants* of Clerkenwell (*t*). Also, in order to show that an Act, which by the terms of a charter was committed to the mayor, aldermen and burgesses, or the greater part of them, was well executed by the majority present at a regular meeting, although not by a majority of the whole number (*u*); that a presentation given by a charter to the mayor, aldermen and burgesses, was properly executed by the mayor and aldermen only (*x*); that the justices of a county have a concurrent jurisdiction with the justices of a borough (*y*), under the particular charter; again, where the power of appointing a schoolmaster was
*777 *given to the minister and churchwardens, to show that an appointment by the minister and a majority of the churchwardens is good (*z*).

It is not essential to the admissibility of evidence of usage that the instances proved should be as ancient as the deed; a custom from time of legal memory is frequently established by evidence of facts done at a much later period (*a*).

Where, however, the terms of an ancient charter are not in themselves doubtful, either from the use of equivocal and obscure terms, or in point of legal construction, evidence of usage can no longer avail; its legitimate object is to remove doubts; its functions therefore cease where no doubt exists; and to admit it in such a case would be not to obviate, but to create, doubts.

Where a statute constituted a body of 48, with power in conjunction with certain others, to do corporate acts in the town of Northampton, it was held that an usage of 300 years' continuance was unavailable to show that the attendance of a majority of 48 was not requisite, the general question having been already settled, that where such powers are delegated to a definite body, the attendance of a majority of that body is essential (*b*).

(*r*) 4 East, 327.

(*s*) Lord Ellenborough said, that without resorting to any assistance from contemporaneous and subsequently continuing usage (to which, however, in such cases, upon the best authorities in the law, resort may allowably be had), on the face of the charter itself, by a fair construction of it, commonalty does include aldermen.

(*t*) *Attorney-general* v. *Parker*, 3 Atk. 576.

(*u*) *R.* v. *Varlo*, Cowp 248. But as to the *decision* in this case, vid. *infra*, 777, note (*b*). See also, *R.* v. *Osborn*, 4 East, 333. *Bailiff of Tewkesbury* v. *Bricknell*, 2 Taunt. 120. *R.* v. *Mayor of Chester*, 1 M. & S. 101. *Chad* v. *Tilsed*,[1] 2 B. & B. 409. *R.* v. *Mayor, &c. of Stratford-upon-Avon*, 14 East, 348. *Mayor of London, &c.* v. *Long*, 1 Cowp. 22. *Weld* v. *Hornby*, 7 East, 199. See also *R.* v. *Mayor of St. Albans*, 12 East, 559.

(*x*) *Gape* v. *Handley*, 3 T. R. 288, n.

(*y*) *Blankley* v. *Winstanley*, 3 T. R. 279. Note, Buller, J. observed, that "Usage consistent with the charter has prevailed for 190 years past; and if the words of the charter were more disputable than they are, I think that ought to govern the case. There are cases in which the Court has held that settled usage would go a great way to control the words of a charter; and it is for the sake of quieting corporations that this Court has always upheld long usage, where it was possible, though recent usage would perhaps not have much weight."

(*z*) *Withnell* v. *Gartham*, 6 T. R. 388.

(*a*) See Lord Kenyon's observations in *Withnell* v. *Gartham*, 6 T. R. 388; where the question was upon the construction of an ancient deed, granting to the minister and churchwardens of a parish the power of appointing a schoolmaster.

(*b*) *R.* v. *Miller*, 6 T. R. 268; and see *R.* v. *Bellringer*, 4 T. R. 810. There the charter of Bodmin gave power to a definite body, which was exercised by a majority of the subsisting body, but not by a majority of the definite number. Usage was adduced to show that a majority of the definite number was essential; but

[1] Eng. Com. Law Reps. vi. 171.

To decide whether the construction of a charter be so doubtful as to admit of explanation from usage, or whether, on the other hand, the terms be so intelligible in their usual plain and ordinary natural sense, or by necessary construction of law, with reference to antecedent decisions, is obviously a pure question of law (*c*). The ambiguity, to require such aid, must clearly be such as arises upon reading the instrument itself, independently of any extrinsic considerations; and unless a doubt arise from that source, usage can avail nothing; for if it be consistent with the legal construction of the deed, it is unimportant; if it be contrary to such construction, to admit it would be, not to explain, but to subvert, an authentic instrument by the aid of presumption and opinion. In the case of *Stammers* v. *Dixon* (*d*), where the ancient admissions of the copyholders were to land by the description of trees *acras prati*, it was held that evidence was admissible to show, from acts of enjoyment, that the admission must be construed to mean *primo tonsura* only. Even in the case of a statute universal usage has sometimes been resorted to for the purpose of explaining doubtful terms (*e*). And in the case of *Withnell* v. *Gurtham* (*f*), it was held that *evidence of usage was as much admissible to construe a deed made by the founder of a school, though a private person, as in the case of the King's charter. *778

The doctrine of applying evidence of contemporaneous usage to the construction of ancient deeds, has, it appears, been applied to merely *private* as well as to *public* instruments (*g*); but it is obvious that the reasons for allowing it in the former case apply with much less force, inasmuch as the mere assent and acquiescence of a private person, who may have been ignorant of his rights, affords a presumption very inferior in weight to that which is to be derived from the long-established practice and usage of a public body. The application of this principle to the case of private instruments has, however, been denied in two instances (*h*) in equity, and it seems to be very doubtful whether such evidence would now be received in a court of law. Private deeds.

Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that

the Court declined to decide upon the validity of the usage alleged, being of opinion, upon the construction of the charter, and without reference to usage, that a majority of the whole definite body was requisite.

(*c*) See the observations of Sir D. Evans on this head; 2 Evans's Pothier, 219, *& sequent.*

(*d*) 7 East, 200.

(*e*) *Shepherd* v. *Gosnold*, Vaugh. 169. *R.* v. *Scott*, 3 T. R. 104. But in general evidence is not admissible to explain the meaning of a statute, as to show what is meant by the word *square* according to the technical usage of the trade. *The Attorney General* v. *The Plate Glass Co.*, 1 Ans. 39. Where the contract is for so many bushels of corn, statutory bushels must be intended. [1] 1 Chit. R. 28.

(*f*) 6 T. R. 388. Lord Kenyon observed, that if there were any difference, it would be in favour of the admissibility in the case of a private deed, for the King's grants are not construed strongly against the grantor, as private deeds are.

(*g*) In the case of *Cooke* v. *Booth*, (Cowp. 819,) the doctrine was extended to a subject of a nature merely private. A lease contained a covenant of renewal; the question was, whether by the terms of the covenant, each subsequent lease was to contain a similar covenant; and as there had been several successive renewals, with similar covenants, the Court held that the parties by their practice had put their own construction on the covenant, and were bound by it. Where the terms of an award are ambiguous in relation to a road, subsequent usage is admissible in explanation of its meaning. *Wadley* v. *Bayliss*,[2] 5 Taunt. 752.

(*h*) 3 Ves. 298; 6 Ves. 237. In the case of *Iggulden* v. *May*, in error, 2 N. R. 449; Mansfield, C. J. in giving judgment, observed upon the case of *Cooke* v. *Booth*, "we think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed." S. C. 7 East, 237. In *Hughes* v. *Gordon*, 1 Bligh, 289, it was said that evidence to explain a deed was highly dangerous, except in cases of fraud or misrepresentation. See *Clifton* v. *Walmesley*, 5 T. R. 564. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. *Stammers* v. *Dixon*, 7 East, 200; *infra*, tit. Wills. [9 Ves. 325; see *South Carolina Society* v. *Johnson*, 1 M'Cord, 41.]

[1] Eng. Com. Law Reps. xviii. 19. [2] *Id.* i. 252.

To explain mercantile contracts (A).

effect is admissible for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters (*i*).

*779 *Thus a general warranty in a policy of insurance, to depart with convoy, may be proved, according to mercantile usage and understanding, to be satisfied by a joining of convoy at the nearest usual place of rendezvous (*k*) (1).

So where upon the sale of a cargo, the vendor covenanted to pay all duties, *allowances*, &c. to be taken out of them, he was permitted to adduce proof of a custom to show that such allowances were to be limited (*l*) to the price which he should receive.

Where it was stipulated in a charter-party that the captain should receive a stipulated sum in lieu of *privilege* and *primage*, and the question was, whether the terms of the contract excluded all right on the part of the

(*i*) Witnesses may be called to show that a particular expression in a commercial contract, is understood in the mercantile world in a different sense from its ordinary import. *Chaurand and another* v. *Angerstein*, Peake's C. 43. Or that a particular meaning was affixed to the word of indeterminate signification (privilege), in a previous conversation between the parties. *Birch and another* v. *Depeyster*,[1] 4 Camp. C. 385; 1 Starkie's C. 210. [4 Camp. 385, S. C.] And see *Iggulden* v. *May*, 7 East, 237; [*Stultz* v. *Dickey*, 15 Binney, 287.] 3 Smith, 269; 9 Ves. 325; 2 N. R. 419, S. C. A bill of lading contains a memorandum, "to be discharged in fourteen days," or pay five guineas a day demurrage; evidence of usage may be adduced to show that *working* days, and not *running* days, are meant. *Cochran* v. *Retberg*, 3 Esp. C. 121. Evidence of a communication to the insurer is admissible to define what otherwise is indefinite. *Urquhart* v. *Barnard*, 1 Taunt. 450. But evidence that "last" imports foreign, not English measure, is inadmissible. *Moller* v. *Living*, 4 Taunt. 102. Where an entry made by a clerk since deceased is ambiguous, a person conversant with the mode in the office in which the business was conducted, may be called to explain a particular item. *Hood* v. *Reeve*,[2] 3 C. & P. 532. In trover for goods sent by the plaintiff to the defendant, a packer, and expressed in the receipt to have been received on account of the plaintiff for *M.*, the party to whom they had been sold; it was held, that evidence of the usage of trade was admissible to explain the meaning of ambiguous terms in such receipt. *Bowman* v. *Horsey*, 2 Mo. & R. 85. And see the case cited below. Also *Syers* v. *Bridge*, Doug. 509. *Uhde* v. *Walters*, 3 Camp. 16. *Edie* v. *East India Company*, 2 Burr. 1216; 1 Ves. 459; 2 B. & P. 16; 7 East, 237. A jury may properly judge of the meaning of mercantile phrases in the letters of merchants. *P. C. Lucas* v. *Groning*,[3] 7 Taunt. 164.

(*k*) *Lethullier's Case*, 2 Salk. 443. See also *Cutter* v. *Powell*, 6 T. R. 320. *Noble* v. *Kennoway*, Doug. 492. In *Robertson* v. *French*, 4 East, 130, Lord Ellenborough observed, that the same rules which applied to all other instruments applied also to a policy of insurance, that is, to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which are to be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the word. See also Lord Eldon's observations on the subject, in *Anderson* v. *Pitcher*, 2 B. & P. 164; and Evans's Pothier, vol. 2, p. 214. *Salvador* v. *Hopkins*, 3 Burr. 1707. *Baker* v. *Paine*, 1 Ves. 459. *Ford* v. *Hopkins*, Salk. 283. [See *Harris* v. *Nicholas*, 5 Munf. 483.]

(*l*) *Baker* v. *Paine*, 1 Ves. 459. Ibid. 317. See 6 Ves. 336, n. *Ekins* v. *Maclish*, Amb. 186. *Ford* v. *Hopkins*, Salk. 283. *Henkle* v. *Royal Exchange Assurance Company*, 1 Ves. 318. *Thomas* v. *Fraser*, 3 Ves. jun. 399; 10 Ves. 227. And see 1 Atk. 545.

(A) (Where a new word is used in a contract, or a word is used in a technical sense as applicable to any branch of business, evidence of usage is admissible to explain it, and that evidence is to be considered by the jury under the instruction of the court as to its legal effect on the contract. *Eaton* v. *Smith*, 20 Pick. 150. But it is inadmissible to show what is commonly understood by a term to which law has applied a precise and definite meaning. *Sleght* v. *Rhinelander*, 1 John. R. 192.)

(1) [Parol evidence is not admissible to show that by the term "specie," in a policy of insurance, certain paper bills were intended by the underwriters. *Benezet* v. *M'Clenachan*, cited 2 Dallas, 173.]

[1]Eng. Com. Law Reps. ii. 359. [2]*Id.* xiv. 432. [3]*Id.* ii. 61.

captain to use the cabin for the carriage of goods on his own account, Gibbs, C. J. said, evidence may be received to show the sense in which the mercantile part of the nation use the term *privilege*, just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to have been used by the parties in its mercantile and established sense (*m*) (1).

In the case of *Cutter* v. *Powell*, where a promissory note was given to a sailor, to be paid provided he served on board the ship as second mate during the voyage, and he died before the completion of the voyage, the Court, deciding upon the terms of the contract, held that his administrator was not entitled to recover *pro ratâ* for the time during which he served; but it appears from the language of the Court in that case, that if a custom could have been established that such notes were in general use, and that the commercial world would have acted upon them in a different sense, they would have decided differently (*n*).

It is to be observed, that it has been questioned by the highest authorities, whether the practice of construing mercantile documents by usage has not been carried too far.

In the case of *Anderson* v. *Pitcher* (*o*), Ld. Eldon observed, "It is now *too late to say that this warranty (in a policy of insurance) is not to be *780
expounded with due regard to the usage of trade; perhaps it is to be lamented that in policies of insurance parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge Lord Holt (*p*). It is true, indeed, that Lord Mansfield, who may be considered the establisher, if not the author, of great part of this law, expressed himself thus, 'whenever you render additional words necessary, and multiply them (*q*), you also multiply doubts and criticisms.' Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned."

The legitimate object of extrinsic evidence in such cases, as consistent with general principles, seems to be to explain terms, (in order to their due application,) which are not intelligible to all who may understand the language; but which nevertheless have acquired by virtue of habit, custom and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the extrinsic testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose may be considered to be the sworn interpre-

(*m*) *Birch* v. *Depeyster*,[1] 1 Starkie's C. 210. [4 Camp. 385, S. C.] And note, that in that case the same learned Judge admitted evidence of a conversation between the parties, to show in what sense they used the term. He said, he thought such evidence fell within the general current of mercantile understanding; since, if the term had been used in different trades in different ways, the conversation was evidence to show in what sense it was used on that occasion. So evidence has been admitted for the purpose of showing the understanding of mariners, in geographical matters; as to show that the Mauritius is considered to be an East India island. *Robertson* v. *Money*,[2] R. & M. 75. See *Uhde* v. *Walters*, 3 Camp. 16.

(*n*) *Cutter* v. *Powell*, 6 T. R. 320.

(*o*) 2 B. & P. 164. The question in that case was as to the meaning of a warranty (contained in a policy) to depart with convoy; and it was held that it is not complied with unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence they can be obtained. So in the case of a bill of lading, &c. evidence was admitted to show what was meant by "days." *Cochrane* v. *Retberg*, 3 Esp. C. 121.

(*p*) *Lethullier's Case*, Salk. 443. (*q*) *Lilly* v. *Ewer*, Dougl. 74.

(1) [See *Astor* v. *The Union Ins. Company*, 7 Cow. Rep. 203, where parol evidence was received to show what was included under the term *fur*, in a policy of insurance.]

[1]Eng. Com. Law Reps. ii. 359. [2]*Id.* xxi. 383.

ters of the mercantile language in which the contract is written (*r*). Beyond this, however, the *principle* does not extend; merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they use plain and ordinary terms and expressions, to which a natural unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principles so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary. It is clear, indeed, that if a contrary practice were to prevail, and be carried to its full extent, the effect would nearly be to annihilate special contracts in mercantile affairs, and to compel all persons, under all circumstances, to conform with the usages of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what is the usage; and the very same terms would denote different contracts as often as mercantile
*781 fashions varied. In short, the *jus et norma *loquendi*, in a legal sense, would become wholly dependent on the usages of trade (*s*).

Where a policy of insurance (in the common form) expressed "that the insurance on the said ship shall continue until she is moored twenty-four hours, and on the goods till safely landed," the Court of King's Bench held that evidence of an usage, that the risk on the goods as well as the ship expired in twenty-four hours (*t*), was inadmissible.

Where the vendor of a quantity of bacon warranted it to be of a particular quality, it was held that the vendee could not give evidence of a custom in the trade, that the buyer was bound to reject the contract if he was dissatisfied with it at the time of examining the commodity (*u*), and Heath, J. who tried the cause, said that it would breed endless confusion in the contracts of mankind if custom could avail in such a case.

So where words have a *known legal meaning* which belongs to them,

(*r*) Within this principle numerous cases have occurred, of which the following may be cited in addition to those already referred to. Parol evidence is admissible to show the meaning of the word *level* in a lease of coal mines (*Clayton* v. *Gregson*,[1] 5 Ad. & Ell. 302; 4 N. & M. 602); of "mess pork of *S.* & Co.;" *Powell* v. *Horton*,[2] 2 Bing. N. C. 668. To reconcile apparent variances in bought and sold notes by the testimony of brokers; *Bold* v. *Rayner*, 1 M. & W. 343. Where the captain of a ship had agreed to convey a boat for the plaintiff of stated dimensions, evidence was admitted of the practice to remove the decks of such boats when put on board. *Haynes* v. *Halliday*,[3] 7 Bing. 587. And see *Hood* v. *Reeves*,[4] 3 C. & P. 532. In *Chaurand* v. *Angerstein*, Peake's C. 43, where it had been represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence, that this was understood among merchants to mean between the 25th and the end of October. The admission of such evidence seems, however, to have been carried further than either principle or convenience warrants. See below.

(*s*) See *Anderson* v. *Pitcher*, 2 B. & P. 168. *Parkinson* v. *Collier*, Parke on Ins. 314, *infra*. Parol evidence is inadmissible to explain the meaning of the words "more or less" in a mercantile contract. *Cross* v. *Eglin*,[5] 2 B. & Ad. 106.

(*t*) *Parkinson* v. *Collier*, Parke on Ins. 314. *Yeates* v. *Pym*,[6] 2 Marsh. Rep. 141. 1 Holt's C. 95. The practice of construing mercantile instruments according to the custom of trade, was carried to a great length in the case of *Donaldson* v. *Foster* (Sittings after Mich. Term, 29 Geo. 3, Abbott's Law of Shipp. 213). There, by the terms of the charter-party, it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers. The defendants insisted, that under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for a private trade. Lord Kenyon admitted evidence to be given to prove this usage, observing, that although *prima facie* the deed excluded this privilege, yet he thought the deed might be explained by uniform and constant usage, the usage being a tacit exception out of the deed. Notwithstanding this high authority, sanctioned as it has, in a measure, been by its adoption and insertion in the very learned work from which it is cited, some doubt may perhaps still be entertained whether the receiving such evidence be strictly warranted in principle. See Sir D. Evans's remarks in his edition of Pothier, vol. 2, p. 215.

(*u*) *Yeates* v. *Pim*,[6] Holt's C. 95.

[1]Eng. Com. Law Reps. xxxi. 342. [2]*Id.* xxix. 452. [3]*Id.* xx. 248. [4]*Id.* xiv. 432. [5]*Id.* xxii. 36. [6]*Id.* iii. 39.

evidence is not admissible to show that the parties intended to use them in a different sense according to the custom of the country (*x*) (1).

In many instances extrinsic evidence of custom and usage is admissible for the purpose of annexing incidents to the terms of a written instrument, concerning which the instrument is silent (*y*). The principle upon which such evidence is admissible, seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom and usage to similar dealings. It is evident that in commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known ordinary practice *and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage to be derived from the known course of dealing, or be placed under the necessity of laboriously specifying in their contracts by what particular usages they meant to be bound. To annex customary incidents. *782

It is unnecessary to allude to the numerous instances in which, upon the same principle, the law itself annexes its own terms to a contract. If a contract for the sale of goods be silent as to the time of delivery, the law annexes the term that they shall be delivered within a reasonable time. A bill of exchange is payable at a certain day; but the law allows three additional days of grace, concerning which the instrument is silent. The instance of a bill of exchange is also a strong one to show how far custom operates to annex terms not expressed in the instrument (2).

It would be superfluous to specify how many terms and conditions, which are not expressed on the face of a bill of exchange, are annexed to it by the custom of merchants, as necessary and inseparable instruments. The operation of this presumption is not confined to mercantile instruments.

It has been held that a tenant might avail himself of a local custom to take a way-going crop after the expiration of his term under a lease; for the custom did not alter or contradict the terms of the lease, but merely superadded a right consequential to the taking (*z*).

(*x*) *Supra*, 301: and see *Doe* v. *Benson*,[1] 4 B. & A. 586.

(*y*) To what extent the silence of a mercantile contract on a particular point may be supplied by evidence of the general course and usage of trade, is a question which it would be difficult to answer with exactness and precision. Per Tindal, C. J. in *Whittaker* v. *Mason*,[2] 2 Bing. N. C. 369. Where the stipulations in a lease as to the mode of cultivation applied only to the holding during the tenancy, but were wholly silent as to the terms of quitting; held that an affirmative covenant, that the wheat lands should be summer fallowed, and an affirmative custom for the off-going tenant to have one proportion of the wheat for a way-going crop, if sown after a summer fallow, and another proportion if sown after turnips, were not so inconsistent as that the tenant might not be entitled to his share of wheat growing at the determination of the tenancy after a crop of turnips, the landlord having a right of action if the covenant had not been observed. *Holding* v. *Piggot*,[3] 7 Bing. 465. If any condition in the lease is necessarily repugnant to or inconsistent with a custom, the latter is excluded.

(*z*) *Wigglesworth* v. *Dallison*, Dougl. 201. [*Stultz* v. *Dickey*, 5 Binn. 285.]

(1) [See *Frith* v. *Barker*, 2 Johns. 327. *Sleight* v. *Rhinelander*, 1 Johns. 192. *Thompson* v. *Ashton*, 14 Johns. 316. *Stoever* v. *Whitman*, 6 Binney, 417. *Henry* v. *Risk & al.* 1 Dallas, 265. *Homer* v. *Dorr*, 10 Mass. Rep. 26; and tit. *Custom*, Vol. II.]

(2) [In Massachusetts, the usage of banks, at which the parties to a note have been accustomed to transact business, are recognized by the courts, not as rules of decision, but as evidence of the assent of the parties to such usages, which may vary the terms annexed to their contracts by general mercantile custom. *Blanchard* v. *Hilliard*, 11 Mass. Rep. 85. *Jones* v. *Fales*, 4 ib. 245. *Lincoln and Kennebeck Bank* v. *Page*, 9 ib. 155. *Pierce* v. *Butler*, 14 ib. 303. *Whitwell & al.* v. *Johnson*, 17 ib. 499.] {*City Bank* v. *Cutter*, 3 Pick. Rep. 414. *Bank of Washington* v. *Triplett*, 1 Peters's Sup. Ct. Rep. 25. *Renner* v. *The Bank of Columbia*, 9 Wheat. 581}.]

[1]Eng. Com. Law Reps. vi. 527. [2]*Id.* xxix. 357. [3]*Id.* xx. 301.

Upon the same principle, evidence was admitted to show that a heriot was due on the death of the tenant for life, although that duty was not expressed in the lease (*a*).

So it has been held that a custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same, in his away-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom (*b*).

The presumption necessarily ceases where it can be collected, from the terms of the instrument, that it was contrary to the intention of the contracting parties, in the particular instance, to be guided by the custom: as where the parties have actually expressed an intention different from the custom, for then, according to the general rule of law, *expressum facit cessare tacitum;* or even where a contrary intention may be inferred from the terms of the contract. Thus, where the lease specified certain payments to be made by the in-coming to the out-going tenant at the time of quitting, but specified no payment for foldage, it was held that this agreement excluded the operation of a custom for the in-coming tenant to pay to the out-going tenant an allowance for foldage (*c*). But a stipulation as to quitting does not exclude so much of a custom as is not inconsistent with such stipulation (*d*). Parol evidence was admittted to show, that by the
*783 custom *of the county the word "thousand," applied in a lease to rabbits, meant 1,200 (*e*).

To rebut a presumption.

It is a general rule, that oral and extrinsic evidence is admissible to rebut a presumption of law or equity. Here, the evidence is not offered as a substitute for written evidence, but to remove an impediment which would otherwise have obstructed or altered its operation (*f*) (1). Thus, it has been held that parol evidence is admissible to show that a legacy was not intended in satisfaction of a debt (*g*), or that the testator, although he gave the executor a legacy, intended that he should have the surplus (*h*), or to

(*a*) Per cur. *White* v. *Sayer*, 211.

(*b*) *Senior* v. *Armitage*,[1] Holt's C. 197. See *Dalby* v. *Hirst*,[2] 1 B. & B. 224. An usage for a landlord to compensate the off-going tenant for tilling, fallowing and manuring arable and meadow land, according to good husbandry, and often from which the tenant can receive no benefit, is reasonable, and is to be considered not as a custom but an usage, and need not be from time immemorial. See *Roxburg, Duke of*, v. *Robertson*, 2 Bligh. 156.

(*c*) *Webb* v. *Plummer*, 2 B. & A. 746. *Roberts* v. *Barker*, 1 C. & M. 808. So evidence of an usage at the Navy-office to pay bills indorsed by an attorney in his own name, and negotiated by him under a power, cannot be received for the purpose of enlarging the terms of the power. *Hogg* v. *Snaith*, 1 Taunt. 347.

(*d*) Where a lease provided for the tenant's spreading more manure on the premises than the custom required, leaving the rest to be paid for by the landlord at the end of the term, and the custom was for the tenant to be paid last year's ploughing and sowing, and to leave the manure if the landlord would buy it, it was held that the tenant was still entitled to be paid for the last year's sowing and ploughing, according to the custom. *Hutton* v. *Warren*, 1 M. & W. 486. *Holding* v. *Pigott*,[3] 7 Bing. 475.

(*e*) *Smith* v. *Wilson*,[4] 3 B. & Ad. 728. (*f*) 2 Atk. 69, 99; Amb. 126; 2 Vern. 252.

(*g*) *Cuthbert* v. *Peacock*, 2 Vern. 593. But see *Fowler* v. *Fowler*, 3 P. Wms. 353; where an allowance of pin-money, being in arrear to the wife for two years, Talbot, C. would not admit evidence to show the intention of the testator that she should have a legacy of 500*l.* in addition to the arrears.

(*h*) 2 Vern. 252, 618, 673. *Wingfield* v. *Atkinson*, 2 Ves. 673; 2 P. W. 158; 9 Mod. 9; 1 Str. 568. So where the wife was executrix, and real and personal property were left to her by her husband. *Lake* v. *Lake*, 1 Wils. 313; Amb. 126, per Buller, J.; Dougl. 40; 2 Atk. 69. Evidence is admissible to show that one *prima facie* a trustee takes for his own benefit. *Langfield* d. *Banton* v. *Hodges*, Lofft, 230. *Doe* v. *Langton*,[5] 2 B. & Ad. 680. The gift of a legacy in reversion to an executor, does not necessarily exclude, but only raises a presumption against his taking the residue beneficially, and if there is no express declaration that

(1) [S. P. *Mann* v. *Mann*, 14 Johns. 1; 1 Johns. Ch. R. 333. *Steere* v. *Steere*, 5 Johns. Ch. R. 1. *Davenport* v. *Mason*, 15 Mass. R. 85. *Eustace* v. *Gaskins*, 1 Wash. 190. *Payne's Ex'r* v. *Dudley*, ibid. 198. *Bigger's Adm'r* v. *Alderson*, 1 Hen. & Mun. 54. *Nelson* v. *Carrington*, 4 Munf. 332.]

[1]Eng. Com. Law Reps. iii. 71. [2]*Id.* v. 66. [3]*Id.* xx. 201. [4]*Id.* xxiii. 169. [5]*Id.* xxii. 166.

rebut the equity of an heir at law (*i*). So where the conusor of a fine dies before the uses are declared, the presumption that the fine was levied to the use of the conusor may be rebutted by evidence (*k*).

If a tenant for life pays off a charge on the estate *primâ facie*, he is entitled to that charge for his own benefit, with the qualification of having no interest during his life. If a tenant in tail or in fee-simple pays off a charge, that payment is *primâ facie* presumed to be made in favour of the estate; but the presumption may be rebutted by evidence, as by calling for an assignment, or by a declaration (*l*).

So oral evidence has been admitted by courts of equity to show that a portion advanced to a child subsequent to the making of a will, and of the same amount with the legacy, was not intended as an ademption of a legacy (*m*); *and for this purpose, and to show the real intention, even oral declarations are admissible (*n*). *784

In the case even of a devise of lands, it has been held that the legal implication, as to the revocation of the will, founded upon the subsequent marriage of the testator, and birth of a child, may be rebutted by parol evidence (*o*). Lord Mansfield observed, "I am clear that this presumption, like all others, may be rebutted by every sort of evidence. There is a technical phrase for it in the case of executors (*p*); it is called rebutting an

he is to be a trustee, but only circumstances raising a presumption, parol evidence is sufficient to rebut it. *Oldman* v. *Slater*, 3 Sim. 84. Where a specific bequest was given in the will to the executor for his care and trouble, held that it excluded him from taking the residue beneficially, and that parol evidence of the testator's declarations after the making of the will were inadmissible. *Whitaker* v. *Tatham*,[1] 7 Bing. 628. And see *Foster* v. *Munt*, 1 Vern. 473; and *Gibbs* v. *Romney*, 2 V. & B. 294.

(*i*) *Mallabar* v. *Mallabar*, Cas. Tem. Talb. 79; 1 Powell, L. D. c. xii.; 2 Powell, L. D. 40.

(*k*) *Roe* v. *Popham*, Dougl. 24. *Lord Altham* v. *Lord Anglesea*, Gilb. Eq. R. 16.

(*l*) Per Lord Eldon, in *The Earl of Buckinghamshire* v. *Hobart*, 3 Swanst. 186. Where a tenant for life of a settled estate purchased incumbrances and had them assigned to a trustee, and purchased the remainder and had it conveyed subject to existing charges, and devised the estate subject to the charges so purchased, it was held that parol evidence was admissible to show that the charges were merged. *Astley* v. *Mills*, 1 Sim. 298.

(*m*) *Debeze* v. *Man*, 2 Bro. C. C. 165. *Coote* v. *Boyd*, 2 Bro. C. C. 521. Or, as it seems, to show that such advancement was intended as an ademption (*Rosewell* v. *Bennett*, 3 Atk. 77). But note, that the intention of the legacy was specified in the will; and the case was not decided on that ground. See also *Hooley* v. *Hatton*. 1 Ves. jun. 390. Where portions are provided by any means whatever, and the parent gives a provision by will for a portion, it is a satisfaction *prima facie*, and unless there be circumstances to show that it was not so intended. Per Lord Alvanley, *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. jun. 516. Per Lord Eldon, in *Pole* v. *Lord Somers*, 6 Ves. 325. The question there was as to *satisfaction*.

(*n*) *Ellison* v. *Cookson*, 1 Ves. jun. 100. *Clinton* v. *Hooper*, 1 Ves. jun. 173. But those made at the time of the will are the most important. *Trimmer* v. *Bayne*, 7 Ves. 508.

(*o*) *Brady* v. *Cubitt*, Dougl. 30. See the observations on this case in *Goodtitle* v. *Otway*, 2 H. B. 516. For the cases in which an alteration in circumstances amounts to an implied revocation of a will, see Bac. Ab. tit. *Wills and Testaments*, 363, 6th edit. *Brown* v. *Thomson*, 1 P. Wms. 304. *Lugg* v. *Lugg*, 1 Ld. Raym. 441. *Shepherd* v. *Shepherd*, Dougl. 38, n.—Sir D. Evans observes that "the allowing a written instrument to derive a construction different from that which it would naturally import, in consequence, not of any relative character of the subject-matter, but of verbal declarations, cannot, on principle, be reconciled with the general tenor of our jurisprudence." It is impossible not to regret, in common with that learned writer, that in any branch of cases, particularly one so important as the present, the uncertainty and vagueness of oral testimony of the very weakest and loosest description should be in effect substituted for the certainty of a written document. The practice involves an inconsistency. If the extrinsic circumstances be so powerful as to create a stronger presumption as to the intention of the party, than that which arises from his own written exposition of that intention (which still remains uncancelled), how can that presumption be considered to be so weak as to be met and defeated by mere oral declarations? It seems to be inconsistent to consider such evidence to be more forcible than the written instrument, and yet weaker than oral evidence; and it is in effect to give to oral evidence a greater authority than the written evidence, to subject solemn and authentic written instruments to all the laxity and uncertainty of parol evidence, and to render titles to property contrary to the policy of the law, hazardous and precarious. And now see the st. 7 W. 4, & 1 Vic. c. 26, and tit. WILLS.

(*p*) An executor is not excluded from proof of the testator's intention that he should take the surplus, by the circumstance of his taking a reversionary contingent interest. *Lynn* v. *Beaver*, 1 Turn. 63. Such evidence, however, is admissible only for the purpose of supporting the apparent effect of an instrument; it is

[1] Eng. Com. Law Reps. xx. 266.

equity." And Mr. J. Buller said, that implied revocations must depend on the circumstances at the time of the testator's death.

But although such evidence be admissible to rebut a presumption arising from the operation of matter in *pais* as to the *intention* of the party to revoke, it is otherwise where the revocation is by act of law, where the law pronounces upon a presumption *juris et de jure* (*q*), that is, where the presumption of law is so violent, that it does not admit circumstances to be set up to repel it (*r*). Thus, where a testator devised his lands to *B.*, and afterwards, upon his marriage, conveyed them by lease and re-lease to trustees, to other uses, with the usual limitations in marriage settlements, the Court, on a trial at bar, refused to hear parol evidence to show that the devisor meant that his will should remain in force (*s*) (1).

Again, parol evidence as to the state and circumstances of a testator are deemed to be admissible in order to give effect to a will, by explaining that which otherwise would have no operation. The legitimate limit to evidence of this description seems to be, that it is admissible to show *what the words*
*785 **themselves*, as applied to their subject-matter, express; but not to show independently of the expressions themselves, *what the testator intended to express.*

For the purpose of determining the meaning of a testator's words, extrinsic evidence seems to be generally admissible (*t*). And it seems to be immaterial whether the necessity for resorting to extrinsic evidence be apparent on the face of the will, or is first raised by extrinsic circumstances (*u*).

It is, however, to be carefully remarked, that if, from evidence of the testator's circumstances, it appear that his words, strictly interpreted, are sensible and applicable, and there be nothing on the face of the will from which an intention to use the words in a different sense is apparent, the strict interpretation of the words must be adhered to, although they be capable of some secondary construction, and though the most conclusive evidence could be given to show that the testator used them in such secondary sense (*x*).

Independent force and effect of parol evidence.

III. Having thus seen how far parol evidence is admissible to *contradict*, *vary*, or *wholly subvert*, a written instrument, as also, on the other hand, to *establish*, *explain*, and *support* written evidence, it remains, in the *third*

inadmissible to show that a legacy in a second will was intended as an ademption of a legacy given by the former will. *Hurst* v. *Beach*, 5 Madd. 360.

(*q*) See tit. PRESUMPTION; and Heinecc. El. J. C., part 4, s. 124.

(*r*) See 2 H. B. 522. (*s*) *Goodtitle* v. *Otway*, 2 H. B. 516.

(*t*) Per Ld. Hardwicke, in *Goodinge* v. *Goodinge*, 1 Ves. 231. Per Ld. Thurlow, in *Jeacock* v. *Falkner*, 1 Bro. C. C. 295; and *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471. Per Ld. Loughborough, in *Gaskell* v. *Winter*, 3 Ves. 540. Ld. Manners, in *Crane* v. *Odell*, 1 Ball. & B. 480. Sir T. Plumer, in *Beachcroft* v. *Beachcroft*, 1 Madd. 430; and *Colpoys* v. *Colpoys*, 1 Jac. 451. Per Ld. Eldon, in *Oakden* v. *Clifden*, Lin. Inn Hall, 1806. See also *Lane* v. *Lord Stanhope*, 6 T. R. 345. *Doe* d. *Le Chevalier* v. *Huthwaite*,[1] 3 B. & A. 632. *Gibson* v. *Gell*,[2] 2 B. & C. 680. *Pocock* v. *Bishop of Lincoln*,[3] 3 B. & B. 27. *Alford* v. *Green*, 5 Madd. 95. *Goodright* v. *Downshire*, 2 B. & P. 608; 1 N. R. 344. *Wilder's Case*, 6 Rep. 16. See Powell on Dev. by Jarman, vol. i. p. 488.

(*u*) See the judgment given by Bayley, J. in *Smith* v. *Doe* d. *Jersey*,[4] 2 B. & B. 553. *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471. *Abbott* v. *Massie*, 3 Ves. 148. *Price* v. *Page*, 4 Ves. 680. *Colpoys* v. *Colpoys*, 1 Jac. 451.

(*x*) *Doe* d. *Oxenden* v. *Chichester*, 3 Taunt. 147; 4 Dow. P. C. 65; *supra*, 771.

(1) [It has been decided in Massachusetts, that where a husband conveyed his life estate in his wife's land to her father, who afterwards, being insolvent, reconveyed it to the wife, to prevent its being taken by his creditors, one of whom, nevertheless, extended an execution on the land, parol evidence was inadmissible to prove that the conveyance to the wife's father was in trust to her use; so that the reconveyance was to be taken to be fraudulent against creditors. *Smith* v. *Lane*, 3 Pick. 205.]

[1]Eng. Com. Law Reps. v. 406. [2]*Id.* ix. 218. [3]*Id.* vii. 335. [4]*Id.* vi. 207.

place, to consider in what cases parol extrinsic evidence is admissible to prove a fact by virtue of its own weight and authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact. What has been already said supplies, indeed, a sufficient test; for it seems that, in general, the mere circumstance that a written instrument exists which *may* be made evidence of a particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law constituted the *authentic* and *sole* medium of proving that fact (*y*). The importance of the subject, however, renders it desirable further to consider, 1st, In what instances written instruments are of an *exclusive* nature; 2dly, With respect to what *parties* and to what *facts*.

Written instrument, when conclusive in its nature.

In the first place, written evidence has an exclusive operation in many instances, by virtue of peremptory legislative enactments (*z*). So it has in all cases of written contracts (*a*).

*So also, in all cases where the acts of a court of justice are the subject of evidence. Courts of record speak by means of their records only; and even *786 where the transactions of courts, which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes (*b*). And it seems that, in general, where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument (*c*) so constructed is the only legitimate medium to prove the result (1).

Thus, as has been seen, parol evidence cannot be received of the declaration of a prisoner taken before a magistrate under the statutes of Philip & Mary, where the examination has, as required by those statutes, been taken in writing (*d*).

So the official return of the sheriff to a writ of execution is usually conclusive as between the litigating parties, although not as between them and himself (*e*) (A).

But in general, public and authorized documents, whether appointed by express authority of law, or recognized by the law as instruments of autho-

(*y*) See *Grey* v. *Smithies*, Burr. 2273, and *infra*. [*Commissioners* v. *Allen*, 2 Rep. Con. Ct. 88.] Still less does the existence of a deed or other written instrument exclude parol evidence as to a collateral transaction. *Fletcher* v. *Gillespie*, 3 Bing. 635. So in the case of a parol agreement to do repairs, in consideration that the plaintiff would become the tenant to the defendant. *Seago* v. *Deane*, 4 Bing. 459. So where the parties to an indenture of charter-party afterwards agreed by parol for the use of the ship, *ad interim*. *White* v. *Parkins*, 12 East, 578. An *admission* of a fact is evidence of the fact against the party who makes it, although a written instrument be essential to the fact. *Slattery* v. *Pooley*, 6 M. & W. 664. *Doe* v. *Ross*, 6 M. & W. 102.

(*z*) *Supra*, tit. Frauds, Statute of.

(*a*) *Supra*, tit. Assumpsit.

(*b*) Vide Vol. I. tit. Judgment. *Supra*, Insolvent, 562. [*Thompson* v. *Bullock*, 1 Bay, 364.] In *Bledstyn* v. *Sedgwick*, Anst. 304, the Court refused to hear parol evidence of the condemnation of a ship in Carolina, a copy of the condemnation which had been given to the captain having been lost at sea. [See *Arnold* v. *Smith*, 5 Day, 150.]

(*c*) Or, in some instances, an examined copy of it. *Supra*, vol. I. tit. Judgment.

(*d*) *Supra*, 38. [*The State* v. *Grove*, Martin's R. 43.] But parol evidence may be given of the same declarations made by the prisoner at other times; *supra*, 38; *infra*, 787. [See *Lewis* v. *Blair*, 1 N. Hamp. Rep. 68.]

(*e*) *Gufford* v. *Woodgate*, 16 East, 296, vol. i. [*State* v. *Wells*, 1 Coxe's R. 424.]

(1) {Therefore on trying the issue of *nul tiel* record, the defendant is not at liberty to give parol evidence to show, that a recognizance purporting to be taken before the Prothonotary, was in fact taken before another person. *Patton* v. *Miller*, 13 Serg. & Rawle, 254.}

(A) (Where a *fieri facias* had lain in the sheriff's hands six years, and was then returned by him *nulla bona*, it was held that evidence was admissible to contradict the return, and show that the sheriff had sold property under it, and paid the proceeds to the plaintiff. *Williams* v. *Carr*, 1 Rawle, 420.)

rity, if they be but collateral memorials of the fact, possess no exclusive authority as instruments of evidence. Thus, although the entry of a marriage in the parish register, made according to the Marriage Act, be evidence of the marriage, it does not exclude the parol evidence of any witness who can prove the fact of marriage. So, although public printed proclamations of government gazettes, public books, official returns, and other (*f*) documents of authority, are admissible in evidence to prove particular facts, they do not exclude parol evidence. The principle applies in general, as it seems, where the document contains a mere subsequent memorial and recognition of the fact (1).

Receipt. A receipt for money, it has been held, is not conclusive evidence against the person who gives it, that he has actually received the money (A).

Thus, upon the failure of an annuity deed for want of a memorial, upon an action brought by the plaintiff against the two grantors, to recover the consideration paid, one of the defendants, who was a surety only, was permitted to show, notwithstanding his having signed a receipt for the money, jointly with the other defendant, the principal, that he had never in fact received the money (*g*).

Confession. In the case of *Wilson* v. *Poulter*, which is very briefly reported (*h*), it is *787 stated *merely that a defendant in trover was charged with his *confession* taken before commissioners of bankrupt, and that the Chief Justice refused to let the defendant explain it by parol evidence. It is not stated in what

(*f*) Vol. I. tit. Written Evidence.

(*g*) *Stratton* v. *Restall & another*, 3 T. R. 366. And see *The Attorney-general* v. *Randall & others*, 2 Eq. C. Abr. 742, and cited 5 T. R. 369, and approved of by Buller, J.; where, although a receipt had been signed by three trustees, the Lord Chancellor decreed that the one only who had received the money should be answerable for it. And see *Rowntree* v. *Jacob*, 2 Taunt. 141; also, 1 Sid. 44; 1 Lev. 43; 1 Saund. 285; Lutw. 1173; Co. Litt. by Harg. and Butler, 373. *Latour* v. *Bland*,[1] 2 Starkie's C. 382.

(*h*) Str. 794. In *Rowland* v. *Ashby*,[2] 1 Ry. & M. 231, it was held that admissions made by a party on his examination before commissioners of bankrupts, and which were material though not contained in the written examination, might be proved. So additional statements made by a prisoner before a magistrate, and not contained in the written examination, may be proved by parol. *Venafra* v. *Johnson*, 1 Mo. & R. 310. *Supra*, tit. Admissions. What a prisoner says before he may know the charge against him is admissible; interlineations and erasures in a confession are cured by the attestation; and it is no objection that it is said to be *signed*, where the party was a marksman; and a voluntary confession, taken before the conclusion of the evidence against the prisoner, may be given in evidence on the parol statement of the clerk, refreshing his memory by the paper. *R.* v. *Bell*,[3] 5 C. & P. 162; questioning *R.* v. *Fagg*,[4] 4 C. & P. 566.

(1) [Parol evidence is admissible to prove the defendant to be an innkeeper, in an action against him as such, although his license as such is on record. *Owings* v. *Wyant*, 1 Har. & M'Hen. 393. Or to prove the existence of a partnership, although there are written articles of partnership. *Widdifield* v. *Widdifield*, 2 Binney, 245. See also 1 Serg. & Rawle, 464. On an issue of infancy, parol evidence is admissible to prove the age of the party, though there be an entry in the family bible. *Buler* v. *Young*, 3 Bibb. 520.

In Massachusetts, parol evidence of marriages is received, although officiating clergymen and magistrates are by statute required to keep a record of all marriages solemnized before them, and to return annually, to the clerk of the town where they reside, a certificate of the names of all persons by them joined in marriage. So parol proof of the age of persons, and the time of their death, is constantly admitted, although a statute requires that births and deaths shall be recorded by town clerks; and parents, householders, &c., are liable to a penalty for neglecting to give notice of births in their families.

Where the magistrate, before whom a clerk of a militia company was alleged to have taken the oath of office, made no record of administering such oath, testimony of witnesses present when the oath was administered was admitted to prove the fact. *Bassett* v. *Marshall*, 9 Mass. Rep. 312. See *Colburn* v. *Ellis & al.*, 5 ib. 427. *Welles & al.* v. *Battelle & al.* 11 ib. 477.

On an indictment for uttering, &c. a counterfeit bank-note, parol evidence is admissible to prove that the person whose name appears on a note as president, actually was president of the bank. *Smith* v. *Smith*, 5 Day, 175. So parol evidence is admissible to prove that the defendant is a judge, on the question of discharging him on common bail. *Gratz* v. *Wilson*, 1 Halsted, 419. Documents, certified by a foreign notary, tending to prove a transfer of an American vessel to a foreigner, may be contradicted by parol evidence. *U. States* v. *The Jason*, 1 Peters, 450.]

(A) (See post tit. *Receipt.*)

[1] Eng. Com. Law Reps. iii. 392. [2] *Id.* xxi. 425. [3] *Id.* xxiv. 256. [4] *Id.* xix. 530.

way the defendant proposed to explain the document; and it would not be safe to rely much on so very loose a report.

In the common case of a confession taken before a magistrate, on a charge of felony, the practice is for the prosecutor to prove by evidence that the written document produced is a faithful account of the prisoner's statement; upon principle, therefore, it scarcely admits of doubt that the prisoner is at liberty to meet such evidence by contrary testimony, and to show that the written instrument is inaccurate. The statutes which authorize the magistrate to take the examination of prisoners do not give them an exclusive force, and their admissibility and operation as evidence seem to stand upon the same footing with any other admissions at common law (*i*), which, in such instances, are usually inconclusive (*k*). And it seems that in general, where a document, such as a letter, not being matter of compact and agreement, is given in evidence as an admission by the adversary, the latter may adduce evidence to show that it originated in mistake, or to explain it by circumstances (*l*).

In an action brought by bankers to recover back money paid on a cheque purporting to be drawn by the defendant, but alleged to be a forgery, and which was the fact in issue, held, that minutes of the defendant's examination on a charge made against a party as having forged the cheque, were receivable, although he afterwards signed a regular deposition (*m*).

2dly. Next, with respect to the *parties*, and the particular *facts* which it recites.—The instrument offered in evidence, whether record, deed, or simple contract, is offered either as between the *same* parties, or where either one or both are *different*. Even where both parties are the same, it frequently happens that the instrument will not operate as an *estoppel* unless it be specially *pleaded* (*n*); and if it has not been pleaded, parol evidence of the fact is usually admissible in contradiction of the written instrument. As to what facts inconclusive inter parties.

In the next place, even where a record or deed exists, which is *conclusive* upon the *parties*, it is not always conclusive upon *all points*.

Thus, evidence is admissible to prove that a deed was executed, or a bill of exchange made, at a time different from that of the date (*o*), or that the party in whose name a contract for the sale of goods was made, was but the *agent of another (*p*) (1). And even in the case of records, which are *788

(*i*) *Supra*, tit. Admissions. (*k*) *Supra*, tit. Admissions.

(*l*) *Supra*, tit. Admissions, and see *Holsten* v. *Jumpson*, 4 Esp. C. 189; 1 T. R. 182.

(*m*) *Williams* v. *Woodward*,[1] 4 C. & P. 346.

(*n*) *Supra*, Vol. I. tit. Estoppel.

(*o*) The plaintiff may declare on a bond bearing date on one day, and prove a delivery on another day (*Goddard's Case*, 2 Rep. 4, b), or allege a deed to have been delivered on a day different from that on which it bears date. *Hull* v. *Cazenove*, East, 477. *Stone* v. *Bale*, 3 Lev. 348. A latitat alleged to have been issued on a particular day after term, may be proved to have been so issued, though tested of the preceding term. 1 Vent. 362.

(*p*) *Wilson* v. *Hart*,[2] 7 Taunt. 295. So a purchaser of land, having made the purchase in the name of another, may show that he (the purchaser) paid for it, in order to raise a resulting trust. Vern. 366. Where parol evidence was offered (to raise an equity) that a pension granted by the Crown absolutely was in trust for the plaintiff, which the defendant, by his answer, denied, the evidence was rejected by Lord Thurlow. *Fordyce* v. *Willis*, 3 Bro. C. P. 577. Parol evidence is admissible to show that land described in a deed as meadow was not meadow, for it is not the essence of the deed, but merely matter of description. *Skipwith* v. *Green*, Str. 610. Or that land described as containing 500 acres, does not contain so many. S. C. Bac. Ab. Pleas, I. 11. Where a deed contains a generality to be done, as to perform all agreements set down by *A.*, 1 Rol. 872, l. 5; to carry away all the marl in close *B.*, Ib.; to release all his right in *C.*, Ib.; 2 Cowp. 600; he is not estopped from denying such agreements, &c. Com. Dig. *Estoppel*, A. 2.

(1) [The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency; but the liability of the principal depends on the facts, 1st. That the act was done in the exercise, and 2d. Within the limits of the power delegated; and on ascertaining these facts, as

[1]Eng. Com. Law Reps. xix. 412. [2]*Id.* ii. 112.

conclusive as far as regards substance, averments and proofs may be received to contradict them as to time and place and many other particulars (*q*).

The reason is, that in the case of the record, the points of variance would not have been considered to be material at the trial, and therefore the evidence does not in effect contradict the record; and that in the case of deeds or other agreements it was not the intention of the contracting parties to bind themselves precisely as to such particulars, such instruments being, for the sake of convenience, frequently executed on days different from those on which they bear date, and commercial agreements being as frequently made on behalf of a principal in the name of an agent (*r*).

The parties to a written agreement are not, in general, precluded from proving facts consistent with the agreement, although not expressed in the agreement. Where the written agreement was, that Maxwell should purchase of Sharp 2,000*l.* stock, it was held that the plaintiff Maxwell might give in evidence a parol agreement to buy 2,000*l.* stock (which belonged to Sharp and Abbott, but stood in the name of Sharp) of Sharp and Abbott, the parol being consistent with the written agreement (*s*) (1).

And as between the parties to a deed, or those who claim in privity, evidence is admissible to show the purpose and intention of executing the instrument, provided it be perfectly consistent with the legal operation of the instrument, and not inconsistent with its express terms.

Thus, in the case of *Milbourn* v. *Ewart & others* (*t*), where a man, in contemplation of marriage, executed a bond to his intended wife (the plaintiff), conditioned for the payment of money by the heirs or executors of the obligor to the plaintiff, at the expiration of twelve calendar months from and after the death of the obligor, and to an action on the bond against the heirs at law of the deceased husband, they pleaded the marriage, &c., and the plaintiff replied the fact that the bond was made in contemplation of a marriage between the defendant and the obligor, and with intent that, in case the marriage should take place, and the plaintiff should survive her husband, the plaintiff should have the benefit of the bond, it was held that those facts might well be averred, being perfectly consistent with the bond.

*789 *It has already been seen that, as between parties to a deed, evidence of a further consideration than that expressed in the deed is admissible where the evidence does not contradict the deed (*u*).

A party to support a deed may show a consideration by parol evidence,

(*q*) See Starkie's Crim. Pleadings, 2d edit. 325, and *supra*, Vol. I. tit. JUDICIAL INSTRUMENTS. [*Brier* v. *Woodbury*, 1 Pick. 362. *Binton* v. *Pond*, 5 Day, 160.]

(*r*) *Infra*, tit. PARTNERS; and tit. VENDOR and VENDEE.

(*s*) *Maxwell* v. *Sharp*, Say. 187. Where one partner deposited his own deeds under a written memorandum "as a security in the dealings which the party had with him," held that evidence to show that the dealings alluded to were partnership transactions, was admissible, and established the lien on payments made on behalf of the firm. *Chuck* v. *Green*,[1] 1 M. & M. 259; S. C. *contra*, 2 Glyn & J. 246.

(*t*) 5 T. R. 381.

(*u*) *Supra*, 758.

connected with the execution of any written instrument, parol testimony is admissible: Hence, where a check, drawn by a person who was the cashier of a bank, appeared doubtful on the face of it, whether it was an official or private act, parol evidence was admitted to show that it was an official act. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326.]

(1) [The shipping articles for a fishing voyage, which by the act of Congress (13 *Cong.* 1 *sess.* c. 2) are to be indorsed or countersigned by the owners, do not determine conclusively who are the owners, nor with whom the contract is made; but a seaman may have his remedy for his share of the fish taken, against all the owners, and he may show those whom he sues to be such, by other evidence than the papers of the vessel. *Wait* v. *Gibbs et al.* 4 Pick. 298.]

[1] Eng. Com. Law Reps. xxii. 302.

so as it be not inconsistent with the deed. A deed operating under the Statute of Uses, and not reciting any consideration, may be supported by evidence of a pecuniary consideration (*x*).

Except in cases where the Statute of Frauds requires a written agreement, parol evidence may be admissible, in conjunction with written, to prove the agreement. Thus, if an agreement be reduced in writing, parol evidence is admissible to show that the parties, without writing, afterwards varied the terms (*y*); for here the evidence is offered, not to vary the terms of an instrument which stands admitted as the real record of the intention of the parties, but is offered consistently with the existence of the instrument, and confessing that it does so exist, in order to avoid its effect by proof of a new agreement, adopting the old one, either wholly or in part, but annexing certain additional terms.

It has, indeed, already been seen, that previous or contemporary declarations are not admissible to vary the terms of a written agreement; where, however, the nature of the subject-matter does not require the agreement to be in writing, although a presumption arises, in the absence of proof to the contrary, that the parties expressed in writing the *whole* of their intention in respect of the subject-matter, and intended the written terms to operate as an agreement, yet that presumption may, it seems, be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more moral agreement, and was not intended to operate absolutely and unconditionally (*z*), or it may be shown that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. In such cases, the parol evidence is used not to *vary the terms* of the written instrument, but to show either that it is *inoperative* as an entire and independent agreement, or that it is collateral and irrelevant.

Where a statute requires the agreement to be in writing, the case admits of a very different consideration; there the oral and written terms could *not, it should seem, be incorporated; and it might be very questionable, *790
under the circumstances, whether the previously written agreement would be discharged and revoked by a subsequent oral agreement (*a*) (1). It has

(*x*) *Mildmay's Case*, 1 Co. 176. So a deed which recites a pecuniary consideration only, may be shown to have been founded on a consideration of marriage. *Villers* v. *Beaumont*, ib. Where premises were purchased at a sale in different lots by plaintiff and defendant, and in their deeds the premises were described only by reference to the then tenants; held, that a handbill exhibited at the sale was admissible, not as controlling, but explaining and applying the deed, and showing what was then in the tenants' occupation. *Murley* v. *M'Dermott*, 3 N. & P. 356.

(*y*) *Lord Milton* v. *Edworth*, 6 Bro. P. C. 587. *Cuff* v. *Penn*, 1 M. & S. 21. *Supra*, 761.

(*z*) See *Jeffery* v. *Walton*,[1] 1 Starkie's C. 267. The action was in *assumpsit* for not taking proper care of a horse. A written memorandum was made upon hiring a horse, "six weeks, at two guineas—*W. W.*" (the hirer); Lord Ellenborough held that evidence was admissible to show that at the time of the hiring it was expressly stipulated, that as the horse was used to *shy*, the hirer, if he took him, should be liable to all accidents. In many instances, the terms reduced to writing may constitute but a small part of the real contract. Suppose *A.* to let a house by parol to *B.* for two years, and that at the time of the parol agreement a stipulation as to the furniture is made, for convenience of calculation, in writing, and that at the foot of the account is written, "*B.* to take the furniture at the above valuation," it would be difficult to contend that *B.* would be bound to buy the furniture, although *A.* refused to let him occupy the house, and that *B.* would be concluded by the written part of the engagement from showing the real condition annexed to it.

(*a*) An agreement to waive a contract for the purcase of lands is as much an agreement concerning lands

(1) [Where land was sold and conveyed, and the parties afterwards agreeing to rescind the contract, the conveyances were given up, but, by accident, the notes for the purchase-money were not given up; it was held, that in an action on the notes, that parol evidence of the rescinding of the contract could not be given at law; the land, having been vested by deed, could not be devested otherwise than by deed. *Sally* v. *Sandifie*, 2 Rep. Con. Ct. 445. See *Barrett* v. *Thorndike*, 1 Greenleaf, 92. *Marshall* v. *Fisk*, 6 Mass. Rep. 24. *Eames* v. *Savage*, 14 ib. 425.]

[1] Eng. Com. Law Reps. ii. 385.

been held that in cases which are within the scope of the Statute of Frauds, parol evidence is admissible to show a dispensation with the performance of part of the original contract, such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold (*b*). But that it was otherwise where the terms of the written contract would be varied by the subsequent agreement (*c*). But it has since been held that where a written contract states a time and place for the delivery of goods, an alteration as to the time is not valid unless it be in writing (*d*).

It has already been seen that mere unsigned memorandums, made with a view to a subsequent agreement, need not be proved (*e*).

Operation of against strangers.

Next, where one of the contending parties was *not a party* to the record or other instrument.—It has been seen, that in some instances, where the proceeding is, as it is technically termed, *in rem*, the judgment or decree is final and conclusive upon all (*f*). Where, however, the record is admissible, but not conclusive evidence, even parol evidence seems to be admissible to prove the fact in contradiction of the record.

Thus, upon an indictment against an accessory to a felony; although the record of the conviction of the principal be admissible evidence to prove the fact, yet as it is not conclusive, the accessory is entitled to adduce any legal evidence in contradiction of the fact stated on the record (*g*).

Although there are many instances in which a deed or agreement between others is evidence for or against a stranger, or where such a deed or other agreement would be evidence in favour of a mere stranger, as to some extrinsic fact stated in the instrument *against a party*, yet it seems to be a
*791 *general rule, that in all these cases parol evidence of the fact would still be admissible; in other words, the instrument could never conclude the party by estoppel or otherwise.

Thus, in the case of *The King* v. *Scammonden* (*h*), already cited, the

as the original contract is, and must therefore, as it seems, be in writing. See Lord Hardwicke's observations in *Buckhouse* v. *Crosby*, Eq. C. Abr. 32, and in *Bell* v. *Howard*, 9 Mod. 332. In *Parteriche* v. *Powlet* (2 Atk. 384), Lord Hardwicke is reported to have said, that to add anything to an agreement in writing, by admitting parol evidence which would affect land, is not only contrary to the Statute of Frauds, but to the rule of common law before the statute was in being; yet, as mere parol agreements concerning land were operative before the statute, there seems to have been no reason why a written contract should not have been varied by a subsequent oral agreement when it related to lands, as well as in any other case. See *Clinun* v. *Cooke*, 1 Sch. & Lef. 35. Subsequently to the publication of the above remarks, it has been decided (*Marshall* v. *Lynn*, 6 M. & W. 109; *supra*, 491) that a contract required by the Statute of Frauds to be in writing, cannot be varied by oral assent.

(*b*) *Cuff* v. *Penn*, 1 M. & S. 21. See also the case of *Warren* v. *Stagg*, cited in *Littler* v. *Holland*, 3 T. R. 591; where Buller, J. held that an agreement to extend the time was not a waver but a continuance of the original agreement. See also *Thrush* v. *Rooke*, 1 Esp. C. 53, cor. Lord Kenyon; where, in a written agreement, an appraisement on a given day was specified as a condition precedent, oral evidence of an enlargement by consent was admitted. Cor. Lord Kenyon. But see *Snowball* v. *Verain*, Bunb. 175.

(*c*) See Lord Ellenborough's observations in *Cuff* v. *Penn*, 1 M. & S. 26; where he says, "If this agreement had been varied by parol, I should have thought, on the authority of *Meres* v. *Ansell*, (3 Wils. 275), that there had been strong ground for the objection." But note, that *Meres* v. *Ansell*, was decided wholly, as far as the report intimates, upon the general principle of the inadmissibility of a *cotemporary* parol agreement to vary the terms of a written one. In *Cuff* v. *Penn* (and the same observation is applicable to *Meres* v. *Ansell*), and all other cases within the Statute of Frauds, the statute itself precludes any alteration of a written contract by a subsequent parol agreement.

(*d*) *Marshall* v. *Lynn*, 6 M. & W. 109.

(*e*) *Supra*, 57; and see *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434; and *Same* v. *Mortley*, Ib. 445, and tit. Stamp.

(*f*) *Supra*, Vol. I. tit. Judicial Instruments; and vide *infra*, tit. Settlement.

(*g*) *Supra*, tit. Accessory.

(*h*) 3 T. R. 474. So in *R.* v. *Llangunner*,[1] 2 B. & Ad. 616, the deed of apprenticeship stating the money to have been paid by *J. M.*, evidence was admitted to show that it was in part parish money. And see *R.* v. *Wickham*,[2] 2 Ad. & Ell. 517, where it was held that a parish might show a settlement by renting a tenement in *A.*, although the lease stated it to be in *B.* Parish officers are not estopped from showing the true consideration for a conveyance, though the parties are. *R.* v. *Inhabitants of Cheadle*,[3] 3 B. & Ad. 833; and

[1]Eng. Com. Law Reps. xxii. 148. [2]*Id.* xxix. 160. [3]*Id.* xxiii. 192.

inhabitants of a parish were permitted to show that 30*l.* was in fact paid as the consideration upon the sale of an estate, although the deed of conveyance between the parties specified 28*l.* as the consideration. Here the question was as to the value actually given for the estate; and although the agreement was *primâ facie* evidence as to the fact, and although the parties themselves might have been bound by their own representations of the transaction, it was not binding upon strangers, to the exclusion of the real fact.

In the case of *The King* v. *Laindon* (*i*), the question as to a settlement was, whether the parties intended to contract as master and servant, or as master and apprentice; the written agreement was as follows: "I, *J. M.* do hereby agree with *J. C.* to serve me three years, to learn the business of a carpenter, the first year to have 1*s.* 2*d.* per day, the second year to have 1*s.* 6*d.* per day;" &c. In addition to this, *J. C.* was admitted to prove, at the trial, that at the time of signing the agreement he agreed to give *J. M.* the sum of three guineas, as a premium to teach him the trade, and that he was not to be employed in any other work. The Court of King's Bench held that the evidence was admissible, being offered not to contradict a written agreement, but to ascertain an independent fact (*k*). It is, however, to be observed upon this case, that the question might have been very different indeed had it arisen as between the contracting parties; as if, for instance, a dispute had arisen between them as to the nature of the service which the master had a right to exact by virtue of the agreement. If in that case the servant had insisted on the co-existing parol agreement, to limit his service to carpenter's work, the objection would have operated strongly that this would have been to superadd terms by parol to those contained in the written instrument, or to explain the intention of the parties by parol evidence (*l*). But the question was between strangers to the contract; the point in issue was, the real intention of the parties when they committed certain terms to writing; the terms so written were admissible evidence, as tending to prove the fact, on the natural presumption, in the absence of all suspicion of fraud, that the parties would disclose their real intention; but this was not the *only* medium of proof, neither was it an *exclusive* one, for the private statement of the parties could not, on any principle, bind and estop strangers.

Where the action was brought against the heir and devisee, on a bond, and issue was taken on the fact, whether the defendant had sold the estate *for more than 168*l.*, a lease and release were produced in evidence, from *792
which it appeared that the defendant had sold the estate for 210*l.*, but it was held that he was at liberty to prove that part of the estate so sold did not belong to the testator, but had been purchased by the defendant for the sum of 42*l.* in order to be sold to the vendee (*m*). Here the evidence was consistent with the terms of the deed; but even if it had not been so, it seems that it would still have been admissible as between those parties; for although, as between the defendant and the vendee, the defendant might have been estopped by his deed from making any averment against it, yet as between the plaintiff and defendant there was no mutuality, and consequently no estoppel, and therefore the defendant was not concluded, upon issue joined as to the amount for which the estate sold, from showing the

see *R.* v. *Olney*, 1 M. & S. 387. See other cases where evidence has been admitted of a consideration different from that expressed in the deed. *Filmer* v. *Gott*, 7 Bro. P. C. 70. *Clarkson* v. *Hanway*, 2 P. Wms. 203; 1 Ves. 128; and *supra*, 548, 555.

(*i*) 8 T. R. 179. See also *R.* v. *Shinfield*, 14 East, 544.

(*k*) Per Lord Kenyon, C. J. and Lawrence, J.

(*l*) *Supra*, 548, *et seq.*

(*m*) *Grove* v. *Weston*, Say. 209.

real fact. It was held in the same case, that although the deed stated that the consideration was paid to the vendor, evidence was admissible to show that it was paid to a third person, with his privity.

A party to a deed may, in an action between others, contradict the deed by his testimony; thus, one who has jointly with another executed an assignment of a ship, as of their joint property, is competent to prove that he had no interest in it (*n*).

General rule as to the independent operation of parol evidence.

With the exceptions already adverted to, the general inference, as above stated, seems to be, that oral evidence may be used indifferently as original and independent evidence of a fact, either concurrently with or in opposition to written testimony (*o*); and that written evidence, however superior it may be, and frequently is in *effect* to mere oral evidence, does not in any case, of its own authority, unaided by an express rule of law, exclude such evidence (1).

In an action for bribery at an election, it was held that parol evidence was admissible to prove the delivery of the precept to the returning officer, although it appeared that the returning officer had indorsed upon the precept, with a view to prove it, the time of his having so received it, and that the indorsement had been attested by two witnesses (*p*).

(*n*) 1 T. R. 301; *supra*, 10.

(*o*) An order for goods, describing their number and kind, is evidence for the plaintiff in an action against the defendant for not delivering the goods, although no time or price was mentioned; and the defendant's acceptance of the order, and the price agreed upon, may be proved by parol. *Ingram* v. *Lee*, 2 Camp. 521. Where the terms of adjustment with an underwriter were indorsed on the policy, and the money was paid, parol evidence was admitted of a previous agreement, that if the other underwriters should eventually pay a less sum, the surplus should be returned. *Russell* v. *Dunsley*,[1] 6 Moore, 233. The fact that a receipt has been given, does not exclude parol evidence of payment by a witness who saw the money paid. *Rambert* v. *Cohen*, 2 Esp. C. 213, *cor.* Lord Ellenborough. An oral admission by a defendant is evidence of a debt, although at the same time a written admission was entered in a book, which cannot be read for want of a stamp. *Singleton* v. *Ballett*, 2 Tyr. 409; and see *Jacob* v. *Lindsay*, 1 East, 460; *Rambert* v. *Cohen*, 4 Esp. C. 213. *Maugham* v. *Hubbard*,[2] 8 B. & C. 14. *Semble*, evidence is admissible that notes were issued by a corporation for a different purpose than that for which they were authorized to issue them. *Stark* v. *Highgate Archway Company*,[3] 5 Taunt. 792.

(*p*) *Grey* v. *Smithies*, Burr. 2273. It appeared in the case of *Reason* v. *Tranter*, Stra. 499, that the dying declaration of Mr. Lutterel, the deceased, had been taken down in writing by a witness, at the instance of two justices of the peace who were present; the witness had afterwards copied the writing thus made, and produced it at the trial; but the original was not produced. The Court held that the copy was not evidence. Upon this it may be observed, that although the copy was not evidence, the original being still in existence, and being better evidence than the copy, yet it seems that, in such a case, the mere fact that the witness reduced the declarations to writing at the time, would not exclude parol evidence of those declarations, the instrument not being an authentic one, authorized by the statute of Phil. & Mary. See *Sayer's Case*, 12 Vin. Ab. A. b. 23, pl. 7. In the same case other declarations of the deceased which had not been taken down in writing, made at other times, were received in evidence. See [4]2 Starkie's C. 208.

(1) [Parol evidence is admissible to enlarge the time of performance of a written simple contract. *Keating* v. *Price*, 1 Johns. Cas. 22. Or to enlarge the time for performing a condition; or to show a waver of the performance of it. *Fleming* v. *Gilbert*, 3 Johns. 528. Or to prove an accord executed in discharge of a written agreement previously made. *Hall* v. *Stewart*, 5 Day, 428. {Or to show the conditions on which a deed was placed in the hands of a depository, which conditions, while they remain executory, may also be proved by parol evidence. *Raymond* v. *Smith*, 5 Conn. Rep. 556.} Or to show that at the time of entering into articles for the sale of land, it was agreed by the parties, that the instalments should be paid in whatever money was current at the time they fell due, the articles not specifying the kind of money to be paid. *M'Meen* v. *Owen*, 1 Yeates, 135. 2 Dallas, 183, S. C. But where certain money had been made a legal tender by statute, parol evidence was held inadmissible to show what kind of money was meant under the words "current lawful money." *Lee* v. *Biddis*, 1 Dallas, 176. *Bond* v. *Haas's Ex'rs*, 2 ib. 133.

Parol evidence is admissible, in an action by the indorsee against the indorsor of a note, *indorsed in blank*, to show that at the time of the indorsement, the indorsee received the note under an agreement that he should not have recourse to the indorser. *Hill* v. *Ely*, 5 Serg. & Rawle, 363. S. P. *Field* v. *Nickerson*, 13 Mass. Rep. 138. *Cummings* v. *Fisher*, Anthon's N. P. 4. So in an action, by the assignee against the assignor of a *sealed note*, to recover back the consideration paid on the assignment, parol evidence was held admissible, on the part of the defendant, to prove that at the time of assigning the note, the plaintiff agreed to put it immediately in suit, and to take it at his own risk. *Mehelm* v. *Barnet*, 1 Coxe, 86. See also *Storer* v. *Logan*, 9 Mass. Rep. 55.]

[1]Eng. Com. Law Reps. xvii. 40. [2]*Id.* xv. 147. [3]*Id.* i. 268. [4]*Id.* iii. 316.

*An executory agreement, and under seal, may be discharged by a parol agreement (*q*). But it seems that a contract under the Statute of Frauds cannot be waived by a subsequent parol agreement (*r*).

To confirm or contradict unauthenticated written evidence.

Where letters are written in so dubious a manner as to be capable of different constructions, or be unintelligible, without the aid of extrinsic circumstances, their meaning becomes a question of fact for the jury, and parol evidence of such extrinsic facts is admissible; as in the case of libels, threatening letters, or a letter offered in evidence to prove acknowledgements to take a case out of the Statute of Limitations. But if they cannot be explained by extrinsic circumstances, then, like deeds or agreements, their construction is matter of law for the Court (*s*).

So an instrument in itself defective and inoperative may be confirmed and supplied by oral testimony, and operate in conjunction with it. Thus, where in the bishop's register a blank was left for the name of the patron, it was held that this might be supplied by oral testimony (*t*), for as the presentation itself might have been by parol, it might have been proved by the aid of the suppletory parol evidence, consequently there was no unwarranted substitution of oral for written evidence.

PARTICULARS, BILL OF.

By a general rule of all the courts of Trin. T., 1 W. 4, it is directed that with any declaration, if delivered, or with notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, when such particulars can be comprised within three folios; and when the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios (*u*).

The particulars, when annexed to the record, are authentic without further proof (*x*); but they are not made part of the record and incorporated in the pleadings (*y*).

Object of.

The object of a bill of particulars is to give the defendant more specific and precise information as to the nature and extent of the demand made upon him by the plaintiff, than is announced by the declaration (*z*), in a

(*q*) *Ld. Milton* v. *Edworth*, 5 Brown. P. C. 587. *Secus*, after breach, *Willoughby* v. *Backhouse*,[1] 2 B. & C. 824; B. N. P. 152. *Case* v. *Baker*, T. Raym. 450.

(*r*) *Goss* v. *Lord Nugent*,[2] 5 B. & Ad. 58.

(*s*) Per Buller, J., 1 T. R. 182.

(*t*) *Bishop of Meath* v. *Lord Belfield*, 1 Wils. 215.

(*u*) If the particulars exceed three folios, the defendant may obtain fresh particulars on payment of costs and taking short notice of trial. *James* v. *Child*, 2 Cr. & J. 252. If the plaintiff do not supply such particulars as the statute requires, he will not be allowed them in costs, if afterwards required and delivered.

(*x*) *Macarty* v. *Smith*,[3] 8 Bing. 145; 1 M. & Scott, 227; 1 D. P. C. 227.

(*y*) *Booth* v. *Howard*, 5 Dow. P. C. 538.

(*z*) Wherever the form of pleading is so general as not necessarily to enable the defendant to prepare fully for his defence, as where a general form is given by a statue, such as 9 Ann, c. 14, or 25 Geo. 2, c. 36, it seems that the plaintiff would be required to furnish a bill of particulars. See Tidd's Practice, 7th. edit. [*Mercer* v. *Sayre*, 3 Johns. 248.] So where the action is on a bond conditioned to indemnify or to perform covenants. So in ejectment on a forfeiture of a lease (*Doe* d. *Birch* v. *Phillips*, 6 T. R. 597); or if the plaintiff declare generally in ejectment, and without sufficiently specifying the lands sought to be recovered (7 East, 332); so the plaintiff may call on the defendant in ejectment to specify for what he defends, where it is not ascertained in the consent-rule. But where the particulars are specified in the declaration, as in actions of special assumpsit, covenant, debt, or articles of agreement, or in actions for *torts* specified in the declaration, an order for particulars does not appear to be requisite. Tidd's Practice, 613, 7th edit.—In an action for *assumpsit* against the vendor for breach of contract in the sale of a house, with counts to recover the deposit, the plaintiff having in his first count alleged that the defendant, who was bound to make a good title, had delivered an insufficient abstract, the Court obliged the plaintiff to give a particular of all the objec-

[1]Eng. Com. Law Reps. ix. 254. [2]*Id.* xxvii. 33. [3]*Id.* xxi. 253.

When sufficient.

*mode unencumbered by the technical formalities of pleading. Hence, as will appear from the decisions on this head, referred to below, particulars are in general sufficient, provided they be not so materially erroneous (*a*) as probably to have led the defendant into error; but if, on the other hand, the particulars vary so materially from the evidence as to render it probable that the defendant has not been apprised of the real claim intended to be made by the plaintiff, the latter will be precluded from going into evidence of that part of his demand.

Objection to omission in, how taken.

In order to preclude the plaintiff from giving evidence of any item not included in the bill of particulars, the order for delivering the bill must be produced, and the delivery of the bill be proved (*b*). If a first bill of particulars has been delivered, under a Judge's order, and the plaintiff deliver a second without any order, he can give no evidence of any item which is not contained in the first particulars (*c*), for the latter will not supersede the former, neither will it confine the plaintiff in his evidence (*d*).

Defects in.

Where the particulars stated merely that the demand was on a promissory note, which for want of a stamp could not be given in evidence, it was held that the plaintiff could not go into evidence of the consideration for which the note was given (*e*).

If the particulars state the demand to be for goods sold and delivered to the defendant, no evidence can be given of goods sold and delivered by the defendant as agent for the plaintiff (*f*). Nor of a mere admission that the

*795 *defendant owed the particular sum (*g*). But in an action against an agent for not accounting for goods delivered to be sold, and for goods sold, particulars headed, "Defendant to plaintiff, 10 tierces of porter, 20*l.*," were held to be applicable to any of the counts (*h*).

A mistake in the date, as to the demand upon a particular item, is not

tions to the abstract arising upon matters of fact (*Collett* v. *Thompson*, 3 B. & P. 246). In ejectment brought on a forfeiture of a lease, the Court will compel the plaintiff to give a particular of the breaches on which he meant to rely. *Doe* d. *Birch* v. *Phillips*, 6 T. R. 597.

(*a*) The particulars should contain an account of the items of demand, and state when, and in what manner, they arose; but it is sufficient to refer to a particular already delivered, without re-stating it (Peake's C. 172; Tidd's Pract. 614, 7th edit.) If the bill specify the transaction upon which the claim arises, it need not specify the technical description of the right resulting to the plaintiff from that transaction (*Brown* v. *Hodgson*, 4 Taunt. 189.) It will be a contempt of court to deliver a particular as general as the declaration (*Brown* v. *Watts*, 1 Taunt. 353); but it is sufficient if it convey the requisite information, although it be inartificially drawn up (1 Camp. 69). It has been said, that where there has been an account current, and the party means to give credit, the particular ought to state those items meant to be allowed (per Lord Kenyon; *Mitchell* v. *Wright*, 1 Esp. C. 280). And where an attorney, by his bill of particulars, claimed 200*l.*, although, on allowing for payments, the balance was but 10*l.*, the plaintiff was compelled to take the balance without costs (2 Camp. C. 410). But the practice does not conform with these cases (Tidd's Pract. 614 (*e*), 7th edit). And in a late case, Holroyd, J. held, upon an application at chambers, that it was sufficient to state the items on the debtor side only (*Cooke* v. *Cooke*, MS.). And see *Miller* v. *Johnson*, 2 Esp. C. 602, where Eyre, C. J. observed that it was never the intention, in compelling a party to give a particular under a Judge's order, to make him furnish evidence against himself, and that such an use could not be made of it. [*Ryckman* v. *Height*, 15 Johns. 222, *acc.*]

(*b*) Peake's C. 172; 2 B. & P. 243; 1 Esp. C. 195; 3 Esp. C. 168.

(*c*) *Brown* v. *Watts*, 1 Taunt. 353. *Short* v. *Edwards*, 1 Esp. C. 374. Where the plaintiff has made a mistake in delivering his particulars, he ought to amend, on a summons. 1 Taunt. 353.

(*d*) *Short* v. *Edwards*, 1 Esp. C. 374.

(*e*) *Wade* v. *Beasley*, 4 Esp. C. 7. The action was by the payee against the executor of the maker. But see *Brown* v. *Hodgson*, 4 Taunt. 189, and *supra*, 577, note (*d*).

(*f*) *Holland* v. *Hopkins*, 2 B. & P. 243.

(*g*) *Buckton* v. *Smith*, 4 Ad. & Ell. 468, although the declaration contained a count on an account stated; and see *Holland* v. *Hopkins*, 2 B. & P. 243.

(*h*) *Hunter* v. *Welsh*,[1] 1 Starkie's C. 224. And where a carrier had misdelivered goods which the defendant had misappropriated to his own use, the particulars "to seventeen firkins of butter, 50*l.*" were held to be sufficient. *Brown* v. *Hodson*, 4 Taunt. 189. Disbursements are evidence under a particular for cash advanced. *Harrison* v. *Wood*,[2] 8 Bing. 371.

[1]Eng. Com. Law Reps. ii. 365. [2]*Id.* xxi. 323.

material where the date cannot mislead (*i*); as where the particular states the work for which the action is brought to have been done in one month, when in fact it was done in another month, and no work was done in the month so specified (*k*).

The plaintiff is not precluded from recovering a demand made in the particulars by his having omitted to include the item in a bill delivered before the action was brought (*l*); but the previous omission may, under the circumstances, afford a presumption against the claim.

A reference to an account delivered before the commencement of the action is a virtual compliance with the order for the delivery of a bill of particulars, and the plaintiff is bound by the account (*m*).

Defect when immaterial.

Where a party cannot have been misled by a mistake made in the particulars, the error is not in general material.

Where the particulars, by mistake, specified a payment made by the plaintiff, on account of the defendant, to *A.*, and it turned out that it had been made to *B.*, the item having been erroneously placed under the name of *A.* instead of *B.*, it was held to be sufficient, unless the defendant would make affidavit that he had been misled by the particulars (*n*). So where the particulars, in an action of debt for rent, stated the premises to be at *A.* instead of *B.*, it was held to be no ground of nonsuit unless the defendant could prove that he held other premises at *A.* of the plaintiff (*o*).

So where the particulars specified the amount of a bill at 60*l.* instead of 63*l.*, and made a mistake in the day of the month in stating the date (*p*).

Effect of, by way of admission.

The plaintiff may recover interest, although the particular merely states a demand upon a promissory note (*q*).

Where the plaintiff's particulars were for horses sold, and upon an account stated, and the defendant paid money into court sufficient to cover the latter demand, and the plaintiff failed on the former demand, it was held that he could not apply the money paid to the counts for horses sold, on which he had given no evidence; and he was nonsuited (*r*).

*Where in *assumpsit* the defendant pleaded non-joinder in abatement, and the particular contained items as due from the defendant and his partner, who was not sued, it was held that the particulars supported the plea, although part of the demand was due from the defendant solely (*s*). *796

The giving credit to the opposite party, where there has been an account current between them, is not an admission that the sum is due (*t*).

Particulars of a set-off are for the benefit of the defendant, to enable him

(*i*) *Milwood* v. *Walter*, 2 Taunt. 224. *Harrison* v. *Wood*,[1] 8 Bing. 371.

(*k*) 2 Taunt. 224. (*l*) *Short* v. *Edwards*, 1 Esp. C. 374.

(*m*) *Hatchett* v. *Marshall*, Peake, 172. *Etches* v. *Fellowes*, Wightw. 78.

(*n*) *Day* v. *Bower*, 1 Camp. 69, n.

(*o*) *Davies* v. *Edwards*, 3 M. & S. 380. So where, in an action by the assignees of a bankrupt, the declaration stated the action to be for money had and received to the use of the bankrupt, but the particulars of demand stated it to be had and received to the use of the plaintiff, it was held that the variance was not material, the particulars having given substantial information of the nature of the claim. *Tucker* v. *Barrow*,[2] 1 M. & M. 137.

(*p*) Per Abbott, J., Manning's Ind. 240. *Fleming* v. *Crisp*, 5 Dow. P. C. 454. Particulars for goods sold by the plaintiffs as *brewers* will not prevent their recovering as *spirit* dealers, the defendant not having been misled, *Lambirth* v. *Roff*,[3] 8 Bing. 411.

(*q*) *Blake* v. *Lawrence*, 4 Esp. 147. So where the plaintiff confined his particulars to one count of his declaration.

(*r*) *Holland* v. *Hopkins*, 3 Esp. C. 168; 2 B. & P. 243.

(*s*) *Colson* v. *Selby*, 1 Esp. C. 452. And the Court of K. B. afterwards refused to set aside the nonsuit. *Qu.*

(*t*) *Miller* v. *Johnson*, 2 Esp. C. 602. Note, there the question was upon the particulars of set-off delivered by the defendants, and it was held that the admission of an item in the plaintiff's account did not render proof by the plaintiff unnecessary. See also [4]5 Taunt. 228; 1 Marsh. 33. S. C.

[1]Eng. Com. Law Reps. xxi. 323. [2]*Id.* xiv. 219. [3]*Id.* xxi. 338. [4]*Id.* i. 88.

to know what to plead, as well as to restrain the plaintiff's proof of his claim in the declaration (*u*). An admission in the particular of a payment by the defendant is evidence for the latter to prove such payment, and the jury are not, in acting on such proof, bound to adopt the statements made in the particular by the plaintiff in his own favour (*v*); and such payment need not be pleaded (*w*).

The particulars of set-off are considered as incorporated with the notice of set-off, which is in the nature of a plea, and therefore a plaintiff cannot make use of a notice of set-off as evidence of the debt under the plea of *non assumpsit;* nor can he use a particular of set-off for that purpose, for it is incorporated with the notice (*x*).

Although the plaintiff be restricted in his own evidence by his particular, he may avail himself of any evidence adduced by the defendant to increase his demand (*y*).

The plaintiff brought an action against his partner, and confined himself by his particular to a balance due on a separate account; the defendant produced a subsequent account, stated by the plaintiff, in which the latter made himself a debtor on the separate account, but on the same paper stated also the general account, by which he made himself creditor to a greater amount than that claimed on the separate account; the Court said that the defendant had made a better case for the plaintiff than he was at liberty to have made for himself, and that the plaintiff was entitled to a verdict for the balance on the general account. Here the defendant himself proved the plaintiff's claim to the larger sum, by giving in evidence
*797 *the balance due on the general account, since the whole of the plaintiff's statement was in evidence.

Where a particular as to some counts (*e. g.* on bills of exchange) is unnecessary, it is sufficient if the particular specify the causes of action in the other counts (*z*).

Objection that a bill has not been delivered.

If the particulars of the defendant's set-off be not delivered within the time limited by the order (*a*), he will be precluded from giving evidence in support of his set-off; but the plaintiff cannot make an objection to such particulars at the trial, which might, if taken earlier, have been rectified by the defendant, or by the Court (*b*).

The objection on the score of variance between the proof and the par-

(*u*) See the observations of Parke, B. in *Kenyon* v. *Wakes*, 2 M. & W. 764; and see *Booth* v. *Howard*, 5 Dow, P. C. 438.

(*v*) *Kenyon* v. *Wakes*, 2 M. & W. 764; and see the observations of Parke, B., ib.

(*w*) Ib., and *Coates* v. *Stevens*, 2 C. M. & R. 118. Note, that in the case of *Kenyon* v. *Wakes*, the objection that without a plea of payment the defendant could use the particulars in reduction of damages only, and not in bar of the action, was not taken at the trial, and therefore the Court refused to set aside the verdict for the defendant. Parke, B., however, intimated his opinion that a plea of payment was unnecessary, and said, that had it not been for the case of *Ernest* v. *Brown*,[1] 3 Bing. N. C. 674, he should have entertained no doubt on the question; and he disapproved of the distinction taken in *Ernest* v. *Brown*, between assumpsit and debt, in this respect. And see *Rymer* v. *Cooke*,[2] M. & M. 86, n.; and now by the rule, Trin. Term, 1 Vict., where the plaintiff, to avoid the expense of a plea of payment, shall have given credit in the particulars for any sum admitted to have been paid to the plaintiff, it shall not be necessary to plead payment. The rule is not to apply where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance without giving credit for any particular sum. See tit. PAYMENT.

(*x*) *Harrington* v. *Macmorris*, 5 Taunt. 228; 1 Marsh, 33; *Supra*, Vol. I. tit. PLEADINGS.

(*y*) *Hurst* v. *Watkis*, 1 Camp. 68; and per Parke, B., 1 M. & W. 486.

(*z*) *Cooper* v. *Amos*,[3] 2 C. & P. 267. *Day* v. *Davis*,[4] 5 C. & P. 340.

(*a*) See the form, Tidd, App. c. 22, s. 10. If the order direct the particulars to be delivered forthwith, without prescribing any specific time, and the particulars are delivered so late as to embarrass the party, he waives the objection by an acceptance of the particulars, and cannot urge it at the trial; the proper course is to object immediately, by application to the Court. See Holt's C. 552.

(*b*) *Lovelock* v. *Chiveley*,[5] Holt's C. 552.

[1]Eng. Com. Law Reps. xxxii. 276. [2]*Id.* xxii. 257. [3]*Id.* xii. 124. [4]*Id.* xxiv. 350. [5]*Id.* iii. 185.

ticulars must be taken on the trial, after production and proof of the particulars (*c*) (1).

PARTIES (*d*).

Grounds of incompetency.

The rule which excludes a party from giving evidence in his own cause is not founded merely on the consideration of his interest; if it did, it would follow that a party might always be called by the adversary to give evidence *against* his own interest; the rule is partly, at least, founded on a principle of *policy* for the prevention of perjury (*e*) (2).

In a recent case, a plaintiff was by consent of the defendant allowed to

(*c*) The plaintiff recovered a greater sum than he claimed by his particulars, and upon discussion, the Court of K. B. approved of the principle on which he recovered, and judgment was entered accordingly, no objection having been made on the score of excess, either at the trial or upon the argument, the Court refused to reduce the judgment to the sum claimed by the particulars. *Bell* v. *Puller*, 2 Taunt. 285; 12 East, 496, n.

(*d*) As to the joinder of parties in an indictment, see Crim. Plead. 2d edit. 33; and *supra*, tit. Accessories. As to compelling a disclosure of the residence of plaintiffs in a suit, see *Worton* v. *Smith*,[1] 6 Moore, 110. *Redford* v. *Birley*, MS.

(*e*) And yet either party may be put to his oath by a bill of discovery in equity, where he is quite as likely to commit perjury as if he were to be examined in a court of common law. It was formerly held (in equity) that though a plaintiff could not examine a co-defendant whom he had *unnecessarily* made a witness (*Gibson* v. *Allen*, 10 Mod. 19), yet one co-defendant might examine another. Ch. Pr. 411; Gil. Eq. Rep. 98. Where a court of equity directs a party to be examined as a witness, the objection is merely reserved *qua* competency as a party. *Rogers* v. *Whittingham*, 1 Swans. 39.

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(1) [If the plaintiff neglects to deliver the particulars of his demand pursuant to an order, the defendant is entitled to move for judgment as in case of *non pros*. *Henrot* v. *Durand*, 14 Johns. 329.

An order for a bill of particulars should be that a bill be furnished by a certain day, or that the plaintiff show cause why he has not furnished it. *Brewster* v. *Sackett*, 1 Cow. 571. An order, staying proceedings absolutely until a bill of particulars be furnished, is irregular. But such order stays proceedings, until it is vacated. *Roosevelt* v. *Gardiner*, 2 Cow. 463.]

(2) {And the objection may be made by a party having an interest in the suit, though not a party on record, if called to testify against his interest in the subject-matter of the cause. *Mauran* v. *Lamb*, 7 Cow. 174; where the *cestui que trust* of the plaintiff on record was protected in her refusal to testify, when called upon by the defendant, the action being brought for her benefit.}

[In *Willing & al.* v. *Consequa*, 1 Peters, 307, it is said that the foundation of the rule, that a party to a suit cannot be a witness, is the interest which the party has in the event of the suit both as to cost and the subject in dispute; and when that interest is removed, the objection ceases to exist.

In Pennsylvania, the practice is established for a party to the suit to prove the service of notice, to produce papers, and to prove notice of taking depositions. *Jordan* v. *Cooper & al.* 3 Serg. & R. 575, 584. *Kidd* v. *Riddle*, 2 Yeates, 444. So in summary inquiries, such as questions of bail, the evidence of parties, though interested in the event of the suit, has always been received. *Bank of Pennsylvania* v. *Hadfeg & al.* 3 Yeates, 560. So, to prove that a material witness is unable to attend, in order to entitle his deposition to be read. *Morris* v. *Flora*, cited 2 Dallas, 117. 1 Yeates, 16. (*Aliter*, in North Carolina. *Willis* v. *Brown*, Martin, 52. *Anon.* v. *Brown*, 1 Hayw. 227.) So, to prove the death of a subscribing witness to a deed, in order to let in evidence of his hand-writing. *Douglas's Lessee* v. *Sanderson*, 2 Dallas, 116. 1 Yeates, 15. *Levan's Lessee* v. *Hart*, cited 1 Yeates, 16. {And in Virginia and New York, a party may be examined so as to lay a foundation for the reception of secondary evidence, by proving the loss of a deed or paper, and the proper search for it. *Ben* v. *Peete*, 2 Rand. 539. *Givens* v. *Mans*, 6 Munf. 301. *Jackson* v. *Frier*, 16 Johns. 193.}

Whether in an action against an innkeeper, for money lost in his house, the plaintiff is a competent witness to prove the contents of a bag delivered to be kept for him? *Quære*. *Sneider* v. *Geiss*, 1 Yeates, 34. Where the master of a vessel broke open a trunk which he had received on board in London to be brought to this country, and embezzled the contents—the owner of the goods was admitted by the Supreme Court of Maine, in an action of trover against the master, to testify to the particular contents of the trunk—he having otherwise proved the delivery thereof and its violation, and there being no other attainable evidence of its contents. *Herman* v. *Drinkwater*, 1 Greenl. 27.

In South Carolina, a party interested in a cause is not a competent witness to prove the loss of a paper material to the issue. *Sims* v. *Sims*, 2 Rep. Con. Ct. 225. As to other states, see Vol. I. 336; *note* (1).

In England the shop-book of a tradesman is not evidence of a debt without the oath of the clerk who made the entry. But in most of the States of the Union, the book proved by the suppletory oath of the party is admitted. In different States, this rule has different modifications, and is applied to very different kinds of charges which are entered in parties' books of account.

[1] Eng. Com. Law Reps. xvii. 17.

be examined upon oath as a witness in the cause, although he came to defeat the claim of a co-plaintiff (*f*).

It has been seen, that in general a voluntary admission made by a party to the cause is admissible evidence against him (*g*). This is true where the party making the admission is affected by it, in his own private and natural capacity; but in other cases the rule is frequently inapplicable.

Where a corporation has been a party, a corporator not disqualified on
*798 *the score of interest seems at all times to have been considered to be competent (*h*). And a declaration or admission by a corporator is not admissible in evidence against the corporation (*i*). But it has been held that the declaration of a rated parishioner is admissible, although it be exceedingly weak evidence in a case of settlement (*j*).

Who are parties. Inhabitants of parishes, hundreds, &c.

The inhabitants of contending parishes in settlement cases are considered *sub modo* as parties, and on this ground it has been held that an inhabitant of the adverse parish is not compellable to give evidence (*k*). Still inhabitants, if not rated, were always considered to be competent (*l*). And upon indictments against the inhabitants of counties for the non-repair of bridges, and of parishes for non-repair of highways, the inhabitants, although parties, seem to have been considered as competent witnesses, except so far as they were rendered incompetent by their interest (*m*). The statute, making inhabitants of hundreds (*n*) competent, notwithstanding their interest, would have been nugatory if the objection might still have been taken that they were parties.

The respondents' overseer, producing an ancient certificate by the appellant parish, may be examined as to the contents (*o*). So may a corporator, producing corporation documents.

Party to the record.

It has already been seen that a party to a transaction is, in general, competent, unless he be either a party to the record, or be disqualified by his interest (*p*). It still remains to be considered how far the being a party to the record will in itself operate as a disqualification. In the first place, whenever there are several defendants in *tort*, and after the whole of the evidence has been gone through on the part of the plaintiff, he may be acquitted, and examined as a witness for the others (*q*). But a plaintiff can

(*f*) *Norden* v. *Williamson*, 1 Taunt. 378; and *Fenn* d. *Pewtris* v. *Granger*, 3 Camp. 177. If, however, the general rule of exclusion be founded partly on the ground of policy, it seems to be clear in principle that the rule ought not to be infringed, even although a party be desirous of examining his adversary. The above case of *Norden* v. *Williamson* was so peculiarly circumstanced, that there could be no danger of perjury.

(*g*) *Supra*, tit. Admissions.

(*h*) *Supra*, 340. The men of one county, city, hundred, town, corporation or parish, are evidence in relation to the rights, privileges, immunities and affairs of such town, city, &c., if they are not concerned in private interests in relation thereunto, nor advantaged by such rights and privileges as they assert by their attestation. Gilb. L. Ev. 128, 2d ed.; Vent. 351.

(*i*) *Mayor of London* v. *Long*, 1 Camp. 22.

(*j*) *R.* v. *Inhab. of Hardwicke*, 11 East, 579; see stat. 54 Geo. 3, c. 170; and see *R.* v. *Whitley*, *Lower*, 1 M. & S. 636; and Vol. I. tit. Witness. But see the observations there as to the stat. 54 Geo. 3, c. 170.

(*k*) Ib. But now see the stat. 54 Geo. 3, c. 170, s. 9, vide *supra*, Vol. I. tit. Witness.

(*l*) Ibid.

(*m*) *Supra*, 530. Vol. I. tit. Witness.—Inhabitant. I am not aware of any instance where exemption from examination has been claimed in such a case by an inhabitant, on the ground that he was a party.

(*n*) *Supra*, Vol. I. tit. Witness. And see the stat. 8 Geo. 2, c. 16, s. 15, which recites that hundredors are incompetent by reason of interest.

(*o*) *R.* v. *Netherthong*, 2 M. & S. 337. (*p*) *Supra*, Vol. I. tit. Witness.

(*q*) He ought to be acquitted at the end of the plaintiff's case, per Alderson, J.; and it was so held by all the Judges on consultation, and ruled accordingly by Alderson, J., in *Kendall* v. *Killshaw*, Lancaster Sp. Ass. 1834. For otherwise, per Alderson, J., the party against whom no evidence given would be entitled to cross-examine the witnesses for defendant. *Supra*, Vol. I. tit. Witness. So upon an indictment. *R.* v. *Bedder*, 1 Sid. 237. *R.* v. *The Mutineers of the Bounty*, 1 East, 313; and see *Dymoke's Case*, Sav. 34; Godb. 326; Vin. Ab. Ev. I. 5, I. 12; Tr. P. P. 334, 7th edit. But a bankrupt who has pleaded his bankruptcy, is not, on proof of the bankruptcy, a competent witness for a co-defendant. *Supra*, tit. Bankrupt. *Qu.* whether, when an action is brought against a constable acting under a warrant, without joining the justice, the constable,

in no case examine a co-defendant, although nothing be proved against him (*r*) on the trial.

*A defendant upon the record, who is no party to the issue tried, may usually be examined as a witness, if he be not disqualified by interest. Thus a co-defendant, in an action of *tort*, who has suffered judgment to go by default, is competent to prove that a co-defendant is not chargeable (*s*). But he cannot be called to prove a co-defendant guilty (*t*). So a defendant in ejectment who has let judgment go by default is a competent witness for either a defendant (*u*) or plaintiff (*v*). *799

A co-defendant in *assumpsit*, who pleads his bankruptcy, is not a competent witness for a co-defendant who has pleaded *non assumpsit* (*w*). But where, in such a case, the plaintiff had entered a *nolle prosequi* as to the bankrupt, the latter was admitted as a witness for the other defendants (*x*) (1).

Where upon an issue to try the validity of a will, a legatee appeared under a liberty "to attend the trial of such issue," it was held that his counsel might cross-examine witnesses, and suggest points of law, but had no right to address the jury or call witnesses (*y*).

The effect of a variance as to parties between the record and the evidence is considered under the respective titles of *Assumpsit* (*z*), *Carriers* (*a*), *Case* (*b*), *Deed* (*c*), *Ejectment* (*d*), *Husband and Wife* (*e*), *Trespass*, *Trover*, *Variance*. Variance.

In *assumpsit*, the joinder of too many, either plaintiffs or defendants, or

on proof of the warrant, is not entitled immediately to his acquittal under the stat. 24 Geo. 2, c. 44, s. 6. Vide *supra*, tit. Justices.

(*r*) B. N. P. 285; 2 Camp. 333, n. The general rule is, that a party to the record cannot be examined; per Le Blanc, J. Ibid.; and per Abbott, L. C. J., in *Blackett* v. *Weir*,[1] 5 B. & C. 387. A plaintiff cannot call a co-defendant in *assumpsit* who has let judgment go by default. Ib. And it seems to be a general rule, that a plaintiff can in no case examine a co-defendant on the record; a rule founded, principally, on the ground of policy in preventing perjury, and a consideration of the hardship of calling on a party to charge himself. And this rule seems to be strictly observed as to plaintiffs, for the joining so many defendants is their own act, although, in many instances, it may be matter of necessity. The case of a defendant in ejectment who has let judgment go by default (*Doe* d. *Harrop* v. *Green*, 4 Esp. C. 198) is scarcely to be regarded as an exception; for there the proceeding is merely fictitious, and the name of the defendant does not appear upon the record. In the cases of *Mant* v. *Mainwaring*,[2] 2 Moore, 9, and *Brown* v. *Brown*, 4 Taunt. 752, it was held that a co-defendant in *assumpsit*, who had let judgment go by default, was not a competent witness for the plaintiff, for by means of his own testimony he would obtain contribution from the defendant who had pleaded. Vide tit. Witness.—Interest.

(*s*) *Ward* v. *Haydon & another*, 2 Esp. C. 552, cor. Ld. Kenyon, 2 Camp. 334, n.; cor. Wood, B. Lancaster, 1809. Where three out of four defendants suffered judgment by default, it was held that one of them might be subpœnaed to produce a deed. *Colley* v. *Smith*,[3] 4 Bing. N. C. 285; and 6 Dowl. 399.

(*t*) *Chapman* v. *Graves*, 2 Camp. 333, n. cor. Le Blanc, J. Lancaster, 1810. And see *Barnard* v. *Dawson*, 2 Camp. 333, n. cor. Lord Kenyon. But in the case of *Worall* v. *Jones*,[4] 7 Bing. 395, it was held that where a party to the record had let judgment go by default, consented to be examined, and had no interest in the cause, it was competent to the plaintiff to examine him. See *R.* v. *Woburn*, 10 East, 395.

(*u*) Vide tit. Witness—Interest. (*v*) *Doe* d. *Harrop* v. *Green*, 4 Esp. C. 198.

(*w*) *Raven* v. *Dunning & another*, 3 Esp. C. 25. See *Emmett* v. *Bradley*,[5] 1 Moore, 332. *Emmett* v. *Butler*,[6] 7 Taunt. 599. Peake's Ev. App. lxxxvii. And the Court would not in such a case permit a verdict to be recorded in favour of the bankrupt, for the purpose of enabling him to give evidence. *Currie* v. *Child & others*, 3 Camp. 283. [*Moody* v. *King*, 2 B. & C. 558.] Where one of several defendants sued as makers of a note, pleaded his bankruptcy and certificate, the Court permitted a verdict to be taken for him, and that he should be examined as a witness for the other defendants. *Bate* v. *Russell*,[7] 4 M. & M. 533. S. P. *Afflalo* v. *Fourdrinier*,[8] 6 Bing. 306. (*x*) *M'Iver* v. *Humble*, 16 East, 171.

(*y*) *Wright* v. *Wright*,[9] 4 C. & P. 389; and 7 Bing. 450, n.

(*z*) *Supra*, 59. (*a*) *Supra*, 285. (*b*) *Supra*, 298.

(*c*) *Supra*, 378. (*d*) *Supra*, 430. (*e*) *Supra*, 535.

(1) {In *New Hampshire* it has been decided, that in a foreign attachment the principal, having received from the plaintiff a release of all the debt due to the plaintiff, except so much as may be found in the hands of the trustee, is a competent witness for the plaintiff on the trial of the issue between the plaintiff and the trustee. *Wallace* v. *Blanchard*, 3 New Hamps. Rep. 395.}

[1]Eng. Com. Law Reps. xi. 257. [2]*Id.* iv. 48. [3]*Id.* xxxiii. 355. [4]*Id.* xx. 177. [5]*Id.* iv. 397. [6]*Id.* ii. 232. [7]*Id.* xxii. 327. [8]*Id.* xix. 89. [9]*Id.* xix. 435.

the non-joinder of plaintiffs, is a ground of nonsuit (*f*), but the non-joinder
*800 *of other defendants must be pleaded in abatement (*g*). In actions of *tort*, on the other hand, although the joinder of too many plaintiffs be a ground of nonsuit (*h*), the non-joinder of plaintiffs must be pleaded in abatement (*i*); the joinder of two many defendants is not a ground of nonsuit, since some may be convicted and the rest acquitted (*k*); the same rule applies in penal actions (*l*); and the non-joinder of others as defendants in *personal* actions of *tort* (*m*) cannot be taken advantage of, even by plea in abatement. Where, however, the action is founded *immediately* upon a contract, and for a damage resulting from mere breach of contract, although in form it be an action of *tort*, the joinder of defendants, who did not contract, would, it seems, be a ground of nonsuit under the general issue (*n*); and in such case one of two joint contractors cannot maintain a separate action (*o*).

PARTNERS (*p*).

Identity of. WHERE two or more unite in partnership, for carrying on a particular trade, or other purpose, they become in point of law so identified with each other (*q*), that the acts and admissions of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. The very constitution of this relationship furnishes a presumption that each individual partner is an authorized agent for the rest, but this presumption has no operation where a party who would rely upon it has received express notice to the contrary, or where the transaction between himself and the individual partner is a fraud upon the rest.

*801 *The rules of evidence on this subject result from these general principles of law regarding partnerships, subject to this further consideration, that the acts, conduct and representations of parties, may be conclusive evidence of their partnership, in favour of strangers who are not cognizant of their

(*f*) *Supra*, 59—100. Joint-tenants must also join in actions *ex contractu* (Co. Litt. 180, b.; Bac. Abr. tit. *Joint-tenants*, K. 1 B. & P. 73); and so must parceners in all actions relating to their estate (R. T. Hardw. 398, 9). Tenants in common may either join or sever in actions on contracts relating to their estate, although they must sever in avowry for rent. Bac. Ab. tit. *Joint-tenants* and *Tenants in Common*, K.; 1 Lev. 109; Sir T. Raymond, 80.

(*g*) Ibid. (*h*) *Supra*, 297.

(*i*) *Supra*, 297. Joint-tenants and parceners must join in personal as well as real actions for injuries affecting their real property, or the non-joinder may be pleaded in abatement (Bac. Abr. tit. *Joint-tenants*, K. 2 Vin. Ab. 59; Vin. Ab. tit. *Parceners*). Tenants in common *must sever* in real actions, except in *quare impedit;* but they *may join* in personal actions for a joint damage to the estate (Bac. Ab. *Joint-tenants*, K.; 5 T. R. 247; Cro. Jac. 231; 2 Bl. 1077; Yelv. 161), or each may sue separately (5 T. R. 248; 2 Bl. R. 1077). The non-joinder of a part-owner of a chattel must be pleaded in abatement, although the omission appear on the declaration in trover. *Addison* v. *Overend*, 6 T. R. 766. Lease to *A.* and *B.*, *A.* demises part to *D.*, and gives receipts and a notice to quit in his own name. *A.* and *B.* (*semble*) cannot jointly maintain an action in the nature of waste. *Steele* v. *Western*,[1] 7 Moore, 29.

(*k*) *Supra*, 285, 297.

(*l*) *Hardyman* v. *Whitaker & al.*, 2 East, 573, n. and see *Barnard* v. *Gostling & al.* 2 East, 569.

(*m*) 1 Will. Saund. 291, a.

(*n*) *Weall* v. *King*, 12 East, 452, [and Mr. Day's note.] The plaintiff declared for a deceit alleged to have been practised by means of a warranty made by two defendants upon a joint sale to him, by both, of sheep, their joint property, and it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only as of his separate property. See also *Max* v. *Roberts*, 2 N. R. 454; where, in an action on the case, upon the delivery of goods to several joint ship-owners, to be carried to *A.* for freight, and alleging a deviation, it was held, that if the plaintiff failed to prove them all to be owners, he could not recover against the rest. It is otherwise where *negligence* is the test of the action, although a contract exist relating to the business in which the negligence occurred. See *Govett* v. *Radnidge*, 3 East, 62. *Supra*, 285.

(*o*) *Hill* v. *Tucker*, 1 Taunt. 7. Bail, jointly, employed an attorney to surrender the principal; and held that they could not maintain separate actions for neglecting to surrender the principal.

(*p*) See the Act for regulating the co-partnership of bankers; 7 G. 4, c. 46. See as to joint-stock companies, 1 & 2 Vict. c. 96, continued and extended by 3 & 4 Vict. c. 111.

(*q*) Partners are at law joint-tenants, part-owners are tenants in common, and one cannot sell the share of another. Abbott's L. S. 68. See *Ouston* v. *Hebden*, 1 Wils. 101.

[1]Eng. Com. Law Reps. xvii. 67.

private arrangements, but who must be guided by external indications, although as between themselves, they are not partners. The subject will be considered as it relates to—

Actions by several.

First. Where several plaintiffs bring an action of *assumpsit*, unless they rely upon a contract expressly made with all, they must prove a joint interest, arising by implication, as by evidence that they are partners, and jointly interested in the subject-matter; for if a contract be made by the joint agent of all, or by one partner in behalf of all, they may sue jointly upon it, although their names have not been expressly mentioned (*r*). It must be proved that all who sue were partners at the time of the contract: one who has been subsequently admitted into the firm cannot join, although it were stipulated that he should have a share in past transactions (*s*).

Proof of partnership (A).

The evidence of partnership usually consists in the oral testimony of clerks, or other agents or persons who know that the alleged partners have actually carried on business in partnership; it is unnecessary, even in criminal cases, to produce any deed or other agreement by which the co-partnership has been constituted.

Where several sue as indorsees of a bill, indorsed in blank, it is unnecessary to give any proof of their partnership or joint interest (*t*).

*Where *A.* and *B.* being partners, their agent, after an act of bankruptcy by *A.* (*u*) but before an act of bankruptcy by *B.*, paid a sum of money on *802

(*r*) See tit. Assumpsit, and Vendor & Vendee. In *Skinner* v. *Stocks*,[1] 4 B. & A. 437, it was held that the action might be brought either in the name of the person with whom the contract was actually made, or in the names of the parties really interested. Where two brought an action as partners (with whom the defendant had formerly dealt), and at the trial it appeared that at the time of the contract a third person, who had formerly been a partner, and though he had withdrawn his name when the goods were supplied, still continued to receive part of the profits, but was not a party to the action, Lord Kenyon refused to nonsuit the plaintiffs. But where the action was brought in the names of several, who had agreed that Ross (one of them) should carry on the business in his own name, it was held that the defendant was entitled to set off a debt to Ross for business done on Ross's own account; and Lord Kenyon observed that the plaintiffs had subjected themselves to this by holding out false colours to the world, and permitting Ross to appear as the sole owner. *Stacey & others* v. *Decy*, 1 Esp. C. 468. *Leveck* v. *Shafto*, 2 Esp. C. 468. Where three firms agreed to purchase jointly certain goods, and the purchase was effected by one party, and the broker knew him only, held that all might join in the action for breach of contract. *Cothay* v. *Fennell*,[2] 10 B. & C. 671. All part-owners are partners in respect of the concerns of a ship, and all ought to join in an action for freight. Abbott on Shipp. 82. And if any injury be done to a ship and a part-owner dies, the action survives. Ib. 81.

(*s*) *Wilsford* v. *Wood*, 1 Esp. C. 182. Where a guaranty is given to one person for the benefit of all, all may sue. *Garrett* v. *Handley*,[3] 4 B. & C. 664.

(*t*) *Rordasnz* v. *Leach*,[4] 1 Starkie's C. 446; and *supra*, 216.

(*u*) The consequence of a dissolution of partnership between *A.* and *B.* by the bankruptcy of *B.* is that *A.*

(A) (Where a note or bill is payable to a firm, strict proof is required that the firm consists of the plaintiffs on the record. *M'Gregor* v. *Cleveland*, 5 Wend. 495. In an action against several as partners, although but one of the defendants be brought into court, if he appear and plead the general issue, the plaintiff is not entitled to recover unless he establish a joint liability of the defendants. *Halliday* v. *M'Dougall*, 20 Wend. 81. General reputation connected with corroborating circumstances, will be sufficient, at least *prima facie* to establish the fact that *A.* was the partner of *B.* and *C.* *Whitney* v. *Sterling*, 14 Johns. 215. Two persons signing a joint note is no evidence of a partnership between them. *Hopkins* v. *Smith*, 11 Johns. 161.)

[1]Eng. Com. Law Reps. vi. 478. [2]*Id.* xxi. 146. [3]*Id.* x. 438. [4]*Id.* ii. 463.

Assignees of partners.

the joint account to *C.*, it was held that the assignees under a joint commission could not recover this money as had and received to the use of *A.* and *B.* before they became bankrupts, or as money received to their use, as assignees since the bankruptcy (*x*), even although *A.* knew of the bankruptcy of *B.*; for a solvent partner may dispose of the partnership effects in discharge of a partnership debt (*y*). So if *A.* in such case, after a secret act of bankruptcy by *B.* dispose of the partnership effects for a valuable consideration, and afterwards commit an act of bankruptcy, the assignees of both under a joint commission cannot maintain trover against the *bonâ fide* vendee (*z*).

Where an Act authorized all suits on the part of the company to be commenced and prosecuted in the name of the chairman, held that it did not extend to authorize a suit to be commenced by the chairman against a member for an account of monies received by him for shares which he was employed to sell, but that it was necessary to make the other members parties to the suit (*a*).

Satisfaction to one, &c.

It is a good defence to show that one of several plaintiffs cannot recover although he may have been guilty of fraud against the rest. Thus *A.*, *B.* and *C.* cannot recover on a bill of exchange drawn by them, and accepted by the defendant, *A.* having (in fraud of his partners) engaged to provide for the acceptance when the bill should be due (*b*). A covenant by one partner not to sue is not a release of a partnership debt (*c*).

*803 *Where *A.* was a partner with *B.* in one firm, and also with *C.* in another, and the firm of *A.* and *B.* indorsed a bill to *A.* and *C.*, and *B.* received securities from the drawer, on an undertaking by *B.* that the bill should be taken up and liquidated by the house of *A.* and *B.*, it was held that *A.* being bound by the act of his partner, could not in conjunction with *C.*, maintain an action on the bill against the acceptors (*d*). So if one partner be precluded by the illegality of his act from recovering in the particular transaction, his partners, although innocent, cannot recover (*e*).

and the assignees of *B.* become tenants in common of each individual article; 15 Ves. 229. The right is not to an individual proportion of each specific article, but to an account; the property is to be made the most of and divided; per Lord Eldon, in *Crawshay* v. *Collins*, Ib. See *Fox* v. *Hanbury*, Cowper, 449. Where one of several partners (the plaintiffs) drew a bill which the defendant accepted on the condition that such partner would provide for it when due, held that as he having failed in performing the condition could not have sued the defendant, his partner being bound by his acts could not maintain a joint action. *Sparrow* v. *Chisman*,[1] 9 B. & C. 241.

(*x*) *Smith* v. *Goddard*, 2 B. & P. 465.

(*y*) *Harvey* v. *Crickett*, B. R. Sittings at Serjeant's Inn before Mich. Term, 57 G. 3; Sel. N. P. 1060; *i. e.* to one who had no knowledge of the bankruptcy of the partner. If a creditor take the notes of a person after knowledge of the bankruptcy of one of several partners, though the rest are then solvent, he cannot set them off; per three Judges, K. B. Sittings before Mich. T. 1830; and see *Biggs* v. *Fellows*,[2] 8 B. & C. 402.

(*z*) *Fox* v. *Hanbury*, Cowp. 449.

(*a*) *M'Mahon* v. *Upton*, 2 Sim. 473. And see *Long* v. *Young*, 369.

(*b*) *Richmond* v. *Heapy*,[3] 1 Starkie's C. 102; where it was held by Lord Ellenborough that the parties could not sue out a commission of bankruptcy founded upon that debt (*Johnson* v. *Peck*, cor. Holroyd, J. Lancaster Summer Assizes, 1821). *Sparrow* v. *Chisman*, 9 B. & C. 241. *Jacaud* v. *French*, 12 East, 317. *Bolton* v. *Poller*, 1 B. & P. 539. So where *A.* being indebted to *B.* and *C.*, allowed the amount on the settlement of a private account between himself and *C.*, and the latter gave a receipt to *A.* for the amount, it was held that this was a good discharge (*Henderson* v. *Smith*, 2 Camp. 561). But where such a receipt was given after notice in the Gazette of the dissolution of partnership between *B.* and *C.* and that debts were to be paid to the former only, it was held to be fraudulent and void, Ibid., and afterwards by the Court of K. B. *A.*, *B.* and *C.* being partners, and *A.* and *D.* being also partners, *A.* indorsed bills and paid money to *A.*, *B.* and *C.*, the property of *A.* and *D.*, in payment of a debt due from *A.* to *A.*, *B.* and *C.*, and afterwards indorsed the bills in the names of *A.*, *B.* and *C.* to a creditor of the firm; held, that though this was a fraud by *A.* on *D.*, yet that *A.* and *D.* could not recover against *B.* and *C.*; and that after the bankruptcy of *A.* and *D.* their assignees were not in a better situation. *Jones* v. *Yates*,[4] 9 B. & C. 532.

(*c*) *Walmesly* v. *Cooper*, 3 P. & D. 149.

(*d*) *Jacaud* v. *French*, 12 East, 317. (*e*) 3 R. T. 454.

[1]Eng. Com. Law Reps. xviii. 366. [2]*Id.* xv. 248. [3]*Id.* ii. 356. [4]*Id.* xvii. 436.

Thus if goods be sold and packed by a partner living in Guernsey, for the purpose of being smuggled into this country, the parties who live in England, although ignorant of the transaction, cannot jointly with the other maintain an action for the goods, for the act of one partner is the act of all (*f*).

But where a party colludes with one partner of a firm to enable him to defraud the other partners, the one partner may maintain a joint action with the rest in respect of such *tort* (*g*). A joint-stock company, the shares of which may be increased to an unlimited extent, and be assigned or disposed of by deed or will to any persons at the discretion of the holders, are fraudulent and illegal (*h*).

The non-joinder of a co-contractor as plaintiff, is, in general, a ground of nonsuit. Action by one of several.

A surviving partner cannot recover in *assumpsit* without naming his deceased partner in the declaration (*i*), for there is a variance. But where money is owing to two partners, and after the death of one it is paid to a third person, the survivor may maintain an action for money had and received to his own use (*k*).

On an execution against one of several partners, the purchaser of his interest in partnership property becomes tenant in common with the rest (*l*).

The party with whom the contract has been expressly made may alone *sustain the action, although it turn out that another person, whose name *804
was not mentioned, is secretly interested (*m*).

Where business has been carried on in the names of several, one of them may still support an action of *assumpsit*, provided he expressly prove that the others were not in fact partners (*n*); and a party in whose name the

(*f*) *Biggs* v. *Lawrence*, 3 T. R. 454. See *Clugas* v. *Peneluna*, 4 T. R. 466. *Waymell* v. *Read*, 5 T. R. 599.

(*g*) *Longman* v. *Pole*,[1] 1 Mood. & M. C. 223.

(*h*) *Blundell* v. *Windsor*, 8 Sim. 601.

(*i*) *Jell* v. *Douglas*,[2] 4 B. & A. 374. *Richards* v. *Heather*, 1 B. & A. 29. *Webber* v. *Tivill*, 2 Saund. by Serj. Will. 121, n. 1. *Israel* v. *Simmons*,[3] 2 Starkie's C. 356. Where a partnership is determined by death, it survives in many cases as to the legal title, but not as to the beneficial interest. Per Ld. Eldon, C., in *Crawshay* v. *Collins*, 15 Ves. 227. If a partner die, the debts and effects survive, but the survivor is a trustee in equity, 1 Ves. 248. *Croft* v. *Pyke*, 3 P. W. 182. *Exparte* Ruffini, 6 Ves. 126. 1 Madd. ch. 76. "Hereby it is manifest, that survivor holdeth place generally, as well between joint tenants of goods and chattels in possession or in right as joint tenants of inheritance." 1 Ins. 182. See the diversities between a naked trust and one joined to an estate or interest. Ib. 181. And between authorities created by parties and those created by law for the sake of justice. Ib.

The law will take notice of the *Lex Mercatoria*, as that there is no survivorship. Per Powell, J. *Bellasis* v. *Hesler*, Lord Ray. 281. See *Jefferies* v. *Small*, 1 Ves. 217.

(*k*) *Smith* v. *Barrow*, 2 T. R. 476.

(*l*) *Chapman* v. *Coops*, 3 B. & P. 289. And the purchaser takes subject to the rights of the other partner. Per Lord Mansfield, *Fox* v. *Hanbury*, Cowp. 449. 1 Salk. 392. *West* v. *Skipp*, cited Cowp. 449. Per Lord Hardwicke. If a creditor of one partner take out execution against the partnership effects he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner. The transfer merely gives a right to an account, each partner having an interest not in the whole, but in the surplus. Per Lord Eldon, in *Dutton* v. *Morrison*, 17 Ves. 201. And see S. P. 5 Madd. Chancery, 76; 1 Wightw. 50. See *Tyler* v. *Duke of Leeds*,[4] 2 Starkie's C. 218. The sheriff must sell the debtor's share and make the purchaser tenant in common. *Holmes* v. *Mentze*,[5] 4 Ad. & Ell. 127.

(*m*) *Lloyd* v. *Archbowle*, 2 Taunt. 324. *Mawman* v. *Gillet*, Ib. 325. And per Sir James Mansfield, Ibid.: "If you can find out a dormant partner you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication shall not sue you." But see *Skinner* v. *Stocks*,[6] 4 B. & A. 437. *Supra*, *Leveck* v. *Shafto*, 2 Esp. C. 468. *Lucas* v. *De la Cour*, 1 M. & S. 249.

(*n*) The banking trade was carried on in the joint names of the father and son, and the accounts were headed in their joint names in the banking books; and it was held that the father could not maintain a separate action without proof that the son (although proved to be a minor) had no share in the business.

[1]Eng. Com. Law Reps. xxii. 297. [2]*Id.* vi. 451. [3]*Id.* iii. 380. [4]*Id.* iii. 322. [5]*Id.* xxxi. 42. [6]*Id.* vi. 478.

business has been carried on as a co-partner is competent to prove that in fact he was not a partner (*o*).

Against several.

Proof of partnership.

Secondly. In an action against several, upon a contract on which they are liable as partners, the proof of partnership usually consists in evidence that they have acted as partners in the particular (*p*) business. Less evidence is usually sufficient in this case than is requisite where partners sue as plaintiffs, for there they are cognizant of all the means by which the fact is capable of being proved: but where they are sued as defendants the plaintiff may not be able to ascertain the real connection between the parties; it is sufficient for him to show that they have acted as partners (*q*), and

Teed v. *Elworthy*, 14 East, 210. *Atkinson* v. *Laing*,[1] 1 D. & R. 16. *Parsons* v. *Crosby*, 5 Esp. C. 199. *Leveck* v. *Shafto*, 2 Esp. C. 468.

Where the contract was originally entered into by *A.* for himself and partner, under the name of "H. and Sons," held that it was not necessary to join parties who were by a subsequent agreement to have a share in the contract. *Havill* v. *Stephenson*,[2] 4 C. & P. 469.

In an action for business done by the plaintiff, as an attorney, it being proved that his son's name was joined as a partner, in letters, and on the door of the office, but he swore that he was not in fact a partner; held that the plaintiff was not entitled to maintain the action alone if the son were believed, notwithstanding the evidence might be sufficient to render them jointly liable in an action for negligence. *Kell* v. *Nainby*,[3] 10 B. & C. 20.

A father and son, being joint farmers, the son died, and the father carried on business for benefit of himself and next of kin. Held that the property was well laid in the father and son's next of kin. *R.* v. *Scott*, Russ. & Ry. C. C. 13; and *R.* v. *Gaby*, Ib. 178. *D.* and *C.* were partners, *C.* died intestate, leaving a widow; the widow acted as partner. Stolen property was held to be well laid in *D.* and *W.*

(*o*) *Glossop* v. *Colman*,[4] 1 Starkie's C. 25.

(*p*) Partners in a particular concern are not liable in respect of transactions foreign to that concern unless they have held themselves out to others as partners in such transactions. See below, notes (*r*) and (*s*).

(*q*) Even although the partnership is by deed (*Alderson* v. *Clay*,[5] 1 Starkie's C. 406). To make one liable as partner, there must either be an actual contract to share in profit and loss, or he must have permitted his credit to be pledged by the use of his name as a partner (*Hoare* v. *Dawes*, Doug. 371). An agreement to share profits alone raises a liability, in point of law, to losses with respect to creditors (*Hesketh* v. *Blanchard*, 4 East, 146. *Waugh* v. *Carver*, 2 H. B. 247). Where a debtor and creditor agree to be jointly concerned in an adventure abroad, which is to be purchased by the debtor, and the returns are to be paid to the creditor in satisfaction of the debt, both are liable as partners to vendors from whom the debtor in consequence purchases goods abroad. *Gouthwaite* v. *Duckworth*, 12 East, 421. And see *Waugh* v. *Carver*, 2 H. B. 235, and *Gardiner* v. *Childs*,[6] 8 C. & P. 345. *A.* directs *B.*, a broker, to buy goods, and it is agreed that *B.* shall be interested therein one-third, acting in the business free of commission, and the concern is afterwards treated as a joint one; it was held that *B.* had power to pawn the goods, there being no ground for imputing fraud or collusion. *Reid* v. *Hollingshead*,[7] 4 B. & C 867.—The *communion of profit and loss* is the true test of partnership. An agreement by several to take aliquot parts of a commodity to be purchased by *A.*, where there is no agreement for a re-sale, does not make them partners (*Coope* v. *Eyre*, 1 H. B. 37). An agent whose wages are paid by a proportion of the profits, is not a partner (*Meyer* v. *Sharpe*,[8] 5 Taunt. 74). [*Rice* v. *Austin*, 17 Mass. R. 197.] If *A.* be paid by a *portion* of the profits, he is as to third persons a partner; but if he be paid by a sum in *proportion* to the profits, it is otherwise. *Ex parte Hamper*, 17 Ves. 404. Per Lord Eldon, *Ex parte Rowlandson*, 1 Rose, 91. *Grace* v. *Smith*, 2 Bl. 398. An agreement that *A.* shall make purchases for *B.*, and in lieu of brokerage, have *one-third of the profits* arising from sales, and bear a proportion of the losses, makes him a partner as to third persons. Per Holroyd, J., *Smith* v. *Watson*,[9] 2 B. & C. 409. An agreement that *A.* for his labour shall share the profits made by *B.*'s vessel, constitutes them partners as to third persons; *secus*, of an agreement that he shall receive half the gross earnings. In the former case there is a communion of profit and loss; the latter is merely a mode of payment for labour. *Dry* v. *Boswell*, 1 Camp. 329. See *Wish* v. *Small*, Ib. 331. *Benjamin* v. *Porteous*, 2 H. B. 590. *Mair* v. *Glennie*, 4 M. & S. 240. *Cheap* v. *Cramond*,[10] 4 B. & A. 663. *Wilkinson* v. *Frazier*, 4 Esp. C. 182. *R.* v. *Hartley*, Russ. & Ry. C. C. L. 139. Joint proprietors of a coach, each of whom provides horses for his own stage, but who share the gross proceeds, are not, it seems, jointly liable for goods supplied for the horses (*Barton* v. *Hanson*, 2 Taunt. 49); but *qu.* whether the particular agreement *inter se* was not known. [See *Wetmore* v. *Bakar*, 9 John. R. 307.] Where *A.*, *B.*, *C.* and *D.* were partners in a coach concern, but *A.* provided coaches and horses at a certain allowance per mile, it was held that *A.* alone was liable for the repairs of the coach, to one who knew the agreement, although the names of all appeared on the coach. *Hiard* v. *Bigg and another*, per Holroyd, J., Winch. Sp. Ass. 1819, Mann. Ind. 220. But they are jointly liable to one who sends goods. Ibid. So for any damage done in the management of the coach. Ibid. And see *Waland* v. *Elkins*,[11] 1 Starkie's C. 272, and *Green* v. *Beesley*,[12] 2 Bing. N. C. 108. *A.* agreed to carry a mail from *M.* to *N.* at so much a mile, the money received for parcels to be equally divided, and losses borne equally; they were held to be partners. Ibid. Executors who continue the share of a deceased partner in trade, for the benefit of the deceased partner's infant child, are liable as

[1] Eng. Com. Law Reps. xvi. 415. [2] *Id.* xix. 477. [3] *Id.* xxi. 17. [4] *Id.* ii. 279. [5] *Id.* ii. 445. [6] *Id.* xxxiv. 420. [7] *Id.* x. 460. [8] *Id.* i. 20. [9] *Id.* ix. 122. [10] *Id.* vi. 556. [11] *Id.* ii. 337. [12] *Id.* xxix. 275.

that by their *habit and course of dealing, conduct and declarations, they have induced those with whom they have dealt to consider them to be partners (*r*). Hence if a person has represented himself to be a partner, and has been trusted as such, he is bound by that representation, and it is no defence for him to show that he was not in fact a partner (*s*). One who

partners. *Wightman* v. *Townroe*, 1 M. & S. 412. One of several joint proprietors of a ship, who assigns his interest to another, the register remaining joint as a collateral security, is liable for repairs. The amount or proportion of profit received is not material. *R.* v. *Dodd*, 9 East, 527.—It frequently happens that a partner in a firm may be considered a third person in transactions between the firm and a party with whom the firm deals (per Eyre, C. J., *Bolton* v. *Puller*, 1 B. & P. 546, 7). [*Gill* v. *Kuhn*, 6 Serg. & R. 333.] But in actions by the firm, the liability of any one partner as a defendant is a bar to the action. *Supra*, 241, and 802. The knowledge of participation in profits by one who seeks to charge the participator as a partner is not material. *Ex parte Geller*, 1 Rose, 297. See *Vere* v. *Ashby*,[1] 10 B. & C. 288.

(*r*) If it can be proved that the defendant has held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he is liable to the plaintiff on all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. Per Parke, J., in *Dickinson* v. *Valpy*,[2] 10 B. & C. 140. To prove the liability of *G.* as the partner of *S.*, evidence that a former partner with *S.* introduced *G.* to the witness as an in-coming partner, and that afterwards he (the witness) reported that *G.* and *S.* were partners, is admissible, although neither *G.* nor *S.* were present at the time when the witness so reported. *Shott* v. *Strealfield*, 1 Mo. & R. 8.

(*s*) As to the general principle, vide *supra*, 40. In an action against the defendant as a partner and shareholder in a joint-stock mining company, for goods supplied to the firm, it was held that it was necessary to prove either that she was in fact a partner, or that she had induced the plaintiff to suppose that she was a partner, and that it was insufficient to show by letters and conversations that the defendant had admitted herself to be a shareholder, or to show payment of money on account of shares. *Vici* v. *Lady Anson*,[3] 7 B. & C. 409. Where, in an action by the indorsee of a bill of exchange drawn and accepted by order of the directors of a mining company, it was proved that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines, and that the defendant had applied to the secretary of the company for shares, some of which had been appropriated to him, and that he had paid an instalment of 15*l.* per share, attended the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders, the Court were inclined to think that there was not sufficient evidence to show that the defendant had either actually become a partner, or held himself out to the world as such, and that at all events it was necessary to prove that the directors had authority to bind the members by drawing and accepting bills of exchange, of which there was no sufficient evidence. *Dickinson* v. *Valpy*,[2] 10 B. & C. 128. A prospectus was issued for a distillery company, with a capital of 600,000*l.*, and 12,000 shares, and to be conducted pursuant to the terms of a deed to be drawn up; all persons who did not execute the deed within eighty days after it was ready, were to forfeit all interest in the concern. No more than 7,500 were ever allotted, only 2,300 persons paid the first deposit, only 1,106 the second, and only sixty-five signed the deed; and the directors, after the time for paying the second instalment had elapsed, advertised that persons who had omitted to pay had forfeited their interest in the concern. Held, that an application for shares, and payment of the first deposit, did not constitute a partner one who had not otherwise interfered in the concern, and that the insertion of his name by the secretary of the company in a book containing a list of the subscribers, was not a holding himself out as a partner. *Fox* v. *Clifton & others*,[4] 6 Bing. 776. Where, in contemplation of forming a company for distilling whiskey, the following prospectus was issued in May, 1825: "The conditions upon which this establishment is formed, are, the concern will be divided into twenty shares of 100*l.* each, five of which to belong to *A. B.*, the founder of the works, the other fifteen subscribers to pay in their subscriptions to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for: the concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October; ten per cent. to be paid into the bank on or before the 1st of June next:" held, that this prospectus imported only that a company was to be formed, not that it was actually formed, and that a person who subscribed his name to this prospectus, and who was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the distillery, which were afterwards taken, and solicited others to become shareholders, but never paid his subscription, were not chargeable as a partner for goods supplied to the company. *Bourne* v. *Freeth*,[5] 9 B. & C. 632. But in *Perring* v. *Hone*,[6] 4 Bing. 28, where the plaintiff's name was entered in a book with those of several other subscribers to a projected joint-stock company, and he received scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to the deed, yet it was held that he was a partner, and that all who subscribed to the fund must be taken to have assented to the deed. In this case the Court seem to have considered that the plaintiff became a partner by being an original subscriber to the undertaking. And in *Lawler* v. *Kershaw*,[7] 1 M. & M. 93, it was held by Lord Tenterden, C. J., at Nisi Prius, that a party paying a deposit on shares in a trading company, and afterwards signing a deed of partnership, was to be considered as a partner from the time of the deposit. Evidence that *A. B.* had contributed to the funds of a building society, and had been present at a meeting of the society, and was a party to a resolution that cer-

[1]Eng. Com. Law Reps. xxi. 79. [2]*Id.* xxi. 41. [3]*Id.* xiv. 63. [4]*Id.* xix. 233. [5]*Id.* xvii. 460. [6]*Id.* xiii. 328. [7]*Id.* xxii. 261.

By one as manager, &c.

lends his name to *a firm, although he receives no part of the profits of the trade, is liable on *the engagements of the firm (*t*), to one who is ignorant *807 of the real fact (*u*).

In an action by one as manager of a district banking company, the return to the Stamp-office under the stat. 7 Geo. 4, c. 46, is not the only admissible evidence of his being one of the public officers; the fact may be proved *aliunde* (*x*).

Where bills drawn on *A.* and Co. are accepted by *B.* in the name of *A.* and Co., it is evidence against *B.* that he is a partner (*y*).

A party cannot be liable merely as a partner unless he was a partner at the time of the contract (*z*); and therefore although the acts and admissions of a party, made subsequently to a contract, may be used as evidence to show that he was a partner at the time of the contract, yet if it be clear that he was not then a partner, no subsequent admission will render him liable in point of law (*a*). Thus one who has been admitted into the firm is not responsible for goods previously sold and delivered, even although he acknowledge his liability, and accept a bill for the amount (*b*).

Admissions.

Although the declaration or admission of each individual member of a firm, that he is a partner, is evidence to charge himself, it is no evidence of the fact against any other party (*c*) (A).

tain houses should be built, was held to be sufficient to make him liable in an action for building those houses, without any proof that he had any actual interest in the houses, or in the land on which they were built. *Braithwaite* v. *Schofield*,[1] 9 B. & C. 401. By the rules of the company, upon the transfer of shares, the party transferring ceased to be a proprietor from the time the transfer was registered, and the person purchasing was not to be deemed a proprietor until he executed the deed: upon a plea, in an action against the company, that the promises, if any, were made jointly with one of the plaintiffs, a co-proprietor; there being evidence by the letters of such party that he was a share-holder, although there was no actual proof of his having executed the deed (it having been done under a power of attorney not produced), and there having been no transfer of his shares, it was held he had not relieved himself from his liability as a partner. *Harvey* v. *Kay*,[2] 9 B. & C. 356. An action was brought against two, for goods supplied to a mining company, originated in fraud, but of which the jury found the defendants to have been ignorant, they had never signed the partnership deed, and had transferred their scrip before the action brought, but both had attended a meeting of the company; it was held that they were liable. *Ellis* v. *Schmœck*,[3] 5 Bing. 521. The defendants consented to become directors of a proposed company, for which an Act was intended to be obtained, and they paid instalments on the number of shares necessary to qualify them as directors, and attended meetings, and the contract with the defendant for certain works was by tender sent in to the directors, in consequence of an advertisement to receive proposals; held, that having held themselves out or allowed themselves to be represented to the public as directors, and done no act to divest themselves of that character, they were liable. *Doubleday* v. *Muskett*,[4] 7 Bing. 110. And see *Nockells* v. *Crossby*,[5] 3 B. & C. 814. *Cromford* v. *Lacy*, 3 Y. & J. 80. *Vere* v. *Ashby*,[6] 10 B. & C. 288.

(*t*) *Guidon* v. *Robson*, 2 Camp. 302. The consent of the party is of course necessary. *Newsom* v. *Coles*, 2 Camp. 617; 2 H. Bl. 235. As by allowing his name to be exposed over a shop door, or to be used in invoices, bills of parcels, or advertisements. *Fox* v. *Clifton*,[7] 6 Bing. 794; 4 M. & P. 714.

(*u*) *Alderson* v. *Pope*, 1 Camp. 404, n. See *Teed* v. *Elworthy*, 14 East, 214. And see *Kell* v. *Nainby*,[8] 10 B. & C. 21. *De Berkom* v. *Smith*, 1 Esp. C. 29. *Ridgway* v. *Broadhurst*, 1 C. M & R. 415.

(*x*) *Edwards* v. *Buchanan*,[9] 3 B. & Ad. 788. It is sufficient in such case, if in the return the party be described as *A. B.* of, &c. esq., a public officer of the co-partnership. The right to sue is not defeated by the omission of the places of abode of one or more partners in the return. *Armitage* v. *Hornen*,[9] 3 B. & Ad. 793.

(*y*) *Spencer* v. *Billing*, 3 Camp. 312. And it was said that it may be shown that bills have been invariably accepted in this way, without producing them, per Lord Ellenborough, C. J.

(*z*) See the cases cited below, 810, note (*s*). There is no distinction between trading and mining companies; and where a party takes shares in a concern, on a prospectus holding out that a certain capital is to be raised for carrying it on, he will not be liable as a partner unless the terms of the prospectus be fulfilled, or it be shown that he knows and acquiesces in the directors carrying it on with a less capital; where the jury negatived such knowledge or acquiescence, and found the defendant not liable, the Court held the finding right. *Pitchford* v. *Davis*, 5 M. & W. 2.

(*a*) *Saville* v. *Robertson*, 4 T. R. 720. (*b*) Ibid. But he would be liable on the bill.

(*c*) Vide *supra*, 31.

(A) (The declarations of one of several partners cannot be given in evidence to prove a partnership, they

[1]Eng. Com. Law Reps. xvii. 404. [2]*Id.* xvii. 391. [3]*Id.* xv. 526. [4]*Id.* xx. 67. [5]*Id.* x. 237. [6]*Id.* xxi. 79. [7]*Id.* xix. 233. [8]*Id.* xxi. 17. [9]*Id.* xxiii. 187.

An affidavit for the registry of a ship, made by *A.*, stating that *A.* and *B.* are the owners, is not evidence of the fact against *B.* (*d*).

Where two of three defendants in *assumpsit* were outlawed, it was held that a letter written by the third, who had pleaded *non-assumpsit*, in which he admitted the partnership, was evidence of the fact (*e*).

An admission by *A.*, in the discussion of a particular transaction, that he is a partner with *B.*, is not evidence to bind him as a partner in any other matter unconnected with the particular transaction (*f*). But if *A.* publicly *and generally represent himself to be a partner of *B.* it will be evidence *808
to prove his liability as a partner on a contract unconnected with the real object of the partnership (*g*).

Where *A.* made an entry at the Excise-office of himself and *B.* as joint dealers in beer, according to the statute, it was held that this was not conclusive evidence of the partnership, in an action by a private person against *A.* (*h*); but with respect to the Crown the entry would have been conclusive against *A.* (*i*).

The record of an issue out of the Exchequer, to try the fact of the partnership of *A.* and *B.* has been admitted as evidence in an action against *A.* and *B.* to charge them as partners (*k*).

When the fact that several parties are partners has once been established, the act or declaration of the one relating to the subject-matter of the partnership is evidence against the rest; although the partner whose acts or declarations so given in evidence be no party to the suit (*l*), or although the admission be made after a dissolution of the co-partnership (*m*) (A).

(*d*) *Tinkler* v. *Walpole*, 14 East, 226. *M'Iver* v. *Humble*, 16 East, 169. *Flower* v. *Young*, 3 Camp. 240. *Smith* v. *Fuge*, 3 Camp. 456. *Ditchburn* v. *Spracklin*, 5 Esp. c. 31 [and Mr. Day's note]. An unsigned entry in the office for licensing stage-coaches, is not evidence that the persons named in the license are the owners (*Strother* v. *Willan*, 4 Camp. 24). The entry of a cart in the books of a tax-gatherer, as the joint property of *A.* and *B.*, is not evidence against them, without proof that they authorized the entry. *Weaver* v. *Prentice and another*, 1 Esp. C. 369.

(*e*) *Sangster* v. *Mazaredo*,[1] 1 Starkie's C. 161.

(*f*) *De Berkom* v. *Smith*, 1 Esp. C. 29, cor. Lord Kenyon, C. J. Where two defendants, who were sued as acceptors, were joint agents of a regiment, but not otherwise connected, and in the habit of accepting bills by a clerk, it was held to be no defence that the bill was accepted by one for his own benefit, and that this might have been known by inquiry of the clerk, if there were no proof of fraud, or of the holders being cognisant of the circumstances. *Sanderson* v. *Brooksbank*,[2] 4 C. & P. 286. In an action against several for breach of contract for building an engine, made by one in the name of *B. & Co.* he, being asked what other persons constituted the firm, endorsed the names of the other defendants, and one of them being asked whether the endorsement by *B.* was correct, answered that it was; and it appeared also that he was occasionally present at the factory, inquiring how the engine was going on, but it being proved in fact, that he had but a limited interest in the concern; it was held that it was a question for the jury whether his admission and acts were referable to such limited interest or not, and the jury having found that he was not a partner, the Court refused a new trial. *Ridgway* v. *Philip*, 1 C. M. & R. 415; 5 Tyr. 131.

(*g*) Ibid. (*h*) *Ellis* v. *Watson and others*,[3] 2 Starkie's C. 453. (*i*) Ibid.

(*k*) *Whatley* v. *Menheim & Levy*, 2 Esp. C. 608. Lord Kenyon thought it was conclusive evidence, but left the fact to the jury. The proceedings in the Exchequer suit would clearly be evidence against the party who alleged the partnership; such evidence would operate by way of admission. But *qu.* how far the record would be evidence of the fact as against the defendant, who denied the partnership; as to him, it should seem that the record would, in principle, have no more operation than it would have had in case he had contested the fact of partnership with a stranger. Vide *supra*, Vol. I. tit. JUDGMENT. See *Studdy* v. *Sanders*,[4] 2 D. & R. 347.

(*l*) *Supra*, 30; and *Thwaites* v. *Richardson*, Peake's C. 16. *Whitcomb* v. *Whiting*, Doug. 652. Such an admission, in order to take the case out of the Statute of Limitations, ought to be clear and unequivocal. Per Lord Ellenborough, *Holme* v. *Green*,[5] 1 Starkie's C. 488.

(*m*) *Wood* v. *Braddick*, 1 Taunt. 104.

are testimony only against the party making them. *M'Pherson* v. *Rathbone*, 7 Wend. 216. *Nelson* v. *Lloyd*, 9 Watts, 22. *Corps* v. *Robinson*, 2 Wash. C. C. R. 388. But if the defendant first gives in evidence their declarations to disprove a partnership, then the plaintiff may also give the same kind of evidence to produce a different result. *Nelson* v. *Lloyd*, *supra*.)

(A) (In cases of partnership, the confession of one partner in relation to a partnership concern is, in gene-

[1] Eng. Com. Law Reps. ii. 338. [2] *Id.* xix. 388. [3] *Id.* iii. 427. [4] *Id.* xvi. 93. [5] *Id.* ii. 479.

The principles upon which the admissibility of such evidence depends, and some of the decisions on the subject, have already been referred to (*n*).

*809 *It is sufficient to prove that a co-defendant in *assumpsit* is a dormant partner with the rest (*o*); it is at the option of the plaintiff to join him as

(*n*) The question to what extent the acts of one partner are binding upon another, with reference to the subject-matter of the co-partnership, is one of law. One partner may bind another partner in trade by drawing or accepting bills of exchange; *supra*, 205; such an authority is inferred from the ordinary course of partnership dealings (*Rooth* v. *Janney*, 7 Price, 193), unless the latter give express *notice* that he will not be bound, or unless *covin* be practised between the partner and the taker of the bill (Ibid). An acceptance by one partner in the name of the firm for his own debt, after a secret act of bankruptcy, is binding against the firm in favour of an innocent indorsee. *Lacy* v. *Woolcot*,[1] 2 D. & R. 460. But a partner cannot, by drawing bills in his *own* name, and procuring them to be discounted, render a co-partner liable, although the produce was actually carried to the partnership account; *Emly* v. *Lye*, 15 East, 6; and although the discount was procured by an agent who had procured bills drawn by the firm to be discounted by the same banker. Ibid. *Secus*, where the firm trade in the name in which the bill is drawn. *South Carolina Bank* v. *Teague*, 9 B. & C. 427. And where *A.* and *B.* agreed to take a farm from *C.* and pay him for certain articles by bills at three months, and *C.* afterwards, without the knowledge of *A.*, took bills from *B.* payable at six and twelve months, accepted by himself in his own and *A.*'s names, it was held that as that was done without the assent of *A.*, *C.* would not recover on the bills. *Greenslade* v. *Dower*,[2] 7 B. & C. 635. One partner has not authority to bind another by deed (*Harrison* v. *Jackson*, 7 T. R. 207), [*Green* v. *Beals*, 2 Caines R. 254]; {*Gerard* v. *Busse*, 1 Dull. 119; *Clement* v. *Brush*, 3 John. Ca. 180}; or by a guaranty of the debt of a third person (*Duncan* v. *Lowndes*, 3 Camp. 478. {*Sutton* v. *Irwine*, 12 Serg. & R. 13; *New York F. Ins. Co.* v. *Bennett*, 5 Conn. R. 575. *Foot* v. *Salin*, 19 John. R. 154.} A part-owner of a ship has no authority to insure on account of the rest, although a partner has (*Hooper* v. *Lusby*, 4 Camp. 66). One partner in a contract with Government, has no authority to pledge goods consigned to him by another partner, for the purpose of performing the contract (*Smith* v. *Burridge*, 4 Taunt. 684). One partner possesses no general authority under a power of attorney, granted to a co-partner. *Edminston* v. *Wright*, 1 Camp. 88. See *Warner* v. *Hargrave*, 2 Roll. R. 393; 2 Ch. C. 202. *Parker* v. *Kett*, 1 Salk. 95. The *implied* authority of one partner to bind another is generally limited to such facts as are in their nature essential to the general object of the partnership; as the borrowing of money for the defraying of the expenses of a partner in transacting the business of the house (*Rothwell* v. *Humphreys*, 1 Esp. C. 406), or the purchasing of goods, although one partner fraudulently converts them to his own use, unless the seller be privy to the fraud. (*Bond* v. *Gibson*, 1 Camp. 185). [See *Marsh* v. *Gold*, 2 Pick. 285.] One of several partners may pledge the goods, if it be done without fraud or collusion on the part of the partner. *Reid* v. *Hollingshead*,[3] 4 B. & C. 867. *Tupper* v. *Haythorn*, Gow. 135. *Ex parte Gillow*, Rose, 205. A partnership cannot acquire property by the fraud of one of the partners. *Reilly* v. *Wilson*,[4] 1 R. & M. C. 178. The knowledge of one that a trader is insolvent, affects all. One partner cannot bind another by submission to arbitration. *Adams* v. *Bankart*, 1 C. M. & R. 681. S. P. *Boyd* v. *Emerson*, 4 N. & M. 106,[5] 2 Ad. & Ell. 184. Where one of three partners, in two Scotch firms, all being partners in English firms, executed a trust-deed in favour of Scotch creditors; held not to be an act within the authority of a partner according to the English law, and that the general assignees of all who had become bankrupt could not homologate it. *Douglas* v. *Brown*, 1 Dow. & C. 71.

(*o*) *Swann* v. *Heald*, 7 East, 209. *Grellier* v. *Neald*, Peake's C. 146. And per Sir J. Mansfield, in *Lloyd* v. *Archbowle*, 2 Taunt. 324. A sleeping partner is liable, or he could receive usurious interest without risk. Per Lord Mansfield, in *Hoare* v. *Dawes*, Doug. 356. Where a partner by an acceptance pledges the partnership name, of whomsoever it may consist, and whether the partner be named or not, and whether known or secret partners, the partnership will be bound, unless the title of the party seeking to charge them can be impeached; but where the partnership acceptance was only in part pledged to satisfy the private debt of such partner, with the knowledge of the taker as to such part only being his separate debt; held, that the secret partner was liable as to so much as was not, to the knowledge of the taker, applied in fraud of the partnership. *Wintle* v. *Crowther*, 1 Cr. & J. 316, and 1 Tyrw. 216. Although a partner going abroad to establish a branch concern, exceeds his powers in respect of the extent of his dealings, indorsing bills for the purpose of such dealings in his own name, the firm in England subsequently sanctioning the transactions which were for the benefit of the firm, are bound as indorsees. *South Carolina Bank* v. *Case*,[6] 8 B. & C. 427. *Ashley, Rowland & Shaw* being partners, but under an agreement that the name of *Shaw* should not appear, a bill was drawn, addressed to the firm of *Ashley & Co.*, and was accepted by *Rowland* in the name of *Ashley & Rowland;* no fraud being found, and a consideration having been given for the bill by the payee to the drawer, it was held that the action was maintainable, notwithstanding the variance between the names of those to whom the bill was addressed and those by which it was accepted. *Lloyd* v. *Ashley*,[7] 2 B. & Ad. 23.

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ral, admissible in an action against the other. Such a confession is admissible to take a case out of the Statute of Limitations, and to establish not merely the amount but the existence of a joint demand even when made after the dissolution of the partnership. *Corps* v. *Robinson*, 2 Wash. C. C. R. 338. *Contra*, *Baker* v. *Stackpoole*, 9 Cow. 423—as to admissions made after a dissolution of the firm.)

[1]Eng. Com. Law Reps. xvi. 101. [2]*Id.* xiv. 106. [3]*Id.* x. 460. [4]*Id.* xxi. 409. [5]*Id.* xxix. 68. [6]*Id.* xv. 256. [7]*Id.* xxii. 17.

a defendant (*p*). But the liability of a dormant partner who withdraws, though recently, ceases in respect of future transactions, as regards those who were ignorant of the partnership (*q*).

But it is not sufficient to show that one of the defendants became a partner *after the time of the contract (*r*), or that he was by agreement afterwards permitted to share in the adventure (*s*). Defence. *810

As the authority of one partner to bind another is merely presumptive (*t*), the presumption may be rebutted by evidence that the partner gave express notice to the plaintiff that he would not be responsible for the acts of another. Thus if *A.*, being partner with *B.*, give notice to a creditor to deliver no goods to *B.* without *A.*'s concurrence, the creditor cannot recover for goods delivered to *B.* without proof that *A.* adopted the sale, or derived benefit from the goods (*u*) (1).

Again, if one partner give notice that he will not be responsible for bills drawn in the name of the firm, he will not be liable to a party who takes such bills after the notice, even although the latter has given a valuable consideration for them (*x*).

The presumption may also be rebutted by proof of fraud or covin between a co-partner and another (*y*). As by evidence that the bill was given by two of three partners in payment of a debt due from the two previous to their partnership with the third (*z*). Fraud.

(*p*) *Lloyd* v. *Archbowle*, 2 Taunt. 324. *Ruppell* v. *Roberts*,[1] 4 N. & M. 31. The rule, however, does not extend to an express written contract, formally made between the parties. *Beckham* v. *Knight*,[2] 4 Bing. N. C. 243. For an express contract excludes mere presumption.

(*q*) *Carter* v. *Wholley*,[3] 1 B. & Ad. 11; *Heath* v. *Sansom*,[4] 4 B. & Ad. 172; and see *Keating* v. *Marsh*, 1 Mont. & Ayr. 570.

(*r*) The defendant on the 24th June agreed that he was to be considered a partner with *A.* and *B.* from the 18th of May previously, but that his name should not appear, and he continued to be a partner until the 21st of September following. The plaintiffs, who before and after the agreement had been the bankers of the firm, discounted one bill for them on the 21st of May, and two others on the 13th July, and placed the amount to the partnership account, but were ignorant of the defendant being a partner until the winding up of the account; held, that the defendant was not liable on the first, when he was not in fact a partner, nor his credit pledged, but that he was for the latter. *Vere* v. *Ashby*,[5] 10 B. & C. 288. But where two parties agree to enter into partnership by a deed to be executed on a day stated, but which was in fact executed on a later day, it was held that one was bound by a contract entered into by the other during the interval between the two days. *Batly* v. *Lewis*, 1 M. & S. 155; 1 Scott, N. S. 143. Negotiations take place with a view to the defendant's taking an interest in a building speculation, and buildings are erected which are to be valued; the defendant afterwards expressly contracts to become a partner from the date; the partnership being prospective only, the defendant is liable only from the date. *Howell* v. *Brodie*, 6 Bing. N. C. 44.

(*s*) *Young* v. *Hunter*, 4 Taunt. 582. And see *Lloyd* v. *Archbowle*, 2 Taunt. 321; *Mawman* v. *Gillett*, 4 Taunt. 325; *supra*, 808.

(*t*) *Rooth* v. *Janney & Quin*, 7 Price, 193. *Note*, the action there was against the firm on a bill accepted by Quin, who had let judgment go by default; the defence by the other defendant Janney was, that the plaintiff had received previous notice of the dissolution of partnership; and the Court of Exchequer held that an answer in equity by Quin, to a bill filed by Janney, was not admissible evidence against Janney to show a continuance of the partnership; sed *qu.* et vide *Grant* v. *Jackson*, Peake's C. 268. *Wood* v. *Braddick*, 1 Taunt. 104.

(*u*) *Willis* v. *Dyson*,[6] 1 Starkie's C. 164.

(*x*) *Lord Galway* v. *Matthew*, 10 East, 264. *Supra*, 205.

(*y*) *Supra*, 205.

(*z*) *Shireff* v. *Wilks*, 1 East, 48. It has been said that the mere single circumstance that the bill has been given in discharge of the separate debt of one partner is not in itself sufficient to raise a presumption of fraud, without some proof that it was without the assent of the rest. *Ridley* v. *Taylor*, 13 East, 175. There the bill was drawn for a larger amount than the particular debt, and it was known to the separate creditor that the indorsement was made by the hand of the partner so indebted to him, and direct evidence might have been given of fraud and covin, if any had existed (2). In the case of *Arden* v. *Sharp & Gilson*,

(1) {If money be lent to one of two partners, who says he borrows it for the firm, and he misapply it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover against the other partner. *Lloyd et al* v. *Freshfield et al.* 2 Car. & Paine, 325.}

(2) {See however *Chazourne* v. *Edwards*, 3 Pick. 5.}

[1]Eng. Com. Law Reps. xxx. 370. [2]*Id.* xxxiii. 342. [3]*Id.* xx. 333. [4]*Id.* xxiv. 44. [5]*Id.* xxi. 79. [6]*Id.* ii. 339.

*But where two firms carry on trade under the same name, one partner being common to both, the members of one firm will be liable on a bill drawn, accepted, or indorsed in the name common to both, although this has been done for the use and benefit of the other firm (*a*). Yet here the claim may, it should seem, be rebutted by evidence of fraud and covin between the partners in the firm for whose benefit the bill is actually used, and the taker.

A partner having obtained a transfer of stock by a forged power of attorney in the name of a customer, the proceeds of which were paid into the partnership account, but afterwards appropriated by him, it was held, that as the other partners might have known the fact had they used due diligence, they were liable at law for money had and received to the use of the customer (*b*).

Where a partner of a firm called the N. and S. W. Coal Co. made a note in the name of the N. Coal Co., payable at a bank where the partnership had no account, it was held to be a question for the jury to say whether it was made with the authority of the firm (*c*).

Dissolution. Where the joint liability results not from a contract expressly made with all the defendants, but from the fact of their partnership, it is competent to the defendant to prove a *dissolution* (*d*) of the co-partnership previous to

2 Esp. C. 524, the plaintiff discounted a bill brought by Gilson, who desired that the business might be kept secret from his partner; and Lord Kenyon held that the action would not lie. And in *Wells* v. *Masterman*, 3 Esp. C. 171, Lord Kenyon said, that if a man have dealings with one partner only, and he draw a bill on the partnership on account of those dealings, he is guilty of fraud. Where *A.*, *B.* and *C.* carried on the cotton trade under the firm of *A.* and *B.* (*C.* not being known to the world as a partner), and *A.* and *B.* traded under the same firm as grocers, and a bill given to them in the cotton business was indorsed in the name of the firm common to both partnerships, and given in payment by *A.* and *B.* for goods received in the grocery business, it was held that *C.* was liable to pay the bill to the holders, although the indorsement was unknown to *C.*, of whom the indorsee had no knowledge at the time of the indorsement. *Swann* v. *Heald*, 7 East, 209.—Where one partner clandestinely drew and accepted a bill in the name of the firm, partly to discharge a debt due from the partnership, and partly to discharge his own private debt, it was held that the payee could recover no more than the debt due from the firm, although money had been paid into court on the count on the bill. *Barber* v. *Backhouse*, Peake's C. 61. See also *Green* v. *Deakin*,[1] 2 Starkie's C. 347.

(*a*) *Baker* v. *Charlton*, Peake's C. 80. *Swann* v. *Heald*, 7 East, 209, and *supra*, n. (*z*). Although one be but a dormant partner. *Ibid.* But where *S.* being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt, the payees indorsed it over, and the indorsees sued the parties who appeared to be makers: held, that this note was made in fraud of *S.*'s partners in the second firm, and could not be enforced against them by the payees, and that at least under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. *Heath* v. *Sansom*,[2] 2 B. & Ad. 291.

(*b*) *Keating* v. *Marsh*, 1 Mont. & Ayr. 570.

(*c*) *Faith* v. *Richmond*, 3 P. & D. 187.

(*d*) The authority of one partner to bind another in respect of partnership property ceases on the dissolution of the partnership. The moment the partnership ceases, the partners become distinct persons; they are tenants in common of the partnership property undisposed of, from that period: and if they send any securities which did belong to the partnership into the world, after such dissolution, all must join in doing so. Per Ld. Kenyon, in *Abel* v. *Sutton*, 3 Esp. C. 110. Where, on the dissolution of partnership between *A.* and *B.*, the latter was entrusted with the settlement of the affairs, it was held that he could not indorse, in the name of the firm, a security, which was part of the joint effects (*Abel* v. *Sutton*, 3 Esp. C. 108, cor. Lord Kenyon. *Kilgour* v. *Finlayson*, 1 H. B. 155); and *qu.* whether *A.* would have been liable on the indorsement, although made during the partnership, if not negotiated until after the dissolution. See *Kilgour* v. *Finlayson*, 1 H. B. 155.—Where *A.*, a partner with *B.* and *C.*, drew a blank bill in the name of the partnership firm, payable to their order, and delivered it to their clerk to be used according to exigency, and *A.* died, and *B.* and *C.* assumed a new firm, and the clerk, inserting a date previous to the death of *A.*, circulated the bill, it was held that *B.* and *C.* were liable to a *bona fide* holder, although they had received no value for the bill. *Usher* v. *Dauncey & others*, 4 Camp. 97; and the Court of K. B. refused a new trial. [See *Putnam* v. *Sullivan*, 4 Mass. R. 45.] One who allows his name to be used after a dissolution of partnership, is liable on a bill drawn in the name of the firm after the holder knew the dissolution. *Brown* v. *Leonard*,[3] 2 Ch. 120. But a bill drawn after an actual dissolution, in the name of the firm, but dated previously to the dissolution, does not bind a former partner if the holder had notice of the dissolution. *Wright* v. *Pulham*,[3] 2 Ch. 120.—Where *A.*,

[1] Eng. Com. Law Reps. iii. 377. [2] *Id.* xxii. 78. [3] *Id.* xviii. 270.

*the contract; this, however, will not be in itself sufficient where the defendants have openly acted as partners, unless *notice* to the plaintiffs of the dissolution be also proved. It is sufficient if the plaintiff in the first instance prove a partnership at a time anterior to the contract; when that is once established, a continuance of the partnership is to be presumed, until a dissolution be proved, and proof of a dissolution will still be insufficient unless reasonable proof be given of notice of the fact to the plaintiff; for although the partnership may in fact have been dissolved, yet if the parties do not announce it, they by their silence induce strangers to trust to the joint credit of the firm as before.

Where a minute of an agreement between partners to dissolve the partnership, made in order to be advertised in the Gazette, and signed by the parties, and attested, is produced in evidence to prove the dissolution, an agreement stamp is necessary (*e*).

Where express notice has been given of the dissolution of the partnership to those with whom the firm have had any dealings (a measure which in prudence ought never to be neglected), the notice must of course be proved in the usual way (*f*). Such notice may also be proved by means of an advertisement in the Gazette, or in a public newspaper; but a newspaper containing such a notice cannot be read in evidence without previous proof either that the plaintiff read an impression of the same paper, or at least that he was in the general habit of reading that paper (*g*). And notice in Notice (A).

B. and *C.*, being partners, ordered goods from abroad, and afterwards dissolved partnership, and assigned their property to trustees for the benefit of creditors, and *A.* and *B.* acted as agents to settle the affairs of the firm, and the goods arrived, and were delivered to *A.* and *B.*, in an action against *A.*, *B.* and *C.* for the freight, it was held that *C.* was not liable. *Pinder* v. *Wilks*,[1] 1 Marsh. 248. Where, after dissolution of a partnership, the defendant accept a bill drawn by one only, it is no defence that by the deed of dissolution it was stipulated that the other partner should receive all debts due to the firm. *King* v. *Smith*,[2] 4 C. & P. 108. After a partnership has been dissolved, one partner cannot bind the other to pay costs as between attorney and client; and a *cognovit*, signed by one in an action against both, was therefore set aside. *Rathbone* v. *Drakeford*,[3] 6 Bing. 375. A partnership firm enter into a joint speculation with the plaintiff and another; the general dissolution of the partnership of the former does not put an end to the partnership in the joint speculation with the latter, nor relieve one partner from the acts of his co-partner in the joint speculation, after the general dissolution. *Ault* v. *Goodrich*, 4 Russ. 430.

Where a bill was drawn upon partners by the name of the *P. & M. Co.*, and accepted by procuration for the company, it appearing that one of the defendants, originally a partner, had withdrawn from the concern before the acceptance given; held, that the defendant not having represented himself to the plaintiff, nor ever appeared publicly as a partner, nor had the plaintiff ever dealt with him as such, no notice of his withdrawing himself was necessary. *Carter* v. *Whalley*,[4] 1 B. & Ad. 11. A notice of dissolution, signed by a partner, is evidence against him of a legal dissolution, though the partnership be created by deed. *Doe* d. *Waithman* v. *Miles*,[5] 1 Starkie's C. 181. Where the concern is entirely put an end to, and nothing left but to get in the debts and settle the credits, one partner cannot pledge the credit of the others; but where a retiring partner gave a general authority to the one who was to wind up the concern to do what he thought proper with the existing securities of the firm; held, that the latter might endorse bills in the partnership name, and it was not necessary that such authority should be by deed or writing. *Smith* v. *Winter*, 4 M. & W. 454.

(*e*) *May* v. *Smith*, 1 Esp. C. 283.

(*f*) *Supra*, tit. Notice. Where printed circular letters have been sent, or duplicates made out, it would be sufficient to produce and prove a duplicate original; but it might still be proper to give notice to produce the original. *Supra*, tit. Notice.

(*g*) *Jenkins* v. *Blizard & another*,[6] 1 Starkie's C. 418.

(A) (General notice in a newspaper of the dissolution of the partnership is sufficient as to all persons who have had no previous dealings with the firm. But as to those with whom the firm has dealt such constructive notice is not enough. Actual notice must be shown, otherwise as to these the act of one of the former firm in the partnership name will bind all the former partners. *Graves* v. *Merry*, 6 Cow. 701. And the fact that sufficient time to give a public notice had not elapsed between the dissolution of a firm and the subsequent making of a note by one of the late partners in the name of the firm, will not excuse the partners from their liability to pay such note in the hands of a *bona fide* holder. *Bristol* v. *Sprague*, 8 Wend. 423.)

[1]Eng. Com. Law Reps. i. 208. [2]*Id.* xix. 299. [3]*Id.* xix. 105. [4]*Id.* xx. 333. [5]*Id.* ii. 347. [6]*Id.* ii. 451.

*the Gazette, if admissible at all, is very weak evidence, if it be not supported by some evidence to show that the plaintiff saw the Gazette (*h*).

There seems indeed to be little if any difference between a notice in the Gazette and a notice in any other newspaper, with respect to contracts of partnership, and other matters which are not of a public and official nature (*i*).

Proof of notice is still requisite, although the plaintiff had no dealings with the partners previous to the actual dissolution of partnership (*k*). But it seems that if notice be given to all the parties with whom the partners have dealt, and be also advertised in the Gazette, it will be presumptive evidence of notice against one who had no previous dealings with the firm (*l*).

Where notice of dissolution has been published in the Gazette, and has been given to the proper parties, the retiring partners are not liable on a contract subsequently made by one of the former firm, although he carries on business in the name of the former firm, unless it can be proved that they either interfered in the business subsequently to the dissolution, or authorized the use of their names (*m*), although the plaintiff was in fact ignorant of the dissolution.

The making an alteration in the description of the partners of a firm of bankers in their printed cheques, is notice to customers, who have used the new cheques (*n*).

Evidence of the general notoriety of the fact of dissolution is not sufficient where no express notice has been given, and no advertisement has been published in the Gazette (*o*).

An infant partner must, on attaining his age, having continued to be a partner up to that time, give notice, in order to relieve him from future liability (*p*).

In the case of a mere secret or dormant partner, it is sufficient to prove an actual dissolution previous to the contract in question, for his liability depends upon the mere fact of partnership, and no credit has been given to him personally as a supposed member of the firm (*q*). But if it appeared that the acting partner had stated the existence of the partnership to one dealing with the firm, notice of the dissolution would be requisite (*r*).

Where it appeared that the plaintiff knew that the defendants intended to dissolve their partnership, and that they were actually carrying that intention into execution, it was held to be incumbent on the plaintiff, who
*814 *relied upon a subsequent contract, to show that their intention had been abandoned (*s*).

(*h*) *Godfrey* v. *Macauley*, Peake's C. 155, n. *Semble*, that notice in the Gazette is notice to all the world. *Wright* v. *Pulham*,[1] 2 Ch. 120.

(*i*) *Infra*, note (*l*).

(*k*) *Parkin* v. *Carruthers*, 3 Esp. C. 248. There the retiring partner allowed his name to continue in the firm. *Graham* v. *Thompson*, Peake's C. 42. *Graham* v. *Hope*, Peake's C. 154.

(*l*) See *Newsome* v. *Coles and others*, 2 Camp. 617. *Godfrey* v. *Turnbull*, 1 Esp. C. 371; where an advertisement in the Gazette is said to have been considered to be presumptive evidence of notice. But see another report of the same case, entitled *Godfrey* v. *Macauley*, Peake's C. 155, n.; from which it seems that the jury were directed to consider the probability that the plaintiff had seen the Gazette. [See *Shaffer* v. *Snyder*, 7 Serg. & R. 503.]

(*m*) *Newsome* v. *Coles and others*, 2 Camp. 617, cor. Lord Ellenborough. For they were not bound to apply for an injunction.

(*n*) *Barfoot* v. *Goodall*, 3 Camp. 147.

(*o*) *Gorham* v. *Thompson*, Peake's C. 42.

(*p*) *Goode* v. *Harrison*,[2] 5 B. & A. 147.

(*q*) *Evans* v. *Drummond*, 4 Esp. C. 89. *Newmarch* v. *Clay*, 14 East, 239.

(*r*) Ibid. Even, as is said, although the communication was made after the actual dissolution; but *qu.* as to the latter point; for by the dissolution the power of the acting partner to bind his former co-partner ceased.

(*s*) *Paterson* v. *Zachariah and another*,[3] 1 Starkie's C. 71.

[1]Eng. Com. Law Reps. xviii. 271. [2]*Id.* vii. 49. [3]*Id.* ii. 300.

Where a secret or dormant partner has retired from the firm, and goods have been supplied previous to the dissolution, and payments have been made by the parties who continue the business, subsequent to the dissolution, it is a question of evidence whether such payments are to be applied to the previous or to a subsequent debt (*t*).

An agreement by a creditor, after notice of dissolution, to transfer the account from the old to the new firm, will be evidence to show that he accepted the latter as his debtors, and will discharge a retiring partner (*u*).

Answer to notice of dissolution.

The plaintiff may rebut the proof of notice of dissolution by evidence of the subsequent conduct and declarations of the co-defendants, tending to induce the world to suppose that the partnership still subsisted, as by proof that they subsequently interfered in the management of the business, or allowed their names to be used, or in any way authorized the parties acting in the concern to make use of their names and credit (*x*).

Plea in abatement.

A defendant cannot take advantage of the non-joinder of others as co-defendants (*y*), except by plea in abatement; upon issue joined on this plea the *onus probandi* usually lies upon the defendant (*z*). And the plaintiff in *indebitatus assumpsit* against a surviving partner, may recover a debt due from such survivor, though the declaration make no mention of the latter (*a*). It will not be sufficient to prove, upon issue taken on this plea, that he has a secret partner (*b*).

Non-joinder.

Where one of several partners promised individually to pay the debt, *without making any mention of his partners, it was held to be conclusive evidence that the debt was due from him individually (*c*). *815

Actions, *inter se.*

Thirdly. Where the parties contest the question of partnership *inter se* (*d*), it seems that such evidence as would be sufficient to establish their partnership in a suit by a stranger, will raise a presumption of the fact of partnership *inter se* (*e*).

(*t*) *Newmarch* v. *Clay*, 14 East, 239. There goods had been furnished subsequently to the secret dissolution of the secret partnership, and bills which had been given, previous to the dissolution of the partnership, for goods previously sold, having been dishonoured, were given up to the continuing partners, they giving new bills which were sufficient to cover the debts incurred previous to the dissolution, although not sufficient to cover the goods subsequently furnished, and it was held that the transaction afforded evidence of an appropriation of the new bills to discharge the old debt.

(*u*) *Kirwan* v. *Kirwan*, 2 C. & M. 617. And see *Hart* v. *Alexander*, 2 M. & W. 484.

(*x*) See *Newsome* v. *Coles*, 2 Camp. 617.

(*y*) In what cases contracts are joint, and when several, is of course a question of law. A contract made by two partners to pay a certain sum of money to a third person, equally, out of their own private cash, is a *joint* contract. (*Byers* v. *Dobey*, 1 H. B. 236). A trader retiring from business lends money to his partner, and receives, by agreement, an annuity, to be paid for a specified number of years; this is not a continuance of the partnership (*Grace* v. *Smith*, 2 Bl. 298). The consignment of a bag of dollars to *A.*, with directions to pay over a specified number to *B.*, does not make them joint-tenants. *Jackson* v. *Anderson*, 4 Taunt. 24.

(*z*) Vide *supra*, p. 2. The practice upon the question, whether the plaintiff's or defendant's counsel shall begin, has not been uniform (see *Pasmore* v. *Bousfield*,[1] 1 Starkie's C. 296. *Roby* v. *Howard*,[2] 2 Starkie's C. 555). In such cases the question as to damages does not arise until the issue on the plea has been determined; and the more convenient course seems to be to try the issue first, the defendant's counsel beginning. This course was adopted by Bayley, J. at York Summer Assizes, 1821.

(*a*) *Richards* v. *Heather*, 1 B. & A. 29. A demand against a surviving partner as such may be joined with a demand due from him individually. *Golding* v. *Vaughan*,[3] 2 Ch. C. T. M. 436. Where *A.* being partner with *B.*, took a warrant of attorney from *C.*, a creditor to *A.* and *B.*, in his own name, knowing that *C.* was insolvent, and after an act of bankruptcy committed by *C.*, the latter, at *A.*'s desire, sent goods to the warehouse of *A.* and *B.*, as a further security; and after the dissolution of partnership between *A.* and *B.*, *A.* received sums of money on account of the warrant of attorney; it was held that the assignees under a commission of bankruptcy against *C.* were entitled, after the death of *A.*, to recover the whole from *B.* *Biggs* v. *Fellows*,[4] 8 B. & C. 402.

(*b*) *Supra*, p. 2, note (*h*).

(*c*) *Murray* v. *Somerville*, 2 Camp. 99, a. Vide *supra*, tit. Admissions.

(*d*) Vide *supra*, 804.

(*e*) Per Lord Ellenborough, *Peacock* v. *Peacock*, 2 Camp. 45. The father told the son, on his coming of

[1]Eng. Com. Law Reps. ii. 397. [2]*Id.* iii. 472. [3]*Id.* xviii. 390. [4]*Id.* xv. 248.

Although one partner cannot maintain an action against another, whilst the partnership accounts remain unliquidated (*f*), it is otherwise where the accounts have been settled and a balance struck, or even where one insulated transaction alone remains (A), or where the cause of action arises out of a transaction perfectly distinct from the general dealings (*g*), or where the liability to be sued is matter of contract (*h*).

But an action is not maintainable by one partner against another on a bill of exchange given in respect of an unascertained balance (*i*).

Parties engaged in a joint adventure in the whale-fishery, deposited the proceeds in a warehouse; the share of each was separated in bulk, and remained at the disposal of each by delivery orders, but subject to be retained until the ship's husband had been satisfied all expenses of the
*S16 *adventure; it was held, first, that this was to be deemed not an absolute but a qualified appropriation; and that upon the general account between one of the partners and the ship's husband, such party being found to be indebted to the other part-owner, who were liable to pay the expenses incurred, the assignees of such partner could not maintain an action for

age, that he should have a share in the business; the son acted as a partner for five or six years. Upon an issue out of Chancery to ascertain the son's share of the profits, it was not *presumed* that he was entitled to a moiety, but it was left by Lord Ellenborough to the jury to say to what proportion he was fairly entitled under the particular circumstances. Note, that Lord Eldon, C. was not satisfied with this decision. See 16 Ves. 56. If a partnership terminate by efflux of time, and the parties continue to trade without any new agreement, they are pronounced to go on upon the old footing. Per Lord Eldon, in *Crawshay* v. *Collins*, 15 Ves. 228. In an action to recover a subscription under the Thames Tunnel Act, it was held that those only were to be deemed subscribers who had signed the contract, so as to be liable for the amount of shares. *Thames Tunnel Co.* v. *Sheldon*,[1] 6 B. & C. 341. As to liability to pay subscriptions, see *Norwich, &c. Navigation Co.* v. *Theobald*,[2] 1 M. & M. 151. A partner cannot be permitted to place himself, in pursuit of his private advantage, in a situation which gives him a bias against the due discharge of the trust and confidence he owes to his co-partner; where one partner had purchased partnership stock, in exchange for his own separate shop goods, held that his co-partner was entitled to share in the profit of such barter. *Burton* v. *Woolley*, 6 Mad. 367.

(*f*) The defendant, a shareholder and managing director of a company, receiving a commission, and also a *del credere* commission, drew bills on a purchaser of the company's goods for the amount, and indorsed them to the actuary of the company, who indorsed them to the plaintiff, also a shareholder, and who purchased goods for them, and was a creditor at the time, of the company, for an amount beyond the bills; it was held, that he could maintain no action against the defendant on the bills, nor could he on the money counts for the amount received by the defendant from the acceptor's estate, because, having received it, not in his individual character, but as a member of the company, in each case the same consequence would follow; it would be a recovery by one contractor against another, and if he succeeded, give the defendant immediately a right to call on the plaintiff for contribution. *Teague* v. *Hubbard*,[3] 8 B. & C. 345.

(*g*) See *Coffee* v. *Brian*,[4] 3 Bing. 54, and the cases cited *supra*, 99. Where the plaintiff and defendant had been engaged as partners in particular purchases and sales of wool, and having had mutual dealings, stated an account, stating, amongst other items, "loss on wool," and having a balance against the defendant, which he signed and admitted to be due from him, held sufficient evidence of a promise to pay it, and that the plaintiff might sue for the amount of that item, and that a subsequent assent by him to take out the balance in meat, being merely matter of accommodation, did not preclude him. *Wray* v. *Milestone*, 5 M. & W. 21.

(*h*) One partner may sue another on a special agreement for a stipulated penalty. *Radenhurst* v. *Bates*,[5] 3 Bing. 463. Part-owners of a ship may each sue on agreement with each other. *Owston* v. *Ogle*, 13 East, 538; Abbott on Shipp. 81.

(*i*) *Verley* v. *Saunders*,[6] 2 Ch. 127; and an indorsee who takes the bill after it is due, cannot recover. *Ib.*

(A) (Where in an action between partners to recover the balance due from the defendant upon the dissolution of the firm, the plaintiff obtained a verdict, but it appeared at the trial that there was one debt against the firm which had not been paid, the plaintiff was nevertheless permitted to take judgment upon releasing to the defendant the amount of that debt. *Brinley et al.* v. *Kupfer*, 6 Pick. 179.

An agreement between two individuals to enter into a single transaction of purchase for the purpose of profit, does not create a partnership such as will confine the remedy of either to an action of account-render. *Assumpsit* will lie. *Galbraith* v. *Moore*, 2 Watts, R. 86; *Musier* v. *Trumpbour*, 5 Wend. 274.)

[1]Eng. Com. Law Reps. xiii. 194. [2]*Id.* xxii. 272. [3]*Id.* xv. 234. [4]*Id.* xi. 25. [5]*Id.* xiii. 53. [6]*Id.* xviii. 274.

the bankrupt's share until they had satisfied what was due from him to the partnership (*j*).

Where the plaintiff and defendant agreed to buy goods on their joint account, the defendant undertaking to furnish the plaintiff with half the amount in time for payment, and the plaintiff paid the whole, it was held that an action lay for the moiety, although an account was still to be taken between them as partners, on the subsequent disposal of the stock (*k*). So if one partner wrongfully carry money belonging to the other to the joint account, an action lies for money had and received (*l*). But where *A.*, *B.* and *C.* had been members of a trading company, and after its dissolution *B.* and *C.* being sued as members of the company, retained *A.*, who was an attorney, to defend them, it was held that as *A.* as a member of the company was jointly liable to contribute to the expense of the defence, he could not maintain an action for the costs (*m*). So an agent employed by a company of subscribers for an application to Parliament for an intended railway, being himself a subscriber, cannot maintain an action for his services, either against the body of subscribers or against the chairman (*n*).

Where *B.* ordered goods on his own credit to be shipped by *A.*, on an agreement between them that if any profit arose, *A.* should have half for his trouble, and goods were ordered, and afterwards paid for by *B.*, it was held that he might recover the amount of such payment from *A.*, who had not accounted to him for the profits, the contract not constituting a partnership *inter se*, but an agreement for compensation for trouble and credit (*o*).

Where an account is taken at the dissolution of a partnership, *assumpsit* will lie without proof of an express promise (*p*) (A).

Notice by one partner that the partnership has been dissolved, is evidence against that partner that it has been dissolved by competent means, even by a deed, if a deed be essential (*q*); and in such case an ejectment lies, upon the demise of one co-partner, against another, for a house agreed to be *occupied jointly during the partnership, without proof of a notice to quit (*r*). *S17

(*j*) *Holderness* v. *Shackels*,[1] 8 B. & C. 612.

(*k*) *Venning* v. *Leckie*, 13 East 7; [and *Mr. Day's* note.]

(*l*) *Smith* v. *Barrow*, 2 T. R. 476.

(*m*) *Milburn* v. *Codd*,[2] 7 B. & C. 419. Damages having been recovered against one of several coach-owners who horsed a coach for different stages, in an action against one for contribution, the partnership still continuing, Lord Denman held, that it was an unliquidated account. *Pearson* v. *Skelton*, York Sp. Ass. 1836. One partner having paid a partnership debt by compulsion, cannot recover contribution. *Sudlow* v. *Hickson*, K. B. 1834, for he could not have recovered had the payment been voluntary.

(*n*) *Holmes* v. *Higgins*,[3] 1 B. & C. 74. *A.* being a member and also the agent of a joint-stock company, drew a bill, accepted by a purchaser of goods from the company, and indorsed it to the secretary of the company, who again indorsed it to *B.*, another member, who purchased goods for the company, and was a creditor of the company to a larger amount than the bill; the acceptor having become insolvent, *A.* received 10*s.* by way of composition; held that *B.* could not sue *A.* on the bill, for it was drawn on behalf of the company, nor recover the sum received, because it was received by *A.* in his character of member of the company. *Teague* v. *Hubbard*,[4] 8 B. & C. 345.

(*o*) *Hesketh* v. *Blanchard*, 4 East, 143.

(*p*) Per Gibbs, C. J., *Rackstraw* v. *Imber*,[5] Holt's C. 368.

(*q*) *Doe* d. *Waithman* v. *Miles*,[6] 1 Starkie's C. 181; [4 Camp. 373, S. C.]

(*r*) Ibid. By an agreement on a dissolution of partnership between the plaintiff and the defendant, the latter being considerably indebted on his private account to the plaintiff, it was agreed that the plaintiff should take two-and-half per cent. on his private debt for six months, and five per cent. afterwards; that the accounts should be wound up, and the debts received by the plaintiff, and the defendant's share go in liquidation of his private debt; and it was stipulated that the partnership might be dissolved upon certain notice,

(A) (*Assumpsit* lies for one against his co-partner for money paid him on a dissolution and adjustment of the concerns of the co-partnership, more than was actually due. *Bond* v. *Hays*, 12 Mass. R. 34.)

[1]Eng. Com. Law Reps. xv. 315. [2]*Id.* xiv. 67. [3]*Id.* xiii. 27. [4]*Id.* xv. 234. [5]*Id.* iii. 132. [6]*Id.* ii. 347.

The ship's husband, being a part-owner, at the request of the defendant, also a part-owner, advanced his share of the outfit; he is entitled to sue for such advances for the separate share of such expenses; and the defendant having represented himself as owner of one-fourth, and dealt as such, is liable to the others in that proportion (*s*).

In an action for calls, after all the requisite forms of the Act had been complied with, against a party whose name had been inserted in the Act as an original proprietor, and who had subsequently acted as such, a misrecital in the Act that parties had signed a contract binding themselves and their heirs, which was not in legal effect true, the contract not being under seal, is no defence (*t*).

Where the Act establishing a joint-stock company, declared that a certain sum should be subscribed before any of the powers, &c. should be put in force, it was held that such sum being incomplete at the time of making the call, no action could be maintained for such call, and that it was not sufficient that the subscription list was complete before the action commenced (*u*).

Competency. In general, a co-partner with the defendant in the subject of the action is incompetent to be a witness for the defendant, where a verdict for the plaintiff would diminish the joint property, or he would be liable to any part of the costs; even although the tendency of his evidence be to charge himself with the whole debt (*v*). But in order to raise this objection, it must be shown that he is a partner; it is not sufficient merely to *suggest* it (*x*). Thus, in an action for goods sold and delivered, a witness is competent to prove that the goods were supplied on his credit, and for his use, although it be *suggested* that he is a partner with the defendant (*y*).

In an action brought to charge *A.* as a partner in a trading company, a witness, who, by other evidence than his own, appeared to be a shareholder in the company, was held to be competent to prove that *A.* was a partner (*z*).

A party is a competent witness for the plaintiff, although he has purchased from the plaintiff an interest in the contract on which the action is brought (*a*).

In an action against three directors for goods supplied to a company, the defence being that the defendant was a shareholder, a release by all the defendants to a witness (a shareholder) renders him competent (*b*).

*818 *Upon a plea in abatement in *assumpsit*, for goods sold and delivered, that the promises were made jointly with *E. F.*, the latter, it has been seen, is a competent witness for the plaintiff (*c*) (1).

on the 1st day of any January, but in consequence of the arrangement it was not expected to take place at the ensuing January; held, that there being no express stipulation for any suspension of the private right of action, nor for any definite period, the plaintiff was not precluded from suing for his separate debt. *Simpson* v. *Rackham*,[1] 7 Bing. 617.

(*s*) *Helme* v. *Smith*,[2] 7 Bing. 709.

(*t*) *Cromford Railway Company* v. *Lacey*, 3 Y. & J. 80.

(*u*) *Norwich and Lowestoff Navigation Company* v. *Theobald*,[3] 1 M. & M. 151.

(*v*) See *Birt* v. *Hood*, 1 Esp. C. 20. *Young* v. *Bairner*, 1 Esp. C. 21.

(*x*) Ibid.

(*y*) *Birt* v. *Hood*, 1 Esp. C. 20.

(*z*) *Hall* v. *Curzon and others*,[4] 9 B. & C. 646.

(*a*) *Supra*, tit. WITNESS.—INTEREST.

(*b*) *Betts* v. *Jones*, 9 C. & B. 199. But a release by one defendant only would not be sufficient. Ib.

(*c*) *Hudson* v. *Robinson*, 4 M. & S. 475; *supra*, tit. ABATEMENT.

(1) [In an action against *A.*, *B.* and *C.* on a bill of exchange, drawn by *C.* on *A.* and *B.*, payable to the plaintiff, to be placed to the credit of a certain vessel, one of the counts in the declaration of which charged the defendants as owners of the ship, and another that *C.* drew the bill as agent for the defendants; it was held that *C.* was not a competent witness to prove the partnership of the defendants in the ship. *Miller* v.

[1]Eng. Com. Law Reps. xx. 260. [2]*Id.* xx. 300. [3]*Id.* xxii. 272. [4]*Id.* xvii. 466.

An examined copy of an answer in Chancery by two of the defendants, to a bill by a third defendant, is good evidence against the parties so answering (*d*).

A stipulation in a deed of a joint-stock company that shareholders should not be at liberty to inspect the books of the company, is no bar to the production of them in a suit by the shareholders against the company (*e*).

PAYMENT (A).

When to be pleaded.

Proof of payment of the debt was formerly evidence under the general issue in *assumpsit* (*f*), but must have been pleaded specially as a bar to an action on a debt by record or specialty. But now by the new rules of Hil. T. 4 W. 4, where payment is insisted on as a defence to the action, it must be pleaded in bar (*g*). And by one of the new rules of Trin. Term. 1 Vict. it is directed that payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall not be pleaded in bar. And by another of these additional rules, in any case in which the plaintiff, in order to avoid the expense of the plea of payment, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money (*h*).

(*d*) *Studdy* v. *Sanders*,[1] 2 D. & R. 347.

(*e*) *Hall* v. *Connell*, 3 Y. & Cr. 717 (in Equity).

(*f*) *Supra*, Assumpsit.

(*g*) Under these rules payment has been allowed in reduction of damages without any special plea of payment, &c. in an action of *assumpsit*. *Shirley* v. *Jacobs*, 4 Dowl. P. C. 136;[2] 2 Bing. N. C. 88. Although in *debt* such evidence was held to be inadmissible without a plea of payment. *Cooper* v. *Morecroft*, 3 M. & W. 500. *Belbin* v. *Butt*, 2 M. & W. 522. But now see the additional new rule of Trin. T. 1 Vict. The plea of payment is divisible, and operates *pro tanto* to the extent that payment is proved. *Cousins* v. *Paddon*, 2 C. M. & R. 547. *Probart* v. *Phillips*, 2 M. & W. 40.

(*h*) Under the former new rules a difference of opinion had obtained as to the effect of an admission in

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M'Clenachan & al. 1 Yeates, 144. A partner in a company is not admissible to prove that another person, defendant in the case, is also a partner—especially where there are written articles. *The State* v. *Penman*, 2 Desauss. 1. A dormant partner, not being a party to the suit, is a competent witness for the other partner in an action by him to recover the price of goods sold, where the interest of the dormant partner was, at the time of the contract, unknown to the defendant. *Clarkson* v. *Carter*, 3 Cow. 84.]

(A) (In general a payment received in forged paper or any base coin is not good, and if there be no negligence in the party who receives such payment he may recover back the consideration paid for it, or sue upon his original demand. *United States Bank* v. *The Bank of Georgia*, 10 Wheat. 333. *Markle* v. *Hatfield*, 2 John. R. 455. *Hargrave* v. *Dusenbury*, 2 Hawks. 326. *Anderson* v. *Hawkins*, 3 Hawks. 568. Bank-notes are a part of the currency of the country; they pass as money, and are a good tender unless specially objected to. *United States Bank* v. *The Bank of Georgia*, *supra*. *Phillips* v. *Blake*, 1 Metc. 156. But this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash, and afterwards discovered to be forged. *United States Bank* v. *The Bank of Georgia*, *supra*. And where a forged check of a customer is received by a bank as cash, and passed to the credit of a depositor (who is ignorant of the forgery, and who has paid the full value of the check), it is equivalent to an actual payment; and if the depositor, after having been informed of the forgery on a sudden misconception of his rights, agrees, that if the check is a forgery it is no deposit, it will not constitute a promise to refund. *Levy* v. *The Bank of the United States*, 4 Dall. 234. S. C. 1 Binn. 27. The note of a purchaser given at the time of the sale is no payment unless there be an express agreement to receive it as such. So of his agent's note. *Porter* v. *Tullcott*, 1 Cow. 359. *Maze* v. *Miller*, 1 Wash. C. C. R. 328. But the acceptance of a negotiable note on account of a prior debt is *prima facie* evidence of satisfaction, and the plaintiff cannot recover upon the old debt without showing the note to have been lost, or producing and cancelling it at the trial. *Holmes & Drake* v. *De Camp*, 1 John. R. 34; *Pintard* v. *Tackington*, 10 John. R. 104; *Burdick* v. *Green*, 15 John. R. 247. And a promissory note, taken by express agreement in payment of a judgment, is an extinguishment of the preceding debt. *The New York State Bank* v. *Fletcher*, 5 Wend. 85. Whether a note was taken absolutely as payment or not is a question of fact for the jury. *Johnson* v. *Weed*, 9 John. R. 310. The acceptance of the note of a third person on the sale of a chattel for the consideration money is payment. *Rew* v. *Barber*, 3 Cow. 272. *Symington* v. *M'Lin*, 1 Dev. & Bat. 291. But the receiving of the promissory note of one partner in payment of an open account against a firm and delivering up the account in writing does not of itself discharge the original demand. *Wilson* v. *Jennings*, 4 Dev. 90. *Henton* v. *Child*, 4 Dev. 460. A check upon a bank given in the ordinary course of business is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means whereby the holder may procure the money. *Crommell* v. *Lovett*, 1 Hall. Rep. 56. *The People* v. *Howell*, 4 John. R. 296.)

[1] Eng. Com. Law Reps. xvi. 93. [2] *Id.* xxix. 266.

This rule is not to be applicable where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

Onus probandi.

Upon issue taken on a plea of payment, the *onus* of proof lies on the defendant. The proof is either general, under the plea of *solvit post diem*, or special, under the plea of *solvit ad diem*.

It is a general principle that the party to be discharged is bound to do the act which is to discharge him (*i*). The obligor of a bond conditioned for the payment of money on a particular day, is bound to seek the obligee if he be in England, and on the set day to tender him the money (*k*). Consequently the burthen of proving such a discharge is, in general, incumbent on the party who seeks to be discharged.

*S19

*Payment being pleaded generally to a declaration in *indebitatus assumpsit*, it lies on the defendant to prove payment to the extent of liability proved against him. Issue being taken for the plea of payment, to a declaration for work and labour, &c., although the defendant prove payment to an amount exceeding the aggregate of the sums stated in the declaration, the plaintiff may, without a new assignment, show works, &c. to a larger amount than is claimed, and recover the balance (*l*). *Assumpsit* for money lent, plea, payment, a new assignment and plea of payment, on which issue is joined: the plaintiff claimed a debt of 15*l.* in August 1833, and having proved a debt then due by the defendant, by the defendant's acknowledgement, and the defendant proving a payment to that amount in October 1833, it is incumbent on the plaintiff, in support of his new assignment, to prove a second debt (*m*).

The party must prove, 1st, a payment of the money, or its equivalent; 2dly, its application to the particular debt (1).

Direct evidence.

The proof of payment is either *direct*, or presumptive; in the former case payment has been made either to the plaintiff or to his agent.

Where a receipt has been given for the money, the receipt should be produced, and proof given of the handwriting of the party to whom the payment was made (2).

A receipt is merely *primâ facie* evidence of payment; it may be proved that it was obtained by fraud or mistake (*n*).

the plaintiff's particulars of the payment of a sum of money. On the one hand, the effect of such an admission has been held to be to restrain the plaintiff from going into that part of his demand which was covered by the payment; on the other, that the effect was merely an admission of payment operating as evidence, and that a plea of payment was requisite to make such evidence admissible. *Coates* v. *Stevens*, 2 C. M. & R. 119. *Ernest* v. *Brown*,[1] 3 Bing. N. C. 674. *Nicholls* v. *Williams*, 2 M. & W. 758. *Kenyon* v. *Wakes*, 2 M. & W. 764.

(*i*) See Lord Ellenborough's observations in *Cranley* v. *Hillary*, 2 M. & S. 122.

(*k*) Litt. sec. 340; and per Dampier, J., 2 M. & S. 122.

(*l*) *Freeman* v. *Crofts*, 4 M. & W. 4. Per Alderson, B., it is like a plea of license in trespass; the defendant must prove a license for every trespass the plaintiff can prove; so on a plea of payment, you undertake to prove that whatever demand the plaintiff can establish, you have paid him.

(*m*) *Hall* v. *Middleton*,[2] 4 Ad. & Ell. 107. The under-sheriff having left it to the jury to say whether the 15*l.* said to have been lent in August had been so lent; the Court held, that the question was whether there had been two debts.

(*n*) *Stratton* v. *Rastall*, 2 T. R. 366; *& supra;* see *Rowntree* v. *Jacob*, 2 Taunt. 141; *infra*, tit. Receipt.

(1) [In Pennsylvania, the defendant is permitted under the plea of payment in an action on a bond, to give in evidence mistake or want of consideration. *Swift* v. *Hawkins & al.*, 1 Dallas, 17. So if notice be given to the plaintiff, fraud in the execution or consideration of a bond may be given in evidence. *Baring* v. *Shippen*, 2 Binney, 154. Or other matter, which shows that *ex aquo et bono* the plaintiff ought not to recover. See cases collected in Wharton's Digest, 467, 468. *Carpenter* v. *Groff*, 5 Serg. & Rawle, 162.]

(2) {But see *Southwick* v. *Heyden*, 7 Cow. Rep. 334, in which it was decided, that proof of a sale of goods, or payment of money, may be made by parol, though there be a receipt, without accounting for its absence; parol proof being of as high a nature as the receipt.}

[1]Eng. Com. Law Reps. xxxii. 276. [2]*Id.* xxxi. 40.

A payment to one of several persons who (not being partners) have deposited money in a bank without the authority of the others, is not good as against them (*o*).

Where the payment has been made to an agent (*p*), an authority from the principal to the agent must be proved: the agent is a competent witness *for that purpose (*q*). Whether such authority has been given to an agent to receive payment, or to receive it in a particular manner, are usually questions of fact for the jury (*r*). Such an authority may be implied from the relative situation of the principal and agent, the habit and course of dealing between the parties, or from some recognition by the principal of the authority of the agent subsequent to the payment (*s*) (1).

Of payment to an agent. *S20 Proof of agent's authority.

Where a principal entrusts an agent with the sale of goods, as to sell them in a shop, or a horse at a fair, a presumption arises that he empowered that agent also to receive payment (*t*). So payment to a broker who sells

(*o*) *Innes* v. *Stephenson*, 1 Mo. & R. 145. *Stewart* v. *Lee*,[1] M. & M. 158.

(*p*) Payment to another by the creditor's authority is a payment to himself, and may be so pleaded.—*Taylor* v. *Beal*, Cro. Eliz. 222. *Goodland* v. *Blewith*, 1 Camp. 477. *Cootes* v. *Lewis*, Ib. 444. In general, if an agent be employed to receive money, and the debtor pays in money, he is discharged; but if the debtor does not pay in money, but settles the account by considering a debt due to him from the agent as paid, it is no discharge; per Abbott, C. J. in *Todd* v. *Reed*,[2] 3 Starkie's C. 16. And therefore, where a broker adjusts a loss with the underwriter, and his name is struck out of the policy and adjustment, the broker becoming bankrupt within the month, the underwriter cannot set off against the assured the balance due to him from the broker at the time of adjusting the policy. Ib.; and see *Russell* v. *Bangley*,[3] 4 B. & A. 395; *Jell* v. *Pratt*,[4] 2 Starkie's C. 67. Where it had been agreed between two partners that a third person should collect and pay the debts, of which the defendant had notice, and promised to pay at a future time, but before that paid it to one of the partners; held, that such agreement amounting only to an authority to such agent to receive, and to make his receipt of the debt, if paid to him, a good discharge, it did not restrain the rights of the partners, and the payment to him therefore was good. *Porter* v. *Taylor*, 6 M. & S. 156. A traveller engaged in receiving orders, is not justified in receiving payment from a customer in other goods, but it will be for the jury to say what acts of his employer amount to a subsequent ratification. *Howard* v. *Chapman*,[5] 4 C. & P. 508. Where the defendant, as owner, was clearly liable to the plaintiff for necessaries, &c. supplied for his ship and crew, by the direction of the broker and agent, to whom the defendant entrusted the whole management, and the plaintiff, before the expiration of the credit, had applied to and received from the broker his acceptances for the amount, allowing discount, the latter having effects of the defendant's beyond the amount in his hands at the time; and the bills were subsequently renewed, and the interest added: held, that upon the broker becoming bankrupt, and the bills remaining due, the defendant was not discharged by such bill transaction, having neither been misled nor prejudiced by it. *Robinson* v. *Reed*,[6] 9 B. & C. 449. The defendant sent a person to the plaintiff's counting-house to pay the amount, with a letter, objecting to certain items, which was there paid, and the letter delivered to a party sitting in the inner part of the counting-house, and who gave a receipt for it; held, that although a stranger and not authorized, nor in the employment of the plaintiff, that the defendant was discharged by such a payment to a person so appearing to be entrusted with the plaintiff's concerns. *Barrett* v. *Deere*,[7] 1 M. & M. 200.

(*q*) *Supra*, Vol. I. tit. Witness.—And see tit. Agent.

(*r*) *Supra*, tit. Agent. (*s*) *Supra*, tit. Agent.

(*t*) 12 Mod. 230. A payment to a person found at the vendor's counting-house, and who appears to be entrusted with the conduct of the business, is a valid payment, although the person receiving the money had, in fact, no authority to receive it; for the debtor has a right to suppose that the trader has the control over his own premises, and that he will not suffer persons to come there and intermeddle with his business without authority. *Barrett* v. *Deere*,[7] 1 M. & M. 200. *Wilmot* v. *Smith*, ib. 288. So where a debtor sent a servant to the house of the creditor to tender the amount of the debt, and the servant having been informed by a servant of the creditor at his house that his master was at home, delivered the money to that servant to be delivered to the creditor, and the creditor's servant went into his house, and returned with an answer that the master would not receive it; Lord Kenyon ruled that there was evidence of a tender for the consideration of the jury. *Anon.*, 1 Esp. C. 350.

(1) [Where *A.* and *B.* agreed to sell and convey land to *C.*, and the payment was made to *A.*, who in fact had no legal title to the land; it was held that *B.* could not afterwards object to such payment, but that it was to be considered, in effect, the same as if paid to *B.* *Waters* v. *Travis*, 9 Johns. 450. *A.* having constituted *B.* his general agent in a county, and also given him a particular agency to sell a tract of land, and receive payments of part of the purchase-money, is bound to allow credits for any other payments made to him before notice that his powers are revoked. *Spencer & al.* v. *Wilson*, 4 Munf. 130.]

[1]Eng. Com. Law Reps. xxii. 274. [2]*Id.* xiv. 149. [3]*Id.* vi. 459. [4]*Id.* iii. 247. [5]*Id.* xix. 499. [6]*Id.* xvii. 418. [7]*Id.* xxii. 291.

for a principal not named, and who makes out the bought-and-sold notes to the buyer and seller, is a payment to the principal (*u*).

So, as has been seen, the authority of an agent to receive payment on bonds, bills, or other securities, is usually evidenced by the agent's possession of the instruments which are delivered up or cancelled upon payment (*x*).

Where the question is, whether the person who received money on a security was the agent of the owner for that purpose, it is not essential to call the agent himself (*y*); the possession of the security by a third person, and receiving payment for it, and giving a receipt for it in the name of the principal, afford strong presumptive evidence that he was employed as agent for that purpose (*z*).

Payment of the debt to the marshal or sheriff in whose custody the debtor is, is no satisfaction to the plaintiff (*a*).

*821 *Where payment has been made to an attorney, proof should be given of his employment by the plaintiff (*b*).

Payment to a country attorney who is merely employed by the attorney of the principal to execute the writ, is insufficient (*c*); so is a payment which is made to an attorney on record, who has never been employed by the plaintiff (*d*); but payment to the attorney really employed by the plaintiff, although after he has been privately changed without leave of the Court, is a good payment (*e*) (1).

Where payment has been made to a servant or other agent, in a cheque

(*u*) *Favenc* v. *Bennett*, 11 East, 36. Vide *infra*, 821.

(*x*) *Supra*, 43.

(*y*) See *Owen* v. *Barrow*, 1 N. R. 101; where, in an action on the Statute of Usury, Chambre, J. said, "I should be sorry to have it laid down as a general rule that agency must be proved by the agent himself."

(*z*) *Owen* v. *Barrow*, 1 N. R. 101. The action was to recover penalties for usury in discounting a bill of exchange; in proof of the receipt of the money, it was proved that *B.*, in the name of the defendant, the owner of the bill, had commenced an action against the acceptor, and that he had received from him the amount of the bill and costs, on producing the bill, and that he had given a receipt in the name of the defendant; and this was held to be good *prima facie* evidence, without producing the proceedings in the action.

(*a*) *Taylor* v. *Baker*, 2 Lev. 203. *Slackford* v. *Austen*, 14 East, 418; and per Holroyd, J. in *Crozer* v. *Pilling*,[1] 4 B. & C. 32.

(*b*) Payment to the attorney pending the action is good; *secus* as to a payment to his clerk, who shows no authority but his master's order to receive it. *Coore* v. *Callaway*, 1 Esp. C. 115.

(*c*) *Yates* v. *Freckleton*, Doug. 623; 1 T. R. 710. (*d*) *Robson* v. *Eaton*, 1 T. R. 62.

(*e*) *Powel* v. *Little*, 1 Blaek, 85. So a plaintiff is bound by the act of the agent in town, in taking money out of court. *Griffith* v. *Williams*, 1 T. R. 610.

(1) (In general, payment to an attorney at law is good, on the custom of the country, especially if he have possession of the bond, &c.; though under particular circumstances, this rule might not apply; as if notice were given that no such power was vested in the attorney. *Hudson* v. *Johnston*, 1 Wash. 10. The attorney at law who obtained the judgment, is, in general, authorized by the custom of the country to receive from the defendant the money recovered, and his receipt will discharge the judgment, though more than a year and a day elapsed between the date of the judgment and the time of payment to the attorney. *Branch* v. *Barnley*, 1 Call, 147. See *Wycoff* v. *Bergen*, 1 Coxe's Rep. 214. Where a judgment has been recovered in any court of law, the attorney of record of the judgment creditor has authority to receive payment, and to discharge the judgment. *Lewis* v. *Gamage & al.* 1 Pick. 347. *Langdon & al.* v. *Potter & al.* 13 Mass. Rep. 319. See *Jackson* v. *Bartlett*, 8 Johns. 361. *Kellogg* v. *Gilbert*, 10 Johns. 220. *Crary* v. *Turner*, 6 Johns. 51. *Richardson* v. *Talbot*, 2 Bibb, 382.

Payment to the plaintiff's attorney of the sum for which judgment was obtained, if made within a year after execution is extended on land, is held, in Maine, to be a good bar to a writ of entry afterwards brought by the creditor against the debtor for the land. *Gray* v. *Wass*, 1 Greenleaf, 257.

Payment, by an officer of money collected on an execution, to the creditor's attorney of record, but whose power had been revoked before the officer received the execution, is not a discharge of the officer, but he is still liable to the creditor. *Parker* v. *Downing*, 13 Mass. Rep. 465. See also *Wart* v. *Lee*, 3 Yeates, 7. Where an attorney indorsed on an execution that he had received the note of a stranger, for a greater amount than the judgment, payable to the judgment debtor, which he (the attorney) was to collect, but which was lost by his negligence; it was held that the judgment was not discharged. *Langdon & al.* v. *Potter & al.*, ubi sup. *Commissioners* v. *Rose*, 1 Desauss. 461, S. P.]

[1] Eng. Com. Law Reps. x. 271.

or bill, it is a question of fact whether the agent had authority to receive such a payment (*f*). And where the payment has been made according to the usual practice in similar cases, such an authority is, it seems, to be presumed (*g*). And, in general, slight evidence of acquiescence on the part of the master will serve to show his assent to any particular mode of payment (*h*).

Payment by the debtor's attorney to a creditor will satisfy an averment of payment by the debtor, although the latter has not repaid the attorney, but has merely given his promissory note (*i*).

If the broker sells goods as his own, and the vendee has no notice to the contrary, a payment to the broker is good, although the mode varies from that which was agreed upon (*k*).

Though it be known that the party is but an agent, the payment will be good, if it be made according to the agreement (*l*), and without notice from the principal not to pay to the agent (*m*); and even where such notice has *S22 *been given, payment to a factor will still be good, if the principal, on the To an balance of account, be indebted to the factor, for he has a lien on the debt (*n*). agent.

(*f*) *Supra*, 44. An agent employed to sell has no authority, as such agent, to receive payment. Per Littledale, J., *Mynn* v. *Jolliffe*, 1 Mo. & R. 326.

(*g*) Ibid. note (*s*).

(*h*) *Ward* v. *Evans*, Salk. 442; *supra*, 44.

(*i*) *Adams* v. *Dansey*,[1] 6 Bing. 506.

(*k*) *Blackburn* v. *Scholes & another*, 2 Camp. 343. And see *De Leira* v. *Edwards*, 1 M. & S. 147. *Favenc* v. *Bennett*, 11 East, 36, *infra*, n. (*l*). So also if the principals have allowed the agent to act as the principal in the sale of the goods (*Coates* v. *Lewis*, 1 Camp. 444. *Gardiner* v. *Davis*,[2] 2 C. & P. 49). So where the principals allowed the broker to draw bills in his own name (*Townsend* v. *Inglis*,[3] Holt's C. 278. *Favenc* v. *Bennett*, 11 East, 36). So if the factor sell in his own name, the buyer may set off, as against the claim of the principal, the debt due to the factor (*George* v. *Claggett*, 7 T. R. 359; 2 Esp. C. 577). *Aliter*, if the buyer be informed of the principal before the whole of the goods are delivered (*Moore* v. *Clementson*, 2 Camp. 22). Where a party sells in the character of an agent, although without disclosing the name of his principal, yet, if the disclosure be made before payment, the effect seems to be the same as if the name of the principal had been disclosed on the face of the contract. See Lord Ellenborough's observations, 4 M. & S. 573.

(*l*) *Favenc* v. *Bennett*, 11 East, 36. The goods were sold for a principal not named, on the terms of "payment in one month money," and the jury found that the meaning of the terms, in commercial understanding, was payment at any time within a month, and that the payment within the month to the brokers, with whom the defendant had dealt, without the knowledge of the principal, was a good payment. But it is otherwise if the payment vary from the terms of the original contract. *Campbell* v. *Hassel and others*,[4] 1 Starkie's C. 233; and evidence of an usage to substitute an equivalent mode of payment is inadmissible.

(*m*) But although the factor sell in his own name, and without disclosing the name of his principal, yet, if the principal give *notice* to the buyer to pay him, and not the factor, the buyer will not be discharged in afterwards paying the factor. (B. N. P. 130. *Houghton* v. *Matthews*, 3 B. & P. 485. See also *Powel* v. *Nelson*, 15 East, 65 n.)

(*n*) *Drinkwater* v. *Goodwin*, Cowp. 251. Vide *etiam*, *Hudson* v. *Granger*,[5] 5 B. & A. 27. The plaintiff sent goods to *A. B.*, his factor, to whom he was indebted in a larger amount; the factor sold the goods to the defendant, to whom he was indebted in a larger amount; the factor became bankrupt, and his assignees settled with the defendant, and it was held to be an answer to the plaintiff's demand. In the case of *Schrimshire* v. *Alderton*, (Str. 1182), the jury, contrary to the direction of the Court in point of law, found that a payment to a factor who sold under a *del credere* commission, after notice by the principal to the contrary, was a good payment (and see B. N. P. 130), on the ground that the factor, in such a case, was to be considered to be the real principal with whom the contract was made. The circumstance, however, of a *del credere* commission, which is no more in effect than an agreement by the factor to ensure the debt to his principal, cannot, it seems, at all affect the relative situation of the principal and the vendee. See *Morris* v. *Cleasby*, 1 M. & S. 576; 4 M. & S. 566. *Gurney* v. *Sharp*, 4 Taunt. 242. And see Lord Ellenborough's observations in *Cumming* v. *Forrester*, 1 M. & S. 499, and the judicious observations in Mr. Long's book on Sales, 243, and the authorities there cited.—As to payments made by a principal to a broker employed to buy for him, see above, p. 819; and see the case of *Powell* v. *Nelson*, 16 East, 65, cited by Lord Ellenborough. There the factor made purchases for his principal, who made payments on account; the vendor wrote to the factor for payment; the letter coming into the hands of the purchaser, he transmitted it to the factor, and afterwards paid him the remainder of the debt; and Lord Mansfield held that the principal was still liable to the vendor.

[1]Eng. Com. Law Reps. xix. 149. [2]*Id.* xii. 22. [3]*Id.* iii. 101. [4]*Id.* ii. 370. [5]*Id.* vii. 10.

The effect of a bill or note in payment has already been considered (*o*) (1). Payment by bills is *primâ facie* evidence of payment; it lies on the plaintiff to show that they have been dishonoured (*p*).

(*o*) *Supra*, Bill of Exchange, 264. *C.* guarantees the payment of *A.*'s debt to *B.* by instalments; *C.*, after the first instalment was due, remits bills to *B.* not due; *B.*, by keeping the bills, waives the objection. *Shipton* v. *Capon*,[1] 5 B. & C. 378. In an agreement between the defendant with the plaintiff and other creditors for a composition of 15*s.* in the pound, it was stipulated that certain bills which had been indorsed by the defendant, and delivered to the plaintiff, should be considered as part payment. It was held that these were not to be considered as an absolute payment, and that the defendant was liable on one of them which was dishonoured at maturity. *Constable* v. *Andrew*, 1 C. & M. 293. Where a purchaser gives the seller an order on a third person, entitling him to receive cash, instead of which he *elects* to take a bill, the payment is good although the bill be dishonoured. *Vernon* v. *Bouverie*, 2 Show. 296; *Smith* v. *Ferrand*,[2] 7 B. & C. 19. So if the purchaser give the seller an order for a good bill on London, the seller must take care that he gets a good bill. *Balson* v. *Reichard*, 1 Esp. C. 106. *Secus* if the order for payment be on the purchaser's *agent*, and the seller take a cheque which is dishonoured. *Everett* v. *Collins*, 7 B. & C. 24, 25; 2 Camp. 515. And where the freighter's foreign agent being furnished with funds to pay the freight, the master took a bill on a third person, it was held (by Gibbs, C. J.) that the freighter was not discharged. *Marsh* v. *Pedder*, 4 Camp. 257. A cheque to operate as payment must be unconditional in its terms. A cheque directing bankers to pay the plaintiff's balance account railing or bearer, was held to be no proof of payment. *Hough* v. *May*,[3] 4 Ad. & Ell. 954. It was held to be no misdirection to leave it to the jury whether the plaintiff received the cheque as money. *Ib.* Judgment on a bill without satisfaction does not operate as payment, *supra*, 264 (c), although it was formerly held otherwise. See *Drake* v. *Mitchell*, 3 East, 251.

(*p*) *Hebden* v. *Hartsink*, 4 Esp. C. 46. *Stedman* v. *Gooch*, 1 Esp. C. 4. The giving a cheque is *prima*

(1) [A bill of exchange or promissory note, either of the debtor or any other person, is not payment of a precedent debt, unless it be so expressly agreed. *Greenwood* v. *Curtis*, 6 Mass. Rep. 388; 4 ib. 93. *Johnson* v. *Johnson*, 11 Mass. Rep. 361. *Goodenow* v. *Tyler*, 7 Mass. Rep. 36. *Murray* v. *Gouverneur*, 2 Johns. Cas. 438. *Herring* v. *Sanger*, 3 Johns. Cas. 71. *Johnson* v. *Weed*. 9 Johns. 310. *Schermerhorn* v. *Loines*, 7 Johns. 311. *Tobey* v. *Barber*, 5 Johns. 68. *Sheehy* v. *Mandeville & al.* 6 Cranch, 254. Nor is a receipt for a note, as cash, evidence that it was taken as an absolute payment. 5 Johns. *ubi sup.* It is merely a suspension of the right of action during the time allowed for payment by the note. *Putnam* v. *Lewis*, 8 Johns. 389. And whether a note was taken absolutely as payment, or not, is a question of fact for the jury. 9 Johns. *ubi sup.* But the acceptance of a *negotiable* note, on account of a prior debt, is *prima facie* evidence of satisfaction. *Holmes & al.* v. *D'Camp*, 1 Johns. 24. *Pintard* v. *Tuckington*, 10 Johns. 124. *Maneely* v. *M'Gee & al.* 6 Mass. Rep. 143. *Thatcher & al.* v. *Dinsmore*, 5 Mass. Rep. 299. *Chapman* v. *Durant & al.* 10 Mass. Rep. 47. The reason assigned by the court of Massachusetts for this doctrine is, that otherwise the debtor might be put to inconvenience, and perhaps be obliged to pay his debt twice; as he could not set up a payment of the original debt, after a seasonable indorsement of the note, against the claim of an innocent indorsee. *Johnson* v. *Johnson*, ubi sup.

In *Wiseman & al.* v. *Lyman*, 7 Mass. Rep. 286, it was decided that if a creditor receive a note of a third person in payment of a demand against his debtor, where there is no fraud, such note is at the risk of the creditor, unless there be an agreement to the contrary; and he shall not afterwards have an action against the debtor on the original contract. In *Barelli* v. *Brown*, 1 M'Cord, 449, it was held, that the liquidation of an account by a note, though it be the note of a third person, unless expressly received in payment, does not destroy the open account. See also *Roget* v. *Merritt*, 2 Caines, 117. *Wilson* v. *Force*, 6 Johns. 110.

In general, a payment received in forged or worthless paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue on his original demand. See *Hargrave* v. *Dusenbury*, 2 Hawks. 326. *Markle* v. *Hatfield*, 2 Johns. 455. *Young* v. *Adams*, 6 Mass. Rep. 182. *Salem Bank* v. *Gloucester Bank*, 17 Mass. Rep. 1. *Gloucester Bank* v. *Salem Bank*, 17 Mass. Rep. 33. *Bank of the United States* v. *Bank of Georgia*, 10 Wheat. 333. {As to what amounts to negligence in such a case, *Raymond* v. *Baar*, 13 Serg. & Rawle, 318.} But this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash, and afterwards discovered to be forged. 10 Wheat, *ubi sup.* See also *Levy* v. *Bank of the United States*, 1 Binney, 27; S. C. 4 Dallas, 234.

In *Alexander* v. *Owen*, 1 T. R. 225, it was held that where goods were delivered under an agreement to take a specific parcel of copper money in payment, a delivery of such copper was a good bar to an action for value of the goods, though it proved to be counterfeit money. {*Curcier* v. *Pennock*, 14 Serg. & Rawle, 51.}

So in *Ellis* v. *Wild*, 6 Mass. Rep. 321, it was decided that if the innocent holder of a forged note sell it for merchandize, without any knowledge of its being forged, the buyer of the note cannot afterwards maintain an action against him to recover payment for the merchandize; for both parties being equally innocent *melior est conditio possidentis.* But in *Salem Bank* v. *Gloucester Bank*, ubi sup, it is said, if the holder of the note had intended to buy merchandize, and the payment by the note had not been a part of the original stipulation, but an accommodation to him, then the forged note would not have been a payment, and an action would have been maintainable for the merchandize.]

[1]Eng. Com. Law Reps. xi. 254. [2]*Id.* xiv. 6. [3]*Id.* xxxi. 235.

If the master of a vessel is to get payment in the best mode he can, and has no power to get anything but a bill, he must take that; but if he could get paid in any other mode, he should do so, otherwise he will be bound by taking a bill (*q*).

Proof of payment by remittance, &c.

If a creditor desire his debtor to remit a bill or note by the post, it will be sufficient to prove that the debtor remitted the bill as directed, and if it *be lost the loss will fall upon the creditor(*r*). But in such case proof of a delivery of the letter, not at the post-office, or at a receiving-house, but to a bellman in the street, would not be a compliance with the creditor's directions, and the loss would fall on the debtor (*s*). *823

This authority seems, however, to have been overruled by a later decision (*t*).

In the absence of any direction by the creditor, it is said that the sending bills or notes by the post would be *primâ facie* evidence to show that they were received by him (*u*). It is clear that in such a case it would be competent to the creditor to show that he had never in fact received the bills, and that they had fallen into other hands.

A payment made by compulsion of law is always sufficient to protect the party who made it from a second demand (*x*).

Presumptive evidence (A).

In an action of covenant against the defendant, the drawer of certain bills, to pay to the plaintiff the amount of his acceptances of bills so drawn, the possession by the plaintiff of bills accepted by him, and drawn by the defendant is *primâ facie* evidence that the plaintiff has paid them (*y*) (1).

The mere production of a cheque drawn by the defendant on his banker, and payable to the plaintiff or *bearer*, is no evidence of payment to the plaintiff, without proof that he received the amount, or that it was in his possession; but proof that he indorsed his name upon it affords *primâ facie* evidence of payment to him (*z*).

facie evidence of payment where a debt is due, but it may be shown by circumstances that a loan was intended. *Boswell* v. *Smith*,[1] 6 C. & P. 60.

(*q*) Per Payley, J., *Strong* v. *Hart*,[2] 6 B. & C. 161. See *Robinson* v. *Read*,[3] 9 B. & C. 449; *Taylor* v. *Briggs*,[4] M. & M. 28.

(*r*) *Warwick* v. *Noakes*, Peake's C. 67.

(*s*) *Hawkins* v. *Rutt*, Peake's C. 186.

(*t*) *Parcke* v. *Alexander*,[5] 3 Moore & Scott, 789.

(*u*) Peake's Ev. 289; where it is also observed, that where the creditor requires *a remittance* by the post the sending bank notes uncut would not discharge the debtor, since the more usual and prudent course is to send them by halves.

(*x*) *Supra*, 443, note (*d*).

(*y*) *Gibbon* v. *Featherstonhaugh*,[6] 1 Starkie's C. 225.

(*z*) *Egg* v. *Burnett*, 3 Esp. C. 196.

(A) (A delay of twenty years to demand the money, or bring a suit upon a contract under seal, will raise a presumption of payment. *Jackson* v. *Hotchkiss*, 6 Cow. 401. *Henderson* v. *Lewis*, 9 Serg. & R. 379. *Dunlop* v. *Ball*, 2 Cranch, 180. But this presumption may be rebutted by any facts which destroy the reason of the rule upon which it is founded. *Dunlop* v. *Ball*, *Jackson* v. *Hotchkiss*, *supra*. *Blackburn* v. *Squib*, Peck. 60. *Peytavin* v. *Maurin*, 2 Louis. R. 481. The possession by the defendant of an order on him, signed by the plaintiff, to pay money to a third person, whose receipt is indorsed but not proved, if not objected to as evidence to go to the jury, may be charged by the court to be evidence of payment, though not conclusive. *Weidner* v. *Schweigart*, 9 Serg. & Rawle, 385. See also *Joublane's Ex'r* v. *Delacroix*, 5 Martin, 477. An account signed by one acknowledging the receipt of articles from another, whose bond the first holds for a larger amount, should be left to the jury as evidence of payment on the bond. *McDowell* v. *Tate*, 1 Dev. 249. A presumption in law arises from the payment of the last instalment, upon a bond that the preceding ones have been paid, provided it has been made in the manner, and at the time contemplated by the parties; if otherwise, it is a presumption that the parties are acting under a new agreement. *Ward* v. *Green's Ad'r*, 2 Car. L. R. 108. If receipts be given for several instalments of a debt, due by instalments, as a salary, and the receipt be for a less sum than the creditor was entitled to receive, yet each receipt be for the same amount and expressed as being in full, it will be presumed that the remainder was remitted, and that the smaller sum was received in full payment. *Girod* v. *Mayor et al.*, 4 Martin, 698.)

(1) [S. P. *Patton's Adm'rs* v. *Ash & al.*, 7 Serg. & R. 116. *The People* v. *Howell*, 4 Johns. 296. *Dennie* v. *Hart & trustee*, 2 Pick. 204.]

[1]Eng. Com. Law Reps. xxv. 282. [2]*Id.* xiii. 130. [3]*Id.* xvii. 418. [4]*Id.* xxii. 238. [5]*Id.* xxx. 318. [6]*Id.* ii. 366.

The mere fact of the payment of money by *A.* to *B.* is presumptive evidence of the payment of an antecedent debt, and not of a loan (*a*). In an action on the bond of the testatrix, proof of a transfer of stock by the testatrix to a larger amount is evidence of payment (*b*).

Payment may be presumed from lapse of time. Under the Statute of Limitations, lapse of time may, it has been seen (*c*), be pleaded as a bar to the action. Still the statute operates but presumptively, and the presumption may be rebutted by evidence of an admission of the debt in writing, within the limit (*d*). And although the statute has not been pleaded, payment may be presumed by the jury, from lapse of time and other circumstances, which render the fact probable (*e*).

Satisfaction of a bond might, before the late statute (*f*), have been presumed from a lapse of twenty years, without any demand or acknowledgement of the debt within that space (*g*), or in a shorter time if circumstances rendered satisfaction probable (*h*). But a lapse of twenty years, before the
*824 *statute, was no legal bar, but merely afforded a presumption in fact for the jury (*i*) (1).

The effect of an indorsement on a bond, of the receipt of interest, within twenty years, has already been considered (*k*).

In the usual course of business, a security, where the money is paid, is either delivered up to the debtor or destroyed; and therefore, where the fact of payment is otherwise doubtful, the possession of the entire instrument by the creditor affords a presumption that it is still unsatisfied (*l*).

(*a*) *Welsh* v. *Seaborn*,[1] 1 Starkie's C. 474; and see *Aubert* v. *Welsh*, 4 Taunt. 293.
(*b*) *Breton* v. *Cope*, Peake's C. 30.
(*c*) *Supra*, tit. Limitation.
(*d*) Ibid.
(*e*) *Cooper* v. *Turner*,[2] 2 Starkie's C. 497.
(*f*) 3 & 4 W. 4, c. 42; *supra*, tit. Limitation.
(*g*) 1 T. R. 270. The surrender of a mortgage term is not to be presumed in less than twenty years. *Doe* v. *Calvert*,[3] 5 Taunt. 170.
(*h*) [*Henderson* v. *Lewis*, 9 Serg. & R. 379.] Ibid. *Colsell* v. *Budd*, 1 Camp. 27. 3 P. Wms. 287. *Rex* v. *Stephens*, 1 Burr. 434; 3 Burr. 1396. *Forbes* v. *Wale*, 1 Bl. 532. Where the drawers of bills accepted by the defendant (who when due had paid the drawers not being the holders, but neglected to have them delivered up), had paid large sums to the plaintiffs, their bankers, the then holders, and they had not only entered the bills to their debit, but had treated them as paid; held, that by the course of their own accounts they were precluded from saying the bills had not been satisfied. *Field* v. *Carr*,[4] 5 Bing. 13; and 2 M. & P. 46.
(*i*) Ibid.
(*k*) *Supra*, tit. Bond. See also tit. Release. *Washington* v. *Brymer*, Ibid. and Peake's Ev. Append. lxxiii. *Moreland* v. *Bennett*, Str. 652. See *Searle* v. *Lord Barrington*, Str. 825; Vol. I. 306. Such indorsements have been held to be inadmissible unless proved to have been made at a time when it was against the interest of the party to make them. *Rose* v. *Bryant*, 2 Camp. 321; and see 9 Geo. 4, c. 14, s. 1; and even then the admissibility of such evidence is very questionable in principle. But in the case of *Parr* v. *Cotchett*, Dom. P. May 6, 1824, it was held, that where the indorsee of a promissory note had made indorsements of the half yearly payments of interest, from the time of making the note until his death, which happened within six years of the date of the note, like indorsements by his executor, who died before the commencement of the action, were admissible in evidence in answer to the statute, although there was no extrinsic evidence to show the time when the indorsements were made, and although more than six years had elapsed between the death of the maker and of the executor. It is observable, that in this case, as well as that of *Searle* v. *Lord Barrington*, the party who made the entry was dead at the time of the trial. In the late case of *Glendow* v. *Atkins*, in the Exchequer, proof having been given, in an action on a bond, of payment of interest to a third person, an indorsement on the bond by the obligor, stating that the bond was to secure trust-money for that third person, was held admissible, there being a memorandum of the trust on the bond of even date with the bond, and attested by one of the two witnesses to the bond. Such evidence is now excluded by the express enactment of the stat. 9 Geo. 4, c. 14, s. 1.
(*l*) *Brembridge* v. *Osborn*,[5] 1 Starkie's C. 374.

(1) [The law does not positively presume payment of a judgment after nineteen years: That is a question for the jury. *Lesley* & *al.* v. *Nones*, 7 Serg. & R. 510.] {But after a lapse of *twenty* years, unless there are circumstances accounting for the delay, a presumption of satisfaction arises, which is not subject to the discretion of a jury, being a presumption of law. *Cope* v. *Humphreys*, 14 Serg. & R. 15.}

[1]Eng. Com. Law Reps. ii. 473. [2]*Id.* iii. 447. [3]*Id.* i. 53. [4]*Id.* xv. 348. [5]*Id.* ii. 433.

A receipt for rent due at one time affords a presumption that the rent due at an earlier date has been paid.

Payment may also be presumed from the habit and course of dealing between the parties; as where the practice has been to pay wages, or for goods supplied, weekly, and a demand is made at a distant time (*m*).

2dly. Where the payment is capable of different applications, proof is frequently necessary to show the application of the payment to a particular debt. The usual rule of law is, that the party who pays money has the

Application of payment (A).

(*m*) *Lucas* v. *Novosilienski*, 1 Esp. C. 196. *Evans* v. *Birch*, 3 Camp. 10. The action was for the proceeds of milk daily sold to customers by the defendant as agent to the plaintiff; and evidence was given that the course of dealing was for the defendant to pay to the plaintiff every day the money which she had received, without any written voucher passing; and upon this evidence Lord Ellenborough held, that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff.

(A) (A person indebted to the same creditor on different accounts or demands, and making payment, may apply the payment to which account or demand he pleases, and if he fails to make the application the creditor may apply the payment to which account or demand he pleases. *Baker* v. *Stackpoole*, 9 Cow. 420. *Hall* v. *Constant*, 2 Hall, 185. The right of appropriation, however, by a creditor can only be exercised within a reasonable time after the payment, and by the performance of some act which indicates an intention to make the application. The rule may be thus stated; the debtor has a right to make the appropriation in the first instance, and if he fail to exercise it the same right devolves on the creditor. But where neither has made the appropriation, and the interest of the debtor can be promoted thereby, the law makes the appropriation in the manner most conducive to his advantage; if, however, the interest of the debtor could not be promoted by any particular appropriation, the law then makes it in the manner the most to the advantage of the creditor. *Hacker* v. *Conrad*, 12 Serg. & R. 305. See also *M'Farlane* v. *M'Farlane*, 1 Tenn. R. 488. A different view has been taken of the rule in some cases, and it has been held in them that the intention of the debtor is to be always the guide in the appropriation of payments. Judge Story, in a learned opinion in *Gass* v. *Stinton*, 3 Sumner, 99, maintains, that since the doctrine of the common law, as to the appropriation of indefinite payments, has generally been borrowed from the Roman law; the doctrine of that law is, or at least ought to be held, and may well be held to be the true doctrine to govern in our courts. And hence, if the creditor has a right in any case to elect to what debt to appropriate an indefinite payment, it can only exist when it is utterly indifferent to the debtor to which it may be applied. See also *Patterson* v. *Hull*, 9 Cow. 717. The creditor's right to make an election is certainly applicable only to voluntary payments. *Blackstone Bank* v. *Hill*, 10 Pick. 129. See also *The Westmoreland Bank* v. *Rainey*, 1 Watts, 26. Where *A.* transmited to *B.* some money, which *A.* directed to be distributed among his creditors in certain proportions; it was held to be a trust-fund, and that it could not be attached in the hands of the correspondent. *Sharpless* v. *Welsh et al.* 4 Dall. 279. And where a mortgagee of two parcels of land released one of them to an assignee of the mortgagor, the money paid in consideration of such release must be applied in discharge of so much of the sum due on the mortgage, although the mortgagor was still indebted to the mortgagee on other accounts. *Hicks* v. *Bingham*, 11 Mass. R. 300. So where a surety on a promissory note gave money to the principal and directed him to pay the note with it, and the principal took it to the holder and told him it was the surety's money sent to pay the note, the holder however declined receiving it upon the note, but took it in payment of another demand against the principal, to which appropriation the principal ultimately assented, it was held, that the holder must be deemed to have received the money of the surety in payment of the note. *Reed* v. *Boardman*, 2 Pick. 441. [There may be cases in which the debtor's right of directing the application of his payments to whichever debt he may choose, would be completely exercised without any *express* direction given at the time. A direction may be evidenced by circumstances as well as by words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it. A positive refusal to pay one debt, and an acknowledgement of another, with a delivery of the sum due upon it, would be such a circumstance. Per Marshall, C. J. *Tayloe* v. *Sandiford*, 7 Wheat. 20, 21. Where a creditor has two demands against his debtor, and the debtor pays a sum of money without directing to which it shall be applied—if the amount paid exceed one of the demands, and is exactly equal to what remains due on the other, it will be considered as having been paid in discharge of that other. *Robert & al.* v. *Garnie*, 3 Caines, 14. If an agent, having blended a demand due to his principal with one due to himself, receives a general remittance from the debtor, it shall be applied towards the discharge of both debts in proportion. *Barrett* v. *Lewis*, 2 Pick. 123.

Where one debt is guarantied, and another not, the creditor is not bound to apply a payment so as first to relieve the surety. *Brewer* v. *Knapp & al.* 1 Pick. 337.] S. P. *Clark* v. *Burdett*, 2 Hall, 197.

If the creditor, receiving a payment unappropriated by his debtor, have two demands against him, the one as a co-debtor with a third party, and the other and more recent claim against the payer individually, it seems the law will appropriate the payment first to the extinguishment of the individual debt. But the creditor cannot wait until the individual debt become larger and then appropriate the payment, if sufficient, to the extinguishment of the increase of that debt, leaving a previous debt unpaid. *Baker* v. *Stackpoole*, 9 Cow. 420. As a general rule, in the absence of all indications of the will or intentions of the parties, the

power to apply it as he chooses, but that if he does not apply it, the party who received it may make the application (*n*). For these purposes, evi-
*825 dence *is admissible of what passed at the time of payment, or of letters enclosing bills or money, and directing their application.

In some instances, the law applies the payment, or the intention of the party paying the money is inferred from the circumstances of the particular case; as where a trader owes 100*l.*, and after he has ceased to trade incurs a further debt, and then pays money on account, it will be set against the old debt (*o*).

A bond reciting that *A.* and *B.* were partners is conditioned for the payment of advances to them; this extends only to advances to the co-partnership; and remittances made subsequently to the death of one are, in the absence of any specific appropriation, to be applied in liquidation of the old balance (*p*). Where one of several partners who are in debt dies, the sur-

(*n*) *Goddard* v. *Cox*, 2 Str. 1194. *Plomer* v. *Long*,[1] 1 Starkie's C. 153. *Marryatts* v. *White*,[2] 2 Starkie's C. 101. *Matthews* v. *Welwyn*, 4 Ves. 118; Cro. Eliz. 68. *Peters* v. *Anderson*, 5 Taunt. 596. *Hall* v. *Wood*, 14 East, 243, n. *Kirby* v. *Duke of Marlborough*, 2 M. & S. 18. *Bosanquet* v. *Wray*,[3] 6 Taunt. 597. *Bodenham* v. *Purchas*, 2 B. & A. 39. *Smith* v. *Wigley*, 3 M. & S. 174. The party who pays the money ought to appropriate it at the time of payment; per Bayley, J., in *Mayfield* v. *Wadsley*,[4] 3 B. & C. 363. But a creditor is not bound to make an immediate application. *Simson* v. *Ingham*,[5] 2 B. & C. 65. And he is not bound by an entry in his book which he has not communicated. Ib.; and see *Cox* v. *Troy*,[6] 5 B. & A. 474. And therefore a mere transfer in the books of a London banker to the credit of an old firm in the country, one of whose members is lately deceased, is not such an appropriation of subsequent receipts as to discharge the condition of a bond for the payment of all monies advanced to the late firm. *Simson* v. *Ingham*,[5] 2 B. & C. 65. *A.*, a solicitor, receives from a client a sum to be paid into Court on the client's account; *A.* pays the amount in a country bill into his bankers without any notice, being then indebted to them in the sum of 450*l.*; for which they held securities, and as to which they kept an account distinct from the general account; *A.* dies; the bankers, after notice from the client, still keep the accounts separate, but ultimately deducting the 450*l.* from the proceeds of the bill pay the balance to *A.*'s executrix; it was held that as there was no agreement to keep the account separate, and the bankers had no notice till after the amount was received of the purpose to which it was intended to be applied, the client was not entitled to recover the proceeds of the bill. *Grigg* v. *Cocks*, 4 Sim. 438. Several parties joined as sureties with the principal in a note to his bankers, who carried it to the account in his pass-book, and charged him with interest on it yearly; upon a change of partners in the banking firm, and a balance struck between the old and new firms it was held that the defendants appearing on the face of the note to be principals, and not having confined their liability to the then existing firm, that it continued, and that the action was properly brought in the names of the partners to whom it was given; and that being made payable on demand, there was no obligation in the bankers to appropriate any balance of the principal to the discharge of that note; and that there having been no appropriation by the debtor, the debt could not be considered as discharged. *Pease* v. *Hirst*,[7] 10 B. & C. 122. In assumpsit for money had and received to the use of the plaintiffs, as assignees of *A. & Co.*, being the proceeds of a bill remitted by *A. & Co.* to the defendants, with orders to get it discounted, and apply the proceeds in a specific way, but before they became due *A. & Co.* became bankrupt, and required to have the bill returned, it not having been discounted, but the defendants received the amount when due; held, that the assignees were entitled to recover, and that the defendants could not set off a debt due to them from the bankrupt. *Buchanan* v. *Findlay*,[8] 9 B. & C. 739; and see *Key* v. *Flint*,[9] 8 Taunt. 21.

(*o*) *Meggott* v. *Mills*, Ld. Raym. 286; Comb. 463; *Supra*, tit. Bankruptcy. *Dawe* v. *Holdsworth*, Peake's C. 64.

(*p*) *Simson* v. *Cooke*,[1] 1 Bing. 452.

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law will apply the payment to the extinguishment of the debts according to the priority in time. *Seymour* v. *Van Slyck*, 8 Wend. 403. Payments made generally on a bond, payable in instalments, without appropriation at the time, to any particular instalments, will not be applied by law to such as are not then payable, but to such as are payable, according to the dates at which they respectively become so. *Seymour* v. *Sexton*, 10 Watts, 255. See also, *Berghaus* v. *Alter*, 9 Watts, 386. *Goss* v. *Stinson*, *supra*. So the payment in such a case, is to be applied to a debt that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rests on a simple stipulation. *Goss* v. *Stinson*, 3 Sumner, 110. The rule in equity, it would seem, is different. And it has been held that where money has been paid, and no application to particular debts directed by the debtor, or made by the creditor, if it becomes necessary for a court of equity to make the application, it will direct that those debts, for which the security is most precarious, be first extinguished. *Field & al.* v. *Holland & al.* 6 Cranch, 8.)

[1]Eng. Com. Law Reps. ii. 334. [2]*Id.* iii. 265. [3]*Id.* i. 201. [4]*Id.* x. 110. [5]*Id.* ix. 25. [6]*Id.* vii. 163. [7]*Id.* xxi. 38. [8]*Id.* xvii. 486. [9]*Id.* iv. 3. [10]*Id.* viii. 377.

vivors continuing their dealings with a particular creditor, who joins the transactions of the old and new firm in one entire account, payments made from time to time by the survivors are to be applied to the old debts (*q*). So payments by a debtor from time to time to surviving partners upon a general account, including the whole debt, are to be applied, in the first place, to the old debt (*r*). In case of a continuing account, such as a banker's cash account, the ordinary appropriation is according to the order of time (*s*).

*Where an old debt is due, and new debts are contracted, and payments are made from time to time, agreeing in amount with the new debts, a very strong inference arises that the payments were made in respect of the new debts (*t*), especially in favour of a surety for the new debts (*u*). *826

Where a creditor has a legal claim on bills of exchange, and also an equitable claim on a mortgage assigned by a third person, and a payment is made by the debtor generally, without prejudice to his claim on any securities, it is to be presumed that the payment is in discharge of the *legal* debt (*x*).

Where a secret partner had retired from the firm, and bills given in payment for goods previously supplied to the firm were dishonoured, and new bills were given by the partners who continued in the firm, on the dishonoured bills being delivered up; it was held that these were to be considered as applicable to the old debts, and not to new debts contracted since the dissolution (*y*).

Where a party placed in the hands of his banker the note of a third person, informing the banker that it was made for his accomodation, and afterwards paid in money generally, after which new credit was given by the banker, it was held that the banker could not recover from the maker more than the balance due on the note, after deducting the amount so paid in (*z*).

(*q*) Per Bayley, J., *Simson* v. *Ingham*,[1] 2 B. & C. 72; and see *Clayton's Case*, 1 Merivale, 572. *Brook* v. *Enderby*,[2] 2 B. & B. 71.

(*r*) *Bodenham* v. *Purchas*, 2 B. & A. 39. *Secus*, where the old debt is not brought into the new account. *Simson* v. *Ingham*,[1] 2 B. & C. 65. And where there are distinct demands by the whole firm, and by a partner, if the money paid be the money of the partners, the creditor cannot apply the payment to the debt of the individual partner. *Thompson* v. *Brown*,[3] M. & M. 40.

(*s*) Where a continuing account is treated as one entire account by all parties, the rule of appropriation does not apply. In the case of a banking account, there is not room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried to account; presumably, it is the first sum paid in that is first drawn out; it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other; upon that principle all accounts are settled, and particularly cash accounts. *Clayton's Case*, 1 Merivale, 572. In general, where payments are made upon one entire account, they are considered as payments in discharge of the earlier items. Per Bayley, J. in *Bodenham* v. *Purchas*, 2 B. & A. 46. A general payment is applicable to a prior legal demand, not to a subsequent equitable one. *Goddard* v. *Hodges*, 1 C. & M. 33. Where a bond was given to secure advances to be made by partners, and one partner died, the account was continued, and the two accounts were blended together, subsequent payments being applied generally in reduction of the whole balance; it was held that the subsequent payments must be considered as payments in discharge of the former balance. *Bodenham* v. *Purchas*, 2 B. & A. 39; and see *Williams* v. *Rawlinson*,[4] 3 Bing. 76.

(*t*) *Marryatts* v. *White*,[5] 2 Starkie's C. 101.

(*u*) Ibid. per Lord Ellenborough. But it seems that the law will not apply a payment in favour of a surety, unless there be some circumstances to show that payments by the principal were intended to be made in discharge of the particular debt. *Plomer* v. *Long*,[6] 1 Starkie's C. 153; and see *Kirby* v. *Duke of Marlborough*, 2 M. & S. 18; and *Williams* v. *Rawlinson*,[4] 3 Bing. 71.

(*x*) *Birch* v. *Tebbutt*,[7] 2 Starkie's C. 74.

(*y*) *Newmarch* v. *Clay*, 14 East, 239.

(*z*) Per Lord Kenyon, *Hammersley* v. *Knowlys*, 2 Esp. C. 665.

[1]Eng. Com. Law Reps. ix. 25. [2]*Id.* vi. 23. [3]*Id.* xxii. 242. [4]*Id.* xi. 34. [5]*Id.* iii. 265. [6]*Id.* ii. 334. [7]*Id.* iii. 252.

Where money is due from a debtor as executor, and other money is due on his own private account, and he makes a payment generally, it must be applied to the latter debt (*a*).

Where a broker sold goods of *A.* and also goods of *B.* to *C.*, and the latter made a payment generally on account, insufficient to discharge both debts, and then became insolvent, it was held that the money so received was to be applied in proportion to the debts (*b*).

Where a creditor has several demands, some of which cannot be enforced
*827 *because they are illegal, and money be paid generally, it will be applied to the legal demand (*c*).

A transfer of funds into the names of trustees, with an illegal intent to evade the legacy duty, without any communication made to such trustees, is not a binding appropriation (*d*).

Solvit ad diem.

In the case of mortgages, bonds, and other instruments, by which the party engages to pay money within a certain time, proof of payment on the last moment of the day will satisfy the allegation on issue taken on the plea of *solvit ad diem* (*e*).

What will amount to payment under the circumstances of the particular case is a question of law (*f*).

(*a*) *Goddard* v. *Cox*, 2 Str. 1194. But see *Steindale* v. *Hankinson*, 1 Simons, 393, where it was held, that where *B.* was indebted to the plaintiff on a balance of account for goods, and *B.*'s widow continued his trade after his decease, and continued to receive goods and make payments, and she was charged by the creditor with the debt, *B.*'s debt was discharged by the payments, and that the ultimate balance could not be proved against *B.*'s estate. It appeared that the plaintiff had adopted the administratrix as his debtor, by making her debtor to the balance, and that accounts had been rendered to her in which she was so debited.

(*b*) *Favenc* v. *Bennett*, 11 East, 36.

(*c*) *Ribbans* v. *Crickett*, 1 B. & P. 264. *Wright* v. *Laing*,[1] 3 B. & C. 166. [See *Hilton* v. *Burley*, 2 N. Hamp. R. 193.] But where one of the demands is for spirituous liquors, supplied in quantities not amounting to 20*s.* at a time, the receiver of the money may apply it to that demand; the stat. 24 G. 2, c. 40, operating merely to prevent the seller from maintaining the action. *Cruickshanks* v. *Rose*, 1 Mo. & R. 100. He may so apply it, although his particulars claim the whole demand, and he may make the appropriation at any time before trial. *Philpott* v. *Jones*,[2] 2 Ad. & Ell. 41; 4 N. & M. 14; and see *Cruickshanks* v. *Rose*, 1 Mo. & R. 100.

(*d*) A party had directed his bankers to transfer certain funds to the accounts of certain persons, as trustees for his wife and others, for his son, with a view to evade the legacy duty, and the bankers accordingly did so, and placed the dividends accruing thereon to such accounts respectively; but such transfers were never communicated to the persons so named trustees, and the party had evinced an opinion that he had still a control over the funds; held, that they were not binding appropriations, being made with a fraudulent intent; and it being clear that the entire control had not been parted with, the funds were therefore on his death to be accounted for as part of his personal estate. *Gaskell* v. *Gaskell*, 3 Y. & J. 502; and see *Wharton* v. *Walker*,[3] 4 B. & C. 163. See further, tit. Appropriation, *supra*.

(*e*) Per Lord Kenyon, in *Leftly* v. *Mills*, 4 T. R. 173, citing *Hudson* v. *Barton*, 1 Roll. R. 189. *Cabell* v. *Vaughan*, 1 Saund. 287; Moor, 122, pl. 166; Salk. 578.

(*f*) Payment in notes which turn out to be worthless is no payment in law. *Owenson* v. *Morse*, 7 T. R. 64. *Brown* v. *Kewley*, 2 B. & P. 518. *Tapley* v. *Martens*, 8 T. R. 451. *Bodenham* v. *Purchas*, 2 B. & A. 39. The giving a note of hand does not operate to alter the debt till payment; and therefore, although *A.* gave a note for rent in arrear to *B.*, and took a receipt for it, it was held that *B.* might still distrain for the rent. *Harris* v. *Shipway*, B. N. P. 182. *Secus*, if *A.* indorse a bill or note to *B.* in payment of a debt, and *B.* neglect to demand payment from the drawer in time. *Ewer* v. *Clifton*, B. N. P. 182; Andr. 190. Where the agreement was for the sale of goods for ready money, and payment was made to the vendor's brother in a bill of exchange, accepted by the vendor, which when due had been dishonoured, and the bill, though objected to in the first instance, was taken and not returned, it was held, in the absence of fraud, to be a good payment as against the assignee of the vendor. *Mayer* v. *Nias*,[4] 1 Bing. 311; *infra*, tit. Set-off. The taking of credit may be equivalent to payment. *A.* receives country bank-notes in payment from *B.*, and by an agreement between *B.* and the country bank *A.* has credit for the amount; it is equivalent to a payment by the bank. *Gillard* v. *Wise*,[5] 5 B. & C. 134. Or it may be by a transfer of a debt. If *A.* be indebted to *B.*, and *B.* to *C.* in the same amount, and by agreement *C.* takes *A.* for his debtor, this constitutes a loan from *C.* to *A.* and operates as a payment by *B.* to *C.* See *Wade* v. *Wilson*, 1 East, 195. *Surtees* v. *Hubbard*, 4 Esp. C. 203. The observations of Holroyd, J. in *Bodenham* v. *Purchas*, 2 B. & A. 47. *Browning* v. *Stollard*,[6] 5 Taunt. 450. *Cecil* v. *Harris*, Cro. Eliz. 140; *supra*. *Secus*, where no new person agrees to become a debtor. *A.*, *B.* and *C.* being partners, *A.* retires from the firm; a transfer of a debt from *A.*, *B.* and *C.* to *D.* from the old to the new firm, with the assent of *D.*, does not discharge *A.* *David* v. *Ellice*,[7] 5 B. & C. 196;

[1]Eng. Com. Law Reps. x. 44. [2]*Id.* xxix. 24. [3]*Id.* x. 302. [4]*Id.* viii. 330. [5]*Id.* xi. 177. [6]*Id.* i. 154. [7]*Id.* xi. 201.

*The payment of money into court was formerly proved by the production of the rule for paying it into court (*g*). It was proved either by the plaintiff or the defendant. Payment of money into court.

But now by the rule of Hil. T., 4 W. 4, such payment must in all cases be pleaded. The effect of paying money into court by way of admission seems to remain as it was before.

The effect of paying money into court, upon a special count, or generally when the declaration contains a special count, is an admission of the right to recover on that count, which supersedes the necessity of the usual proof of the making of the contract (*h*) (A). Effect of.

and see *Lodge* v. *Dicas*,[1] 3 B. & A. 611. *Newmarch* v. *Clay*, 14 East, 239. Where the defendants gave orders to their bankers to place a sum to the credit of the plaintiffs, so as to make the same as a bill of one month, and the brokers assented, but treated it as a payment to be made at a future day, and gave notice to the defendants accordingly, and became bankrupts before the day, it was held to be no payment. *Pedder* v. *Watt*,[2] 2 Ch. C. T. M. 619. An execution against the person of the debtor operates as a legal satisfaction of the debt. *Cohen* v. *Cunningham*, 8 T. R. 123. *Burnaby's Case*, Str. 653. *Goddard* v. *Vanderheyden*, 3 Wils. 262. Payment to the obligee of a bond, after notice of assignment, is not sufficient to discharge the obligor (in equity). *Baldwin* v. *Billingsley*, 2 Vern. 539. *Ashcomb's Case*, 1 Ch. Ca. 232. An order by a creditor on his debtor to pay the amount to a third person, after being assented to by the debtor, is not revocable. *Hodgson* v. *Anderson*,[3] 3 B. & C. 842. If *A.* owe *B.* 100*l.*, and *B.* owe the same sum to *C.*, and the three met, and it is agreed that *A.* shall pay *C.* the 100*l.*, *B.*'s debt is extinguished, and *C.* may recover from *A.* Per Buller, J., in *Tatlock* v. *Harris*, 8 T. R. 174; and per Bayley, J., 3 B. & C. 855. So if *A.* engage to pay *C.* the amount due to *B.* when ascertained. *Crawfoot* v. *Gurney*,[4] 9 Bing. 372. And *C.* may recover from *A.* notwithstanding the intermediate bankruptcy of *B.* Ib.; and see above, 79, 80. Payment of one entire rent to the clerk of seven trustees of a charity, coming to their title at different times, is *prima facie* evidence of a joint title. *Doe* v. *Grant*, 12 East, 221. In general, money voluntarily paid under a knowledge of the facts cannot be recovered. *Supra*, tit. Assumpsit. *Gower* v. *Popkin*,[5] 2 Starkie's C. 85; 1 B. & A. 571. To a rector in lieu of tithes, when exempt from rate. *R.* v. *Boldero*,[6] 4 B. & C. 467.

(*g*) *Israel* v. *Benjamin*, 3 Camp. 40; Tidd's Pr. 645, 7th edit.

(*h*) 4 T. R. 579. *Cox* v. *Parry*, 1 T. R. 464. *Elliott* v. *Callow*, 2 Salk. 597. *Guillod* v. *Nocke*, 1 Esp. C. 347. *Watkins* v. *Towers*, 2 T. R. 275; and see *Cox* v. *Brain*, 3 Taunt. 95. Payment of money into court admits everything which the plaintiff must have proved to recover it. P. C.,[7] 1 B. & C. 4. And such admission is conclusive, 1 C. M. & R. 207; which a payment before action brought is not, Ib.; to show that the plaintiff has a legal demand to the extent of the money brought in. *Blackburn* v. *Schoole*, 2 Camp. 341. It admits the right to sue in the particular capacity (*Tuson* v. *Batting*, 3 Esp. C. 192), and supersedes the usual proofs in the case of a bill of exchange. *Gutteridge* v. *Smith*, 2 H. Bl. 374. *Jenkins* v. *Tucker*, 1 H. & B. 90. *Bennett* v. *Francis*, 2 B. & P. 550; 2 Camp. 357; Peake's C. 14. *Dyer* v. *Ashton*,[8] 1 B. & C. 3; 2 D. R. 19. It admits the sufficiency of the stamp. *Israel* v. *Benjamin*, 3 Camp. 40. It conclusively admits the character in which the plaintiff sues. *Lipscombe* v. *Holmes*, 2 Camp. 441. As also that in which the defendant is sued. *Lucy* v. *Walrond*,[9] 3 Bing. N. C. 841. It excludes (where the work was done under one contract) the defendant from objecting to the non-joinder of a co-plaintiff. *Walker* v. *Rawson*, 1 Mo. & R. 250. If all the defendants pay money into court, there being but one contract in fact, they are excluded from the defence that one of them was not a party. *Ravenscroft* v. *Wise*, 1 C. M. & R. 203. Where several breaches of covenant are assigned, payment on a single breach admits the deed. *Randall* v. *Lynch*, 2 Camp. 352. Payment into court generally, where no special contract is stated, admits no more than that the sum paid in is due; but where there is a special contract, the payment admits that contract. *Seaton* v. *Benedict*,[10] 5 Bing. 31; and 2 M. & P. 67, 301. In an action on a security bearing interest; the defendant pays into court a sum sufficient to cover the principal, and interest up to the time of the action brought but not up to the time of paying money into court; the plaintiff is entitled to proceed in the action, and may recover damages for the remaining interest. *Kidd* v. *Walker*,[11] 2 B. & Ad. 705. A sum of 4*l.* is paid into court on the account stated; the plaintiff cannot recover a larger sum by showing that on an application to the defendant he admitted that something was due, insisting however on a cross-demand, with proof that a larger sum in fact was due; for the account stated is applicable to but one accounting. *Kennedy* v. *Withers*,[12] 3 B. & Ad. 767. Payment of money into court admits the contract and breach of it as alleged, but asserts that no more was due than the sum paid in. Per Bayley, B., *Lechmere* v. *Flecher*, 3 Tyr. 455. On a general account, where it appears that there is one entire contract between the parties, the payment of money on the general count admits the contract. *Meager* v. *Smith*, 4 B. & Ad. 673. *Secus* if there be no entire contract. Where money had been paid into court on a general *indebitatus* count, Parke, B. held that the plaintiffs, to recover a further sum on a further cause of action, were bound to prove the partnership of the plaintiffs.

(A) (A payment of money into court admits the contract and damages only *pro tanto*, and if the plaintiff does not establish more at the trial, he must be nonsuited or have a verdict against him. *Donnell* v. *The Columbia Ins. Co.*, 2 Sumner, C. C. R. 366.)

[1] Eng. Com. Law Reps. v. 397. [2] *Id.* xviii. 432. [3] *Id.* x. 247. [4] *Id.* xxiii. 309. [5] *Id.* iii. 257. [6] *Id.* x. 380. [7] *Id.* viii. 4. [8] *Id.* xxxii. 349. [9] *Id.* xv. 354. [10] *Id.* xxii. 174. [11] *Id.* xxiii. 182. [12] *Id.* xxiv. 138.

*Thus a general payment admits the policy of insurance, alleged in a special count, and precludes the defendant from proving by evidence that the policy has been vacated by a material alteration (*i*). And in an action by a farmer of tithes under the statute, the payment admits the title, and reduces the question to the *quantum* of damages (*k*).

It has even been held that the admission by paying money into court will support the contract stated upon the declaration, although it appear upon the evidence, that if the admission had not been made the plaintiff must have been nonsuited (*l*); as where in an action of *assumpsit* for negligence in the carriage of goods, it appeared that according to the terms of the contract actually made, the plaintiff was not entitled to recover at all (*m*).

Admission, by paying money into court.

And such payment amounts to an admission of a contract for goods sold and delivered, with respect to goods of the plaintiff tortiously converted by the defendant to his own use (*n*).

Although in the case of a special contract, the payment admits the contract, yet in the case of *indebitatus assumpsit*, where the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due (*o*). And it seems that the liability as to the rest may be disturbed under this plea, although *non assumpsit* be not pleaded (*p*).

But in an action against a justice of the peace for an action done in his official capacity, the bringing money into court by virtue of a statute, does not, it is said, admit the right of action (*q*).

In an action against an infant for work and labour done for him, the payment of money into court does not exclude infancy as a defence, for to that amount he may have been liable for necessaries (*r*).

*830 *Such payment operates merely as evidence of the defendant's admission of the contract, upon which a jury may act; and if they do not in a special verdict expressly find the contract, but merely the fact of the payment of money into court, it seems that the Court cannot make the inference (*s*).

Paley & others v. *Barker*, York Lent Assizes, 1835. The payment of money into court, in an action for use and occupation, precludes the defendant from questioning the plaintiff's title or alleging the non-joinder of another as co-plaintiff. *Dolby* v. *Isles*, 3 P. & D. 287. In an action on a guaranty, the plea admits an agreement signed according to the Statute of Frauds. *Middleton* v. *Brewer*, Peake's C. 15. The plea admits the right to sue in the court in which the action was brought. *Miller* v. *Williams*, 5 Esp. C. 19. The performance of conditions precedent. *Harrison* v. *Douglas*,[1] 3 Ad. & Ell. 396. The declaration stating a contract to pay a specified sum for particular articles, the payment of part of the money into court, by admitting the contract, admits the sum originally due, and the question is as to the remainder. *Cox* v. *Brain*, 3 Taunt. 95. Payment generally admits something to be due on each count. *Stoveld* v. *Brewer*, 2 B. & A. 116. But see *Stafford* v. *Clarke*,[2] 2 Bing. 383. *Drake* v. *Lewin*, 4 Tyr. 730.

(*i*) *Andrews* v. *Palsgrave*, 9 East, 325; and *supra*, note (*h*).

(*k*) *Broadhurst* v. *Baldwin*, 4 Price, 58; and see *Cox* v. *Parry*, 1 T. R. 464.

(*l*) *Yate* v. *Willan*, 2 East, 128. *Pigott* v. *Dunn*, Ibid. Where goods had been sold by sample at a stipulated price, and the defendant in an action of *indebitatus assumpsit* for goods sold and delivered, paid money into court, it was held at *Nisi Prius* that he could not afterwards insist upon the inferiority of the goods, and that he ought to have returned them. [3]2 Starkie's C. 103; *sed qu.*

(*m*) *Yate* v. *Willan*, 2 East, 128; *infra*, 830, note (*x*). But in a subsequent case the court held that this case could not be supported to the full extent, and that the defendant might still avail himself of a stipulation by which the amount of damages was limited. When it appears that there is a material variance between the contract declared upon, and the real contract, the plaintiff, it seems, cannot recover; for although the defendant admits the contract stated, yet the plaintiff must show damages from the breach of that contract, which he cannot do where the damage has resulted from the breach of another and different contract. See *Mellish* v. *Allnutt*, 2 M. & S. 106; *infra*, 830.

(*n*) *Bennett* v. *Francis*, 2 B. & P. 550. *Qu.* whether, independently of this consideration, the plaintiff might not waive the *tort*, and recover as for goods sold and delivered. Vide *supra*, 83.

(*o*) *Meager* v. *Smith*,[4] 4 B. & Ad. 673. *Seaton* v. *Benedict*,[5] 5 Bing. 32.

(*p*) *Booth* v. *Howard*, 5 Dowl. 438. (*q*) 13 East, 202, 3.

(*r*) *Hitchcock* v. *Tyson*, 2 Esp. C. 482; and see *Cox* v. *Parry*, *infra*.

(*s*) *Mellish* v. *Allnutt*, 2 M. & S. 106.

[1]Eng. Com. Law Reps. xxx. 125. [2]*Id.* ix. 437. [3]*Id.* iii. 206. [4]*Id.* xxiv. 138. [5]*Id.* xv. 354.

Where the plaintiff had misled the defendant, and induced him to prepare to try a question of fraud, the Court would not permit him to insist upon the admission made by the payment of money into court, so as to exclude the defendant's evidence of fraud (*t*).

Such payment merely admits the contract and damages *pro tanto*, and the plaintiff will be nonsuited unless he prove that a greater sum is due (*u*). And where a limitation has been annexed to the real contract, the effect of which is, under certain circumstances, to preclude the plaintiff from recovering more than a specified sum, the defendant, although he has paid money into court generally, may prove the limitation, and show that the plaintiff is not entitled to recover more than has been paid into court.

In an action against a carrier, on a breach of an *assumpsit* to carry goods safely, 5*l.* having been paid into court generally, it was held that it was competent to the defendant to prove notice to the plaintiff that no more than 5*l.* would be accounted for, for any goods, unless entered as such, and paid for accordingly (*x*); for the notice did not alter the contract for safe carriage, but merely limited the amount of damages for breach of that contract.

In an action on a valued policy, the payment of money into court upon a count which states a total loss by capture, does not admit a total loss, and the plaintiff is bound to prove a damage exceeding the sum so paid in (*y*). And where the declaration was for the price of bark sold to the defendant, to be paid for at the average price, as ascertained on a day specified, it was held that the payment of money into court did not admit the average price to be as stated in the declaration (*z*).

Such payment into court does not preclude the defendant from objecting to the illegality of the contract, in order to bar the plaintiff from recovering more than has been paid into court (*a*). Neither is the defendant precluded from insisting that the loss complained of did not result from the breach of the particular contract (*b*).

Effect of paying money into court.

Thus, where money is paid into court generally, on a declaration containing a special count on a policy, the defendant may dispute his further liability with respect to goods which were not loaded according to the terms of the policy (*c*). Such payment does not preclude the defendant from *taking an objection to the recovering beyond that sum, although if money had not been paid into court, the objection would have been an answer to the whole demand (*d*). *831

Where the payment into court is applicable indifferently to several

(*t*) *Muller* v. *Hartshorne*, 3 B. & P. 556. The declaration contained a special count on a policy of insurance, and the money counts, and money had been paid into court generally.

(*u*) 3 T. R. 657; 2 Salk. 597; 4 T. R. 10; 7 T. R. 372; 2 H. B. 374. *Rucker* v. *Palsgrave*, 1 Taunt. 419; *infra*, note (*f*).

(*x*) *Clarke* v. *Gray*, 6 East, 564. In the previous case of *Yates* v. *Willan* (2 East, 128), it was held, that in such an action, and payment of money into court, it was sufficient for the plaintiff to produce the rule, and prove the value of the goods, to entitle him to recover to the full amount; and that the defendant could not avail himself of a notice that he would not be responsible for more than 5*l.* unless, &c. But in the latter case of *Clarke* v. *Gray*, the Court intimated that the former case could not be supported to the full extent. See also *Cox* v. *Parry*, 1 T. R. 464.

(*y*) *Rucker* v. *Palsgrave*, 1 Taunt. 419; 1 Camp. 557. Payment of money into Court in an action on a promissory note payable by instalments, is an admission only to the extent paid, and does not exclude the Statute of Limitations as to a further sum payable on the same note. *Reid* v. *Dickens*,[1] 5 B. & Ad. 499.

(*z*) *Stoveld* v. *Brewin*, 2 B. & A. 116. See also *Everth* v. *Bell*,[2] 7 Taunt. 450; *Lechmere* v. *Fletcher*, 1 C. & M. 623.

(*a*) *Cox* v. *Parry*, 1 T. R. 464. (*b*) 2 M. & S. 106.

(*c*) *Mellish* v. *Allnutt*, 2 M. & S. 106.

(*d*) *Cox* v. *Parry*, 1 T. R. 464; where the action was on a policy which was void.

[1]Eng. Com. Law Reps. xxvii. 113. [2]*Id.* ii. 171.

grounds of claim alleged by the plaintiff, the plaintiff cannot apply the admission resulting from the payment of money into court generally, so as to make it evidence of any one particular ground of claim.

The plaintiff, on a declaration on a policy on fish, free from average, unless general, or the ship be stranded, averred that the ship was stranded, bulged, damaged and wrecked, and it was held that payment of money into court was not evidence of a total loss, and of a stranding; for the loss, consistently with the declaration, might have arisen from other means than by stranding (*e*).

If money be paid into court generally, and the plaintiff insists upon several claims, some of which are illegal, and others legal, the Court will apply the payment to the legal demand (*f*). And where money cannot be paid into court upon some of the counts, the payment will be applied to those upon which it might legally be made (*g*) (1).

If as to part of the demand the plaintiff be entitled to recover, but not as to the rest, the payment will be attributed to the former, and will not entitle the plaintiff to recover in respect of the latter demand (*h*). Such payment does not take a case out of the Statute of Limitations (*i*).

The rule of Trinity Term, 1 W. 4, as to annexing the particulars of the plaintiff's demand to the declaration, does not make the payment of money into court to operate as an admission of such particulars (*k*).

Where the defendant has taken out a rule for the payment of money into court, but has not paid the taxed costs to the plaintiff, and the plaintiff proceeds in the action in order to recover the costs, it is sufficient for him to produce the rule of court and the master's *allocatur*, and this will entitle him to a verdict for nominal damages (*l*), unless the defendant prove that he has paid the costs under the rule, pursuant to the master's *allocatur*. And it is not necessary to such case for the plaintiff to prove a previous demand of costs, where they have been taxed, but the defendant has omitted to pay them (*m*).

Unless the plaintiff proves his claim to a larger sum than that which has been paid into court, he is liable upon the production of the rule to be nonsuited (*n*). But if the plaintiff, after taking the money out of court, take a verdict for the whole sum, without deducting the sum paid into court, the Court will set it aside, although no evidence be given of the
*832 rule (*o*). It has *been doubted whether the production of the rule by the defendant is to be considered as evidence given by him, so as to entitle the plaintiff's counsel to a reply; but by a rule of the Court of Common Pleas, it is not to be so considered (*p*).

(*e*) *Everth* v. *Bell*,[1] 7 Taunt. 450; 1 Moore, 158.

(*f*) *Ribbans* v. *Crickett*, 1 B. & P. 264. The late rules require illegality to be pleaded; but where such a defence is open, it seems that payment into court will be no waver of the incapacity to sue. See *Wills* v. *Longridge*, 5 Ad. & Ell. 383.

(*g*) *Cotterell* v. *Apsey*,[2] 6 Taunt. 322; 1 Marsh. 581.

(*h*) Where the action was for use and occupation by the bankrupt, and afterwards by his assignees (the defendants) at their special instance and request, and the defendants paid money into court, which on the evidence was sufficient to cover their own occupation, they had a verdict as to the rest. *Naish* v. *Tatlock*, 2 H. B 319.

(*i*) *Long* v. *Greville*,[3] 3 B. & C. 10. *Reid* v. *Dickens*,[4] 5 B. & Ad. 499.

(*k*) *Booth* v. *Howard*, 5 Dowl. 438. *Meager* v. *Smith*,[5] 4 B. & Ad. 673.

(*l*) *Horsburgh* v. *Orme*, K. B. Sitt. in H. T. 49 Geo. 3, 1 Camp. 558, in note.

(*m*) *Smith* v. *Smith*, 2 N. R. 473. *Smith* v. *Battersby*, 7 Price, 674.

(*n*) By the terms of the rule. See 3 T. R. 657; 4 Salk. 597; 4 T. R. 10; 7 T. R. 372; 2 H. B. 374.

(*o*) 2 Taunt. 267. (*p*) 2 Taunt. 267.

(1) {The payment of money into Court on several general counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. *Stafford* v. *Clarke*, 2 Bingh. 377.}

[1] Eng. Com. Law Reps. ii. 171. [2] *Id.* i. 400. [3] *Id.* x. 5. [4] *Id.* xvii. 113. [5] *Id.* xxiv. 138.

Of taking money out of court.

The act of taking money out of court, and accepting it with costs in satisfaction, will not operate as conclusive evidence in a collateral action, to show that nothing more was due.

By the defendant.

In an action on the statute, for selling five chaldrons of coals, and delivering them short by sixteen bushels, the plaintiff proved, that in an action by the present defendant for the price of the five chaldrons, the plaintiff, then defendant, paid the amount into court, minus the value of the sixteen bushels, and that the then plaintiff took the money out, and had his costs; and this the plaintiff contended was conclusive to show the deficiency. But Lord Ellenborough held, that as the act of the attorney in taking the money was equivocal, he would admit evidence for the purpose of explaining the intention (*q*).

If money has been paid into court in a case where it could not regularly be paid in, the plaintiff should move to discharge the rule (*r*).

Money which has been paid into court cannot be recovered back, though it was paid wrongfully, for it is acknowledged on the record to be due (*s*).

Where, on a plea of payment, the defendant proved payment to the plaintiff's attorney, on his account, held that the attorney was a competent witness for the plaintiff to show that the defendant afterwards called upon him and got back the money (*t*).

PEDIGREE.

In proving *A.* to be the heir-at-law (*u*) of *B.*, in strict and formal detail (*v*), it is necessary to prove, 1st, their relationship through their common ancestor (*x*); and, 2dly, negative proof is requisite that no other descendant from the common ancestor impedes the descent to *A.* (*y*).

(*q*) *Hildyard* v. *Blowers*, 5 Esp. C. 69, *cor.* Lord Ellenborough; the defendant had a verdict.

(*r*) *Griffiths* v. *Williams*, 1 T. R. 710.

(*s*) *Malcolm* v. *Fullarton*, 2 T. R. 645. And the Court will not order money paid in through mistake to be restored, unless it appear that some fraud or deceit has been practised upon the defendant. 2 B. & P. 392.

(*t*) *Bowers* v. *Evans*, 3 Cr. M. & R. 214.

(*u*) Vide *supra*, tit. Heir. One born in America after the treaty of 1783, is an alien, and incapable of inheriting lands in England. *Doe* v. *Acklam*,[1] 2 B. & C. 779.

(*v*) As to presumptive evidence, vide *infra*, 833.

(*x*) By the late stat. 3 & 4 W. 4, c. 106, several important alterations have been made relating to the descent of real property. By sec. 2, the descent shall always be traced from the purchaser, and the person last entitled to the land, shall, for the purposes of the Act, be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner, the last person from whom the land shall be proved to have been inherited shall be considered to have been the purchaser, unless it shall be proved that he inherited the same.—By sec. 5, no brother or sister shall be considered to inherit immediately from his brother or sister; but every descent to a brother or sister shall be traced through the parent.—Sec. 6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. Sec. 7. The male line is to be preferred. No female maternal ancestor shall be capable of inheriting, until all the male maternal ancestors and their descendants shall have failed.—Sec. 8. Where there shall be a failure of male paternal ancestors of the party from whom the descent is to be traced and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. By sec. 11, the Act shall not extend to any descent before Jan. 1st, 1834.

(*y*) The person who claims as heir at law to the person last seised, must prove not only his relationship, but the failure of issue from the persons who intervene in the course of descent, by negative evidence (*Richards* v. *Richards*, B. R. 4 Geo. 2, Ford's MSS.). Where the plaintiff claimed as heir by descent, and proved the death of his elder brothers, but did not prove that they died without issue, it was held to be insufficient; but reputation of the negative, where such brothers had been absent from the family, would have been sufficient. *Doe* v. *Griffin*, 15 East, 293; *infra*, 604.

[1] Eng. Com. Law Reps. ix. 238.

Proof of relationship.

*1st. In order to prove the relationship of *A.* and *E.* supposing *C.* to be the common ancestor, and *D.* and *E.* to be his son and grandson in the one line, and *B.* and *A.* to be his son and grandson in the other, the direct course would be to prove the marriage of *C.* and his wife, and that *B.* and *D.* were his legitimate children (*z*); and also the marriages of *B.* and *D.*, and that *A.* and *E.* were respectively the issue of those marriages (*a*).

2dly. Proof is requisite of the deaths of *E.* and *B.* (*b*), and also that *B.*, *C.*, *D.* and *E.* had no issue, which, according to the well-known rules which regulate descents, would take in preference to *A.*, or if they had, then to show the failure of such issue by negative evidence, or to prove that the issue, if any exists, which would otherwise take in preference to *A.*, is of half-blood, &c. (*c*).

Presumptive evidence.

As in matters of pedigree it is impossible to prove the relationships of past generations by living witnesses, resort must usually be had to *traditionary declarations* made by those now dead who were likely to *know* the fact, and to declare the truth, or to evidence of *general reputation.*

Proof by declarations, &c.

Proof of the cohabitation of parties who publicly acknowledged each other in the characters of husband and wife, their treating and educating children as their legitimate offspring, according to their rank and station in life, and their acknowledging them to be such in the face of the world; or,

*834 *on the other hand, the representation and treatment of a child as illegitimate; are all of them solemn and deliberate admissions relating to facts necessarily within the knowledge of the parties making them, accompanying and corresponding with their acts and conduct. Such representations are therefore admissible in evidence, on the broad and general elementary principle already adverted to (*d*).

They are not to be considered as mere wanton assertions, upon which no reliance can be placed; on the contrary, in the absence of any motive for committing a fraud upon society, it is in the highest degree improbable that the parties should have been guilty of practising a continued system of imposition upon the rest of the world, involving a conspiracy in its nature very difficult to be executed. So far, upon the strictest principles, the evidence is receivable, but the necessity of the case warrants a far greater latitude.

(*z*) By direct proof, or by copies from the registers, with evidence of identity, or by reputation where direct proof, &c. cannot be had.

(*a*) By the testimony of members of the family, or of those conversant with it, or by reputation. See below, 833, 843.

(*b*) *Supra*, 364. Proof of letters of administration to the effects of *A. B.* is not sufficient evidence of the death of *A. B.* *Thompson* v. *Donaldson*, 3 Esp. C. 63; and per Park, J., Lanc. Sp. Ass. 1830. See *Moors* v. *Bernales*, 1 Rus. 307; *Polhill* v. *Polhill*, Hil. 1701, cited Bac. Ab. Evidence, F. In order to establish the determination of a life estate, hearsay evidence of the death of the *cestui que vie* is not, as in the case of pedigree, sufficient; nor is the register of a dissenting chapel, nor are inscriptions on the tombstones in the adjacent burial-ground, receivable. *Whittuck* v. *Waters*,[1] 4 C. & P. 375. Where the brothers of an ancestor to whom the plaintiff claimed to be heir died a century ago, held that, in the absence of any evidence to the contrary, it might be presumed that they died without issue. *Doe* d. *Oldham* v. *Woolley*,[2] 8 B. & C. 22; and 3 C. & P. 412.

(*c*) By the late stat. 3 & 4 W. 4, c. 106, s. 9, any person related to the person from whom the descent is to be traced by the half-blood shall be capable of being his heir, and the place in which any such relation by the half-blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half-blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother shall inherit next after the mother.

(*d*) *Supra*, Vol. I. tit. REPUTATION.

[1]Eng. Com. Law Reps. xix. 427. [2]*Id.* xv. 150.

All those who knew the actual state of the family at a remote period may now be deceased, and very possibly no means of proof remain, except such as are derived from traditionary declarations of members of the family, or persons connected with it, now deceased, or from general reputation (1). The great difficulty of proving remote facts of this nature renders it necessary that the Courts should relax from the strictness which is required in the proof of modern facts, in the ordinary manner, by living witnesses (*e*).

Hence the traditionary declarations of deceased members of the family are in general admissible as evidence, after the deaths of those persons, as to the degrees of relationship of the different branches of the family, their intermarriages, the number of their children, and the times of their respective births (*f*).

Such declarations, made by persons who must have *known* the facts, and who laboured under *no temptation* to deceive, carry with them such a presumption of truth, as, coupled with the great difficulty of procuring more certain evidence, sanctions their reception.

Connection of the declarant with the family.

To warrant the admission of declarations relating to pedigree, it is essential, 1st, that the parties who made the declaration be proved to be dead at the time of the trial, otherwise it is not the *best* evidence (*g*); 2dly, that the declarants were likely to know the facts. The tradition must therefore be derived from persons so connected with the family, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. Lord Eldon observed (*h*), that "declarations in a family, descriptions in wills, inscriptions upon monuments (*i*), in bibles (*k*) and registry-books, are all admitted upon the principle that they are the natural effusions of a party who *must know the truth*, and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed or fall short of the truth."

*Proof by one of the family that a member of it went abroad many years ago, and was supposed to have died there, and that the witness never heard in the family that he had ever been married, was held in a late case to be good evidence of the death of that person (*l*). *835

Declarations by the deceased husband as to the legitimacy of the wife, are admissible after his death; for although he was not connected by blood,

(*e*) See the observations of Le Blanc, J. in *Higham* v. *Ridgway*, 10 East, 120.

(*f*) See *Higham* v. *Ridgway*, 10 East, 120; the case of the *Berkeley Peerage*, 4 Camp. 404; and the Lord Chancellor's judgment in the case of *Vowles* v. *Young*, 13 Ves. 143.

(*g*) *Supra*, Part I. tit. REPUTATION. *Pendrel* v. *Pendrel*, 2 Str. 924; B. N. P. 113; 1 M. & S. 689. *Doe* v. *Ridgway*,[1] 4 B. & A. 53; *supra*, 368.

(*h*) *Whitelocke* v. *Baker*, 13 Ves. 514.

(*i*) A copy of a mural inscription in a church, made at the time when, by repairing the church, it was effaced, in pencil, afterwards traced over with ink, was held to be admissible on a question of pedigree. *Slaney* v. *Wade*, 7 Sim. 595.

(*k*) Entries in a religious book treated by deceased owners as important family memorials, were held admissible, although it did not appear by whom they were made. *Hood* v. *Beauchamp*, 8 Sim. 26.

(*l*) *Doe* v. *Griffin*, 15 East, 293. Proof by an elderly person that a particular individual went abroad to the West Indies many years ago, when he was a young man, and that, according to the repute of the family, he had afterwards died in the West Indies, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that that person died without issue (Ibid. and see *Doe* d. *George* v. *Jesson*, 6 East, 80). Proof that the husband went abroad, and had not been heard of seven years, was held to be sufficient evidence to entitle the widow to her dower (3 Bac. Ab. 369, 6th edit.). So evidence that a tenant for life of premises, born in 1759, had absented himself from his relations ever since 1804, given by a person who resided near the spot, but who was not a member of the family, was held to be good evidence to show that the tenant for life was dead in the year 1818, although no member of the family was called as a witness. *Doe* d. *Lloyd* v. *Deakin*,[2] 4 B. & A. 433.

(1) [Hearsay is evidence in case of pedigree only where the fact sought to be established is ancient, and no better evidence can be obtained. *Briney* v. *Hann*, 3 Marsh. 326.]

[1]Eng. Com. Law Reps. vi. 347. [2]*Id.* vi. 476.

yet it is probable that he would be well acquainted with the fact, and possess better means of information than a remote relation would (*m*).

But declarations of mere strangers are inadmissible evidence as to pedigree (*n*); it has lately been held, that even the declarations of those who lived in intimacy with them, and who consequently possessed the means of judging, if not relations, are inadmissible (*o*) (A).

Absence of suspicion.

3dly. The very foundation on which such declarations are admisible fails *where it is probable that the parties who made the declarations laboured under any temptation to misrepresent the facts (*p*); when that is the case, such evidence is admissible. Although the practice on the subject has not been uniform (*q*), it seems to be now settled by the cases of the

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(*m*) *Vowles* v. *Young*, 13 Ves. 143. *Doe d. Northey* v. *Harvey*,[1] 1 Ry. & M. 297.

(*n*) 3 T. R. 723. But where a trustee conveyed property to a party, entitled as a child of a particular marriage, by deed reciting that he was such child, held, that as an act done under a state of things which, if true, the trustee would have been compellable to do, and coming out of proper custody, the deed was admissible on a question of pedigree, although *res inter alios acta*, and was not the description of evidence to which the doctrine of *lis mota* was applicable; held, also, that where a testator bequeaths a legacy to a person designated as a "relation," it is to be presumed that he was a legitimate relation. *Slaney* v. *Wade*, 7 Sim. 595; and affirmed 1 Myl. & Cr. 338.

(*o*) See the observations of Buller, J. 7 T. R. 303; where he says, "I admit that the declarations of members of a family, and *perhaps* of others living in intimacy with them, are received in evidence as to pedigrees." See also Lord Kenyon's observations, Ib. And see B. N. P. 295; where, in the case of the *Duke of Athol* v. *Lord Ashburnham*, Mr. *Worthington's* declarations were admitted in evidence. In *Weeks* v. *Sparke*, 1 M. & S. 679, Le Blanc, J. says, "In questions of pedigree, the evidence of what persons *connected* with the family may have been heard to say, is received as to the state of the family." And see *Higham* v. *Ridgway*, 10 East, 120. See also Lord Kenyon's observations in *R.* v. *Eriswell*, 3 T. R. 723. *Doe* d. *Lloyd* v. *Deakin*, 4 B. & A. 443; *supra*, note (*l*). But in the case of *Johnson* v. *Lawson*,[2] 2 Bingh. 86, it was held that the declaration of servants and intimate friends of the family were not admissible in cases of pedigree. {*Chapman* v. *Chapman*, 2 Conn. R. 347. See however, *Jackson* v. *Cooley*, 8 Johns. R. 99, (2d edit.). *Lessee of Banert* v. *Day*, 3 Wash. C. C. R. 243.} The declarations of an illegitimate child were held not within the rule as to members of the family of his reputed father, and have been rejected in a question of pedigree, as evidence of reputation. *Doe* v. *Barton*, 2 M. & R. 28. A declaration by a party that she heard her first husband say, that after his death the estate would go to *F.*, and after his death to his heir, under whom the lessor of the plaintiff claimed, is evidence to show the relation of *F.* to the family. *Doe* v. *Randall*,[3] 2 M. & P. 20. Where *A.* claims property as the heir at law of *B.*, the declarations of *C.* deceased, who is proved to be a member of the family of *A.*, are evidence to prove *B.* to be a member of the family of *C.* and *A.*, though there be no evidence to show that *C.* was in any manner recognized by *B.* as his relation. *Monckton* v. *The Attorney-General*, 2 R. & M. 156; by Brougham, Lord Chancellor; and the evidence was afterwards admitted by Littledale, J. On a question of legitimacy, the declarations of deceased persons supposed to have been married (who might themselves have been examined when living), are admissible to prove the fact of marriage. *R.* v. *Inhabitants of Barnsley*, 6 T. R. 330. The declarations of a deceased parent, though they are evidence of the time of a child's birth, are not evidence of the place. *R.* v. *Inhabitants of Erith*, 8 East, 539.

(*p*) *Supra*, Vol. I. tit. Traditionary Declarations. Lord Eldon's observations, *supra*, 834.

(*q*) In the case of *Goodright* v. *Moss*, (Cowp. 591), the Court held that an answer in Chancery, by the mother of the lessor of the plaintiff, to a bill filed by the committee of a lunatic, the person last seised, against the lessor of the plaintiff, and his mother, in which she stated the lessor of the plaintiff to be illegitimate, was evidence against the plaintiff; but this appears to have been so decided on the general principles relating to the admissibility of declarations in cases of pedigree; and the particular objection, as to the time of making the declaration, does not appear to have been urged. It is also to be observed, that it was unnecessary to decide upon this point, the defendant being clearly entitled to a new trial, on the ground that other evidence, viz. of declarations made by the father, had also been rejected, which clearly were admissible; such evidence, however, appears to have been received by Lord Camden, in the case of *Hayward* v. *Firmin*, Sitt. after Trin. T. 1766, cited by Lawrence, J. in the case of the *Berkeley Peerage;* and see *Nicholls* v. *Parker*, 14 East, 331, in note. On the other hand, Reynolds, C. B., in a case cited Vin. Abr. Ev. I. b. 21, as tried Dev. Spring Ass. 1731, rejected such evidence arising subsequently to the controversy.

(A) (It is not every statement or tradition of a family that can be admitted as evidence. The tradition must be from persons having had such a connection with the party to whom it relates, that it is natural and likely from their domestic habits and connections that they are speaking the truth and could not be mistaken. *Stein* v. *Bowman*, 13 Peters, 209. *Jackson* v. *Browner*, 19 John. R. 37. *Gregory* v. *Baugh*, 4 Rand. 611. But in *Lessee of Banert* v. *Day*, 3 Wash. C. C. R. 242, it was held that it is not a valid objection to the competency of a witness who deposes as to general reputation of pedigree, that he is not a member of the family, or intimately acquainted with it. Such evidence is, however, entitled to more or less weight in proportion to the means of information possessed by the witness.)

[1]Eng. Com. Law Reps. xxi. 443. [2]*Id.* ix. 329. [3]*Id.* xvii. 200.

Banbury Peerage (*r*) and *Berkeley Peerage* (*s*), that a declaration as to

(*r*) *Supra*, 196.

(*s*) In the case of the *Berkeley Peerage*, before a committee of privileges of the House of Lords (4 Camp. 401), in order to prove the legitimacy of the claimant of the peerage (which depended upon the validity of a marriage alleged to have been contracted by his parents in the year 1786), the claimant, who was born subsequently to that marriage, but previous to a marriage contracted between the parties in 1796, had in the year 1799, conjointly with two brothers, born also after the first, but previous to the second marriage, filed a bill in Chancery to perpetuate the evidence of their legitimacy, on the ground that they were entitled in remainder in tail to certain lands then held by the father for life. The children born after the second marriage were defendants, along with others entitled in remainder after them.

The Earl of Berkeley was one of the witnesses examined on interrogatories for the plaintiffs, and in his deposition swore positively to the plaintiff's legitimacy, and the validity of the first marriage. The counsel for the claimant proposed to read this deposition before the committee, as a declaration in a matter of pedigree.

The admissibility of this evidence being objected to, the following questions were submitted to the Judges by the House of Lords:—

1st. Upon the trial of an ejectment respecting Black Acre, between *A.* and *B.*, in which it was necessary for *A.* to prove that he was the legitimate son of *J. S.*, *A.* after proving by other evidence that *J. S.* was his reputed father, offered to give in evidence a deposition made by *J. S.* in a cause in Chancery, instituted by *A.* against *C. D.*, in order to perpetuate testimony to the alleged fact disputed by *C. D.*, that he was the legitimate son of *J. S.*, in which character he claimed an estate in White Acre, which was also claimed in remainder by *C. D.* *B.*, the defendant in the ejectment, did not claim Black Acre under either *A.* or *C. D.*, plaintiff and defendant in the chancery suit:

According to law, could the deposition of *J. S.* be received, upon the trial of such ejectment, against *B.*, as evidence of declarations of *J. S.* the alleged father, in matters of pedigree?

2ndly. Upon the trial of an ejectment respecting Long Acre, between *E.* and *F.*, in which it was necessary for *E.* to prove that he was the legitimate son of *W.*, the said *W.* being at that time dead, *E.* after proving by other evidence that *W.* was his father, offered to give in evidence an entry in a Bible, in which Bible *W.* had made such entry in his own handwriting, that *E.* was his eldest son born in lawful wedlock from *G.*, the wife of *W.*, on the 1st day of May, 1778, and signed by *W.* himself:

Could such entry in such Bible, be received to prove that *E.* is the legitimate son of *W.*, as evidence of the declaration of *W.*, in matter of pedigree?

3dly. Upon the trial of an ejectment respecting Little Acre, between *N.* and *P.*, in which it was necessary for *N.* to prove that he was the legitimate son of *T.*, the said *T.* being at that time dead, *N.* after proving by other evidence that *T.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *T.* had made such entry in his own handwriting, that *N.* was his son born in lawful wedlock from *J.*, the wife of *T.*, on the 1st day of May, 1778, and signed by *T.* himself; and it was proved in evidence on the said trial, that *T.* had declared "that he *T.* had made such entry for the express purpose of establishing the legitimacy, and the time of the birth of his eldest son *N.*, in case the same should be called in question in any case or in any cause whatsoever, by any person after the death of him, the said *T.*:"

Could such entry in such Bible be received, to prove that *N.* is the legitimate son of *T.*, as evidence of the declaration of *T.*, in matters of pedigree?

There being a difference of opinion upon the first question, the Judges delivered their opinions *seriatim*.

Bayley, J. held that the deposition was inadmissible, because it was made *post litem motam*, after a controversy raised upon this very point; because *J. S.*, the witness who made it, was brought forward to speak to the point, by a person who had a direct interest in establishing it, because the deposition is upon interrogatories formally put to *J. S.* by an interested party; and because *B.*, against whom it is proposed that the deposition should be read, had no opportunity of putting any questions on his own behalf. In general, when evidence is given *viva voce* in courts of justice, the witnesses speak to what they know, and each party has, in turn, an opportunity of putting such questions as he may think fit, for the purpose of drawing forth the whole truth, and of throwing every light upon the subject which the witness is capable of giving. Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the *ex parte* statement of any witness, and still more of a witness brought forward under the influence of a party interested.

Wood, B.—The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree, is an exception to the general law of evidence, and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to be made; but the declarations to be receivable in evidence, as I have always understood, and as was said in the case of *Whitelocke* v. *Baker*, must have been the natural effusions of the mind of the party making them, and must have been on an occasion when his mind stood in an even position, without any temptation to exceed or fall short of the truth. Upon this principle it has been the general rule, as far as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only relative to matters of actual suit, but in dispute and controversy prior to the commencement of judicial proceedings.

Graham, B.—I have the misfortune to differ upon this question, not only with the two learned persons who have preceded, but, I am afraid, with the rest of my brethren who are to follow me; but the opinion I am about to offer is the conclusion to which my mind has come with perfect satisfaction. Under the circumstances of the case, I think there is no legal objection to receiving this deposition in evidence, not as a deposition—that I am not prepared to say—but as a declaration of the deponent. One ground on which I am induced to doubt the soundness of that rule which has been laid down by my learned brothers is, that I cannot

pedigree, if *made *post litem motam*, that is after the commencement, not merely of the litigation, but of the controversy, is not admissible (A).

find it stated in any book of law that ever fell within my reading. If there be a rule that the declaration of a deceased person upon a subject on which evidence of reputation may generally be received, is inadmissible when made subsequent to suit commenced, it is a rule with which, in my little experience, I have not become acquainted, and which is confined to the breasts of a few peculiarly conversant with the business of *Nisi Prius*. I must likewise observe that great uncertainty will arise in the application of the rule. We are told that it extends to all declarations after a suit is in contemplation. But how is it to be determined whether the parties did or did not contemplate a suit at any given moment of time? Then, if it should be clearly shown that the party making the declarations could not, by possibility, know that a suit was commenced or contemplated, surely the declarations are receivable; but if you exclude them when his knowledge of the *lis mota* is made to appear, what a field of inquiry is opened as often as evidence of reputation is tendered to a judge and jury? It seldom happens that an investigation of a pedigree takes place till an action is brought or resolved upon, and it will often be a great hardship to reject what was then said by a member of the family who dies before the trial. Suppose a man is privately married before the English ambassador at Paris, where no register is kept, and has a son; on his return to this country he is re-married, to satisfy the scruples of his wife, and afterwards has another son. In the progress of twenty or thirty years, when all the witnesses to the marriage, except the father are dead, an estate is left to the eldest legitimate son, who enters into possession. The youngest son brings an ejectment to recover this. The father hears of such a proceeding with surprise and dismay, makes a solemn declaration of the legitimacy of the eldest son, and dies. I should require strong authority, and clear principle, for the rule which should exclude his dying declaration at the trial of the ejectment. You may have the natural and voluntary effusions of the mind of the individual after a suit is commenced, although what he then says may be subject to more suspicion.

Lawrence, J.—I concur with the Judges who have stated their opinions against the admissibility of the evidence. From the necessity of the thing, the declarations of members of the family, in matters of pedigree, are generally admitted; but the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth. Where the relator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, (which may be fairly inferred before any dispute upon it has arisen,) we may reasonably suppose that he neither stops short nor goes beyond the limit of truth in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which, in matters of pedigree, would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in *Goodright* v. *Moss*, I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that, according to my experience of the practice (an experience of nearly forty years), wherever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in cases of prescription, that will equally apply in cases of pedigree, where the state is generally of much greater value. In looking for authorities upon the subject, I have found two cases of Nisi Prius, *Spadwell* v. ——, before Lord C. Baron Reynolds, at the Spring Assizes at Exeter in 1630, and *Hayward* v. *Firmin*, before Lord Camden, at the Sittings after Trin. Term, 1766. In the first of these, the declarations of an aunt, as to which of three brothers came first into the world, made after the dispute had arisen, were rejected; but such as she had made prior to the dispute were received. Therefore, in that case, the learned Judge took the distinction of before and after litigation commenced. *Hayward* v. *Firmin*, was an issue to try the legitimacy of a child, and the declarations of the mother as to that fact were received in evidence, though made after the commencement of the suit. But it appears that the case determined by Lord C. Baron Reynolds was not at that time brought under the consideration of Ld. Camden. In *Goodright* v. *Moss*, the point whether declarations could be received which were made while the dispute was existing, was not adverted to; and in considering the authority of that decision, it must not be forgotten that Mr. Baron Eyre, who tried the cause, was of opinion that the answer was not admissible evidence. The authorities being thus balanced, I think the point must be considered as without any decision; and we must resort to principle, and the uniform practice which has obtained in matters of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit, and the time of the trial; but such hardships are not confined to the case of pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must

(A) (The declarations offered in evidence were made subsequent to the commencement of the controversy, and in fact after the suit had commenced. It would be extremely dangerous to receive such evidence. This would enable a party by dangerous contrivances to manufacture evidence to sustain his cause. It is therefore essential that the declarations offered as evidence should have been made before the controversy originated, and at a time, and under circumstances where the person making them could have had no motive to misrepresent the facts. *Stein* v. *Bowman*, 13 Peters, 209. *Contra*, *Boudereau* v. *Montgomery*, 4 Wash. C. C. R. 136.)

*It is not necessary, in order to the exclusion of the evidence, to show that the *lis mota* was known to the person who made the declaration.

be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate the testimony. In the supposed case of a marriage at Paris no difficulty need have arisen; for under a bill to perpetuate the testimony the father might have been examined on behalf of the eldest son, and his deposition as to all the circumstances of the first marriage regularly read, against the younger son, on the trial of the ejectment. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose Courts of Justice to the frauds which would be practised upon them were a contrary rule to prevail. That this is not an imaginary apprehension will occur from what happened at the bar of your Lordships' house in the *Douglas* and *Anglesea* causes; in the first of which, fabricated letters were given in evidence before your Lordships, and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarcely an assize or sittings in which witnesses are not produced who swear in direct contradiction the one to the other; and it may be feared that persons who have so little regard to truth may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till their death. We know that passion, prejudice, party, or even good-will, tempt many who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely upon the commencement of the lawsuit, but after the dispute has arisen (that is the primary meaning of the word *lis*), are evidently more likely to mislead the jury, than to direct them to a right conclusion, and therefore ought not to be received in evidence.

Heath, J. and *Macdonald*, C. B. agreed with the majority.

Mansfield, C. J., after observing upon the latitude allowed by the practice of Scotland in the reception of hearsay evidence, observed, "But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds. To the general rule with us there are two exceptions; first, on the trial of rights of common, and other rights claimed by prescription: and secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead; there, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like; a declaration with regard to a particular fact which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and family transactions among the relations of the parties; therefore what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; and to admit them would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many instances in which the rule has been acted upon; I never heard the contrary contended, either by counsel or judge. I think the rule is equally applicable to questions of pedigree, and the violation of it here would be still more alarming. There is no difference between the declarations of a father and those of any other relative; and if the declarations of a father, after the suit has begun, be received, so must the declarations of all related to the parties, whatever their station in society, and whatever their private character. I do not feel that much mischief is likely to arise from such declarations being rejected.

"I have now only to notice the observation, that to exclude declarations, you must show that the *lis mota* was known to the person who made them. There is no such rule. The line of distinction is the origin of the controversy, and not the commencement of the suit; after the controversy has originated all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced. For these reasons I conceive that the deposition now offered in evidence is not admissible.

Lord *Eldon*, C., after referring to the case of the *Banbury Peerage*, said, "Upon the admissibility of such evidence, Judges have held different opinions; and it might appear remarkable that a declaration under no sanction was receivable, and a declaration upon oath was not. I therefore thought it material to ascertain from the highest authority what the law is upon the subject. Accordingly, in the *Banbury Case*, as the depositions under the bill to perpetuate testimony, contained many statements with regard to pedigree, a question was put to the Judges, whether, if they could not be received as depositions, they could be received as declarations. The Judges thought that, at all events, the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions were *aliunde* proved to be relations, and that there was no such evidence. I therefore thought it right that the question should be again put to the Judges in the present case, it being of great importance to the claimant and to the public. Your Lordships have heard the opinions which the learned Judges have delivered, and I have no difficulty in saying that I agree with that of the majority. In the case alluded to, decided in the Court of Chancery by myself (on which I ought to place less reliance than any other noble Lord), conscious of my liability to err, and prone to doubt (an infirmity which I cannot help), I delivered the sentiments which

After the *controversy has originated, all declarations are to be excluded, without regard to the knowledge of the witness; for if an inquiry were in
*840 each case *to be instituted, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced (*t*). Such declarations however, though they tended to show that the person making them might, if they were true, derive an interest by proof of the fact, are still admissible, provided they were made *ante litem motam* (*u*).

*841 Declarations, to what facts limited.

*There is a material difference between traditionary declarations in matters of pedigree, and those which relate to ancient rights, dependent on usage; in the latter case, the admissibility is confined to general declarations and reputation concerning the right, such as a right of common, right of passage, or the like (*x*); and it does not extend to declarations concerning particular facts, from which the right may be inferred, for those are not likely to be made matter of public notoriety and discussion, as general rights are. But in the case of pedigree it is otherwise, and particular declara-

I believed to be according to law. I have heard nothing since which has convinced me I was wrong. I have attended most anxiously to the distinctions taken by Mr. Baron Graham; but on revolving the subject in my mind, I am forced to concur with the opinion so forcibly expressed by Mr. Justice Lawrence, that if the writing was not evidence as a deposition, it was not evidence at all. The suit in equity is commenced on the ground that, unless the testimony be so perpetuated that it may be used as a deposition, it must be entirely lost. Being embodied in deposition, are you to say that this same testimony is to be received as declaration, and read in evidence from the deposition? The previous existence of the dispute would be a sufficient ground to proceed upon. I have known no instance in which declarations *post litem motam* have been received. When it was proposed to read this deposition as a declaration, the Attorney-general flatly objected to it; he spoke quite right, as a western circuiteer, of what he had often heard laid down in the west, and never heard doubted. Lord Thurlow was most studious to contradict the case of *Goodright* v. *Moss*, and he had learned his doctrine in the same school; so had the Chief Justice of the Common Pleas, and I believe Mr. Justice Heath, the result of whose experience your Lordships have just heard. Therefore, although the authorities are at variance, principle and practice unite in rejecting the evidence. I introduced the Bible into the second and third questions, as the book in which such entries are usually made. If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion, and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child."

On the second and third questions, *Mansfield*, C. J. delivered the unanimous opinion of the Judges.—Referring to the second, he said, " I cannot answer this question, without adding something to the answer beyond what is in the question, because it supposes that an entry written by a father in a Bible would be of more weight than the same written in any other book. Now I know no difference between a father writing anything respecting his son in a Bible, and his writing it in any other book, or on any other piece of paper; and therefore the answer I would give is, that such a writing by a father in a Bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father, might be admitted in evidence. Were it to appear in your Lordships' Journals that the answer was given in the very words of the question, some persons might suppose that the admissibility of the entry depended upon its being written in a Bible, and therefore I submit that the answer should be, 'that such a writing in a Bible, or any other book, or any other paper, would be admissible in evidence, as a declaration of the father, in a matter of pedigree.'

" The third question is the same in effect, with the addition that the father is proved to have declared that he had made such entry for the express purpose of establishing the legitimacy of his son, and the time of his birth, in case the same should be called in question after the father's death. The opinion of the Judges is, that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled. Of course, I should wish the same addition to be made to this as to the former answer, 'a Bible, or any other book, or any other piece of paper.' "

See also *R.* v. *Cotton*, 3 Camp. 444; and *supra*, Vol. I. p. 319; and the case 12 Vin. Ab. T. b. 91. See below, note (*b*).

(*t*) Case of the *Berkeley Peerage*, 4 Camp. 401; and Sir James Mansfield's observations, Ibid. 40; and *supra*, note (*s*).

(*u*) *Doe* d. *Tilman* v. *Turver*,[1] 1 Ry. & M. 141; where declarations were received which tended to show that the parties making them were entitled to a remainder on failure of the issue of the then possessor of the estate. So in a case of title to a peerage in the House of Lords, a widow was admitted to prove the declarations of her deceased husband, in support of her title, though her husband, if living, would have had the right which the declarations went to establish. Ib., per Tenterden, L. C. J.; and his Lordship added, that the precedent had since been acted on.

(*x*) *Supra*, Part I. tit. REPUTATION.

[1]Eng. Com. Law Reps. xxi. 399.

tions as to marriages, births, deaths, &c. are receivable, because from the nature of the case those are facts which are within the peculiar knowledge of the members of the family, and of those who are intimately connected with them (*y*).

The extent to which such declarations are evidence is defined by the reasons which warrant its admissibility; the principles apply generally to declarations concerning the *state* of the family, the members of which it consisted, the degrees in which they stand related, their births, marriages, and deaths, their ages, (1) seniority, and their legitimacy (*z*). Thus, the declaration or entry of a father is evidence as to the time when his son was born, or of the fact that he was born previous to the marriage (*a*).

Where the question was, which of three sons, all born at a birth, was the eldest, the declaration of a female relation, that she was at the birth, and that she tied a string round the arm of the second son in order to distinguish him, was admitted as evidence (*b*). But in the case of *The King* v. *Erith* (*c*), it was held that the declaration of the deceased father, as to the *place* of the son's birth, was not admissible, since it was a simple fact involving only a question of locality; and it was observed by the Court, *that the case did not fall within the principle of, and was not governed by, *842
the rules applicable to cases of pedigree, and was to be proved as other facts are generally proved, according to the ordinary course of the common law (2).

A declaration by a party that she heard her first husband say that after his death the estate would go to *A.* and afterwards to his heir, under whom the lessor of the plaintiff claimed, was held to be evidence to show the relationship of *A.* to the husband's family (*d*).

(*y*) See the observations of Mansfield, C. J. in the case of the *Berkeley Peerage*, 4 Camp. 417, 18; and *supra*, note (*s*). In *Baker* v. *Whitelocke*, 13 Ves. 514, the Lord Chancellor observed, that there may be many circumstances forming a part of the tradition which you would reject, taking the body of the tradition. It is not necessary that the fact declared should be cotemporary with the declaration. A mere declaration that his grandmother's maiden name was *M. N.*, is admissible. Per Brougham, C. in *Monkton* v. *Attorney-general*, 2 Russ. & M. 158.

(*z*) *Herbert* v. *Tuckal*, Sir T. Raym. 84. Upon a trial at bar, cited in *Roe* d. *Brune* v. *Rawlins*, 7 East, 290. See also *Higham* v. *Ridway*, 10 East, 109. See *Monkton* v. *Attorney-general*, 2 Russ. & M. 147. So it seems that monumental inscriptions, and declarations made by deceased relations, are evidence to prove the ages of the parties referred to. See *Kidney* v. *Cockburn*, 2 Russ. & M. 167. Tindal, C. J., had rejected such evidence, but Brougham, C., expressed a strong opinion in favour of its admissibility, and afterwards stated that Littledale and Park, Justices, concurred with him. In the course of the argument, the case of *Rider* v. *Malbone* was cited, in which Littledale, J., admitted evidence of an inscription on the tombstone, stating the age of the deceased, the age being material. An old tracing from an effaced monument is also admissible. *Slaney* v. *Wade*, 7 Sim. 595.

(*a*) *Goodright* v. *Moss*, Cowp. 591. Case of the *Berkeley Peerage*, 4 Camp. 401.

(*b*) A man had eight sons; the three last were all born at a birth. Question, on ejectment, which was the eldest? They were baptized by the names of Stephanus, Fortunatus, and Achaicus. Declarations of the father were proved that Achaicus was the youngest, and he took these names from St. Paul, in his epistles. The son of Fortunatus was lessor of the plaintiff; *è contra*, it was proved from the declarations of one *M. F.*, who was a relation, and at the birth, and upon the birth of the second child took a string and tied it round the arm, to know one from the other, &c. Objection was made that the declaration of this woman was not evidence, seeing it was since the death of the fifth son (the said Stephanus and all the other sons dying before him without issue), when there was a discourse about this matter; but what this woman said soon after the birth was allowed in evidence, when there was no prospect of a controversy. Per Reynolds, C. B., at Devon Lent Assizes, cited in Vin. Ab. Ev. T. b. 91. This, it seems, is the case cited by Lawrence, J., *supra*, 838.

(*c*) *R.* v. *Erith*, 8 East, 539. [*Shearer* v. *Clay*, 1 Little's R. 266, acc.]

(*d*) *Doe* v. *Randall*,[1] 2 M. & P. 20.

(1) [In the case of *Lessee of Albertson* v. *Robeson*, 1 Dallas, 9, it was held that evidence of hearsay, from the father and mother, is not admissible in a question of *age*.]

(2) {*Wilmington* v. *Burlington*, 4 Pick. 174. See 1 Pick. 247.}

[1] Eng. Com. Law Reps. xvii. 200.

Written entries.

Written entries being written declarations, stand upon the same footing with oral ones, as to admissibility.

An entry by a father in a Bible, or in any other book, stating that *A. B.* was the eldest son born in lawful wedlock, by *M. N.* his wife, at a time specified, is evidence to prove the legitimacy of *A. B.* (*e*) (1).

Written entries and inscriptions.

Upon the same principles, a pedigree hung up in a family mansion, inscriptions on rings (*f*) used by members of the family, inscriptions upon tombstones (*g*), and other matters of the like nature, are admissible to prove a pedigree, for they are all in their nature equivalent to declarations made by the family upon the subject (*h*). A bill in Chancery, by a father, in which he states his pedigree, is also admissible for the same purpose (*i*) (2).

So the recital in a family conveyance by a trustee is evidence of parentage (*j*).

So it has been held that a paper found with other papers relating to the private concerns of the party last seised of an estate, in a drawer, in his house, purporting to be the will of Richard, the grandfather of the person last seised, was evidence to show that the grandfather acknowledged a brother of the name of Thomas to be older than a brother of the name of William (*k*), although the will was found in a cancelled state, and although

(*e*) Case of the *Berkeley Peerage*, 4 Camp. 401. *Supra*, 836. *Goodright* v. *Moss*, Cowp. 591; 4 Bl. Comm. C. 7.

(*f*) A ring worn publicly, stating the date of the death of the relation whose name is engraved upon it, is admissible, Per Brougham, L. C. in *Monckton* v. *Attorney-general*, 2 Russ. & M. 147.

(*g*) *Baxter* v. *Foster*, Vin. Ab. Ev. T. b. 87; Sty. 208.

(*h*) Cowp. 591; 12 Vin. Ab. Ev. T. b. 87; 13 Ves. jun. 148, 514; B. N. P. 233; 10 East, 120.

(*i*) *Taylor* v. *Cole*, 7 T. R. 3, n. *i. e.* where there is no controversy as to the pedigree. But in general a bill in equity, and depositions taken under it, are not evidence of the statements they contain as declarations concerning pedigree. See the case of the *Banbury Peerage*, Sel. N. P. 712; and Vol. I. tit. Bill in Equity.

(*j*) *Slaney* v. *Wade*, 7 Sim. 595. See *Doe* v. *Pembroke*, 11 East, 504.

(*k*) *Doe* d. *Johnson* v. *Earl of Pembroke & another*, 11 East, 504.

(1) [An entry respecting the age of a child, in a book called the family bible, in the hand-writing of the brother of the child, and supported by his oath, that by the direction of the deceased father, he copied that and other entries, respecting the ages of the family, from another book in which the original entries were made in his father's hand-writing—without accounting for the non-production of the book in which the original entries were made—is not evidence. *Curtis & al.* v. *Patton & al.*, 6 Serg. & Rawle, 135. *Aliter*, if the original be proved to be destroyed or lost. *Ibid.*]

(2) [An *ex parte* affidavit, made *abroad*, may be admitted to prove pedigree, and the identity of a person so far as respects marriage, but not to establish an independent fact. *Fogler's Lessee* v. *Simpson*, cited 2 Dallas, 117. 1 Yeates, 17. *Winder* v. *Little*, 1 Yeates, 152. *Lessee of Lilly* v. *Kintzmiller*, 1 Yeates, 28. But such affidavit made in another *State*, is not admissible. *Semb. Douglas's Lessee* v. *Sanderson*, 2 Dallas, 118. But depositions made by *deceased* witnesses, whether in or out of the State, in a case between other parties, may be admitted to prove pedigree. *Boudereau* v. *Montgomery*, Circuit Court, Nov. 1821. Wharton's Digest, 247. The acknowledgement of a deed from persons describing themselves as heirs taken according to the directions of statute, before the mayor of London, is a circumstance of weight in evidence of pedigree. *Jackson* v. *Cooley*, 8 Johns. 128. Recitals in a conveyance are evidence of pedigree.

In tracing a pedigree, in a suit for freedom, what a witness swore to, on the executing of a writ of inquiry between the mother of the plaintiff and another person, may be given in evidence to prove the said mother to have been descended from a female Indian ancestor, although the name of that witness be not recollected, nor the witness himself positively known to be dead; it being proved by the witness stating the substance of his testimony, that he was a very old man when he gave his evidence—that he believed him to be dead, and had endeavoured in vain, as counsel for the plaintiff, to find a witness to prove the point to which he had testified. *Pegram* v. *Isabel*, 2 Hen. & Mun. 193. See *Mima Queen & Child* v. *Hepburn*, 7 Cranch, 290.

Letters purporting to have been written in a foreign country, by a widow, in which she speaks of the death of her husband, and of the existence of children by him—and testimony of a third person that he had seen a letter from the husband, in which he mentioned his marriage and his children—and reputation in the vicinity that the husband had died abroad leaving children—are not admissible evidence for the tenant in a real action, wherein the demandant (a co-heir of such supposed deceased) claims title by descent—the tenant not claiming under him or his heirs. *Crouch* v. *Eveleth*, 15 Mass. Rep. 305. Whether such evidence would be admissible in a suit against the defendant by persons claiming as heirs at law of the supposed deceased.—*Quære. ibid.*]

there was no evidence that it had ever been acted upon, or that it had ever been proved.

The probate of a will is not admissible to prove matters of pedigree; the will itself ought to be produced (*l*).

In the case of *Zouch* v. *Waters*, (*m*), an old book from Lord Oxford's library, containing the pedigree of William Zouch, of Pilton, and *signed by him*, was admitted as evidence to show that the plaintiff was not descended from William Zouch of Pilton.

A paper in the hand-writing of a person deceased, purporting to give a genealogical account of his family, is admissible evidence to prove the truth of the relationship there stated, although it was never made public by the writer, although it be erroneous in several particulars, and profess to *be founded chiefly on hearsay (*n*); and although the object be to connect *843
the family of the narrator with that of a party deceased, to whose property one of the family of the narrator lays claim (*o*).

Public registers of authority are also admissible for the same purpose, being documents made under the authority of law (*p*). But the entry of the time of a child's birth, although contained in a public register, is not evidence as to the time of the birth (*q*), unless it can be proved that the entry was made by the direction of the father or mother; and then it seems to be receivable as a declaration made by one of them; for a clergyman has no authority to make an entry as to the time of the birth, and possesses no means for making any inquiry as to the fact (*r*).

It seems also that the herald's original visitation books are evidence for the same purpose, since it was their business to make out pedigrees (*s*). So are inquisitions *post mortem* (*t*).

With respect to general reputation, it is to be observed, that the public has an interest in the state of each of the individual families of which society is composed; the whole mass, from the highest to the lowest ranks, is bound together by the connecting ties of marriage and consanguinity. Society in general, therefore, has not only an interest in knowing, but possesses the means of knowing, from its connection with each individual General reputation.

(*l*) *Doe* v. *Ormerod*, 1 Mo. & R. 466.

(*m*) Guildford Lent Assiz. 5 Geo. 1; 12 Vin. Ab. T. b. 87, pl. 5.

(*n*) *Monckton* v. *Attorney-general*, 2 Russ. & M. 147.

(*o*) Ibid.

(*p*) *Supra*, Vol. I. p. 243.

(*q*) So held in a case in the K. B. Mich. T. 2 Geo. 4, MS.

(*r*) *Goodright* v. *Moss*, Cowp. 591; 3 Bl. Comm. c. 7; B. N. P. 233; 10 East, 120. A public register does not prove the time of birth. Cowp. 391.

(*s*) *Steyner* v. *Burgesses of Droitwich*, Skinn. 623. But see the animadversions upon these documents in that case; and 12 Vin. Ab. Ev. T. b. 87. And note, that a charter of pedigree is not evidence, without showing the books and records whence it is deduced, although the heralds swear that the pedigree was deduced out of the records and ancient books in the office. *Earl of Thanet's Case*, 2 Jones, 224; and Vin. Ab. Ev. T. b. 87. And see *Zouch* v. *Waters*, Ib. In order to impeach the pedigree attempted to be established by the lessor of the plaintiff, the defendant having proved that Ann Brack was of the family of the lessor of the plaintiff, produced books from the Heralds' Office, containing an entry, purporting to be the affidavit of Ann Brack, stating the different members of her family. An officer from the Heralds' College stated that affidavits sent thither with a view to the making out a pedigree were copied in the herald's books, and that the originals were sometimes kept and sometimes returned, and that search had been unsuccessfully made for the original, the copy of which was contained in the book. Littledale, J., held that the copy was admissible evidence for the defendant, for the purpose of contradicting the pedigree set up by the lessor of the plaintiff; but held that the pedigree in the Heralds' Office, compiled from it, was not admissible. *Doe* d. *Hungate* v. *Gascoigne*, York Spring Assizes, 1831.

(*t*) Inquisitions *post mortem*, whilst they were in use, frequently afforded great facilities for tracing descents (see 13 Ves. jun. 143). These, under the feodal system, were taken before the justices in eyre, upon the death of a person of fortune, to inquire into the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was, and thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the heirs thereon. These, at last, having been greatly abused, were abolished in the reign of Hen. 8, and the Court of Wards and Liveries erected in their stead. See 2 Bl. Comm. 69; 32 Hen. 8, c. 46; 4 Inst. 198.

family, the state of that family, the members of which it consists, and their various degrees of kindred. The laws which exclude the marriages of parties within certain limits of consanguinity, and those also which regulate the descent of real and the distribution of personal property, according to known and settled rules, make it a matter of interest, as well as duty and necessity, that the various degrees of relationship, not only in each individual family, but also in those with which it is connected, should be ascertained and known. The public forms of solemnizing marriages, births, and burials,
*844 *tend also to the same end. Lastly, it may be remarked, that no fraud can usually be practised in affairs of this nature, which will not probably interfere with the rights of individuals connected with the family; and that the difficulty of practising such impositions successfully, and the vigilance with which they are likely to be watched, not alone by those whose interests are likely to be prejudiced by them (*u*), but by those who are actuated merely by a spirit of curiosity, so apt to be excited in such affairs, powerfully conspire to support the authority of this species of evidence.

Hence it is that not only particular and specific declarations as to the state of a family, made by those connected with it, are admissible with a view to pedigree, but so also is *general reputation*, as that *A.* was the father, or *B* the husband of *C.* Such reputation or general opinion may be presumed to be the general result in the opinion of the public, founded upon actual knowledge and observation of the acts, conduct, and declarations of the family, tending to that conclusion (*x*).

It seems, however, that evidence of reputation must be of a general nature, such as that *A.* was generally reputed to be the son of *B.*, or the father of *C.*, although a much greater latitude is allowed to traditionary declarations; for although it is probable that the general facts of relationship would be matter of public notoriety and discussion, it is not to be presumed that the same would happen with respect to particular declarations or circumstances of a domestic nature; but that, on the contrary, the knowledge of the latter would be confined to a few who were either members of the family, or closely connected with it (*y*).

It has been doubted whether general evidence of heirship be sufficient to warrant the finding one person to be heir to another; or whether it be not necessary that the claimant should prove that he and the deceased were descended from some common ancestor, or at the least from two brothers or sisters (*z*) (1).

Upon an ejectment, Thorn, the lessor of the plaintiff, gave slight evidence of a reputed relationship between himself and the person last seised, and of acknowledgements that the Thorns were his heirs at law, but made no de-

(*u*) Even the most abject poverty does not exempt the parties from rigorous observation; the omission of the marriage ceremony, or the unlawful repetition of it, seldom escapes the scrutinizing eye of the parish officer, who, with a view to parochial interests, prosecutes for bastardy, bigamy, &c., according to the exigency of the case.

(*x*) Le Blanc, J. observed (10 East, 120) that reputation was no other than the hearing of those who might be supposed to have been acquainted with the fact handed down from one to another.

(*y*) Vide *supra*, Vol. I. tit. Reputation. (*z*) 2 Bl. 1099.

(1) [In *Chapman* v. *Chapman*, 2 Conn. R. 347, it was held that in order to make hearsay admissible evidence of relationship on a question of title to land, it must come from persons having a connection with the party to whom it relates; and that it is essential that such persons be *named*, and that the declarations should specify such relationship as makes the party, to whom they refer, heir to the land in question. {But see *Banert et ux.* v. *Day*, 3 Wash. C. C. R. 243.} See *Butler* v. *Haskell*, 4 Desauss. 651. In *Jackson* v. *Cooley*, 8 Johns. 128, the lessor of the plaintiff, in an action of ejectment, resided in England, and claimed as the heir of the person who died seised of the land in question. A witness here deposed that he knew the ancestor, and had charge of the land as his agent, and corresponded with him; and after his death, corresponded with the lessor, who sent him a power to act for him as heir and devisee—and that his information was also derived from persons acquainted with the family of the lessor. It was held that this was sufficient evidence, *prima facie*, of pedigree or heirship to go to the jury.]

duction of pedigree, nor was able to state how the relation arose, or who was the common ancestor, or whether any ancestor of Thorn was a brother or sister to any ancestor of the deceased. The jury found for the plaintiff. Upon a motion for a new trial it appears that the Court did not agree upon the general question; but the Judges agreed in opinion that the evidence was too loose and insufficient to prove even general kindred (*a*). Upon *showing cause against the rule for a new trial, the plaintiff's counsel cited *S45
the case of *Newton and the Corporation of Leicester* and *The Attorney-general*, as having been tried at Leicester about eight years before, where the lessor of the plaintiff obtained a verdict, although there was no deduction of pedigree, because it was proved that the deceased used to call him cousin.

The *onus* of proving the death of a person once known to be living is incumbent on the party who asserts the death; for it is to be presumed that he still lives, till the contrary be proved (*b*). But it seems that the presumption of the continuance of life ceases at the end of seven years from the time when the party was last known to be living (*c*) (A), in analogy to the Statute of Bigamy (*d*), and the statute concerning leases for lives (*e*). Proof of death.

Proof by an elderly person that a member of her family went to the West Indies many years ago, when he was a young man, and that according to the repute of the family he died there, and that she never heard of his being married, is *primâ facie* evidence that the party died without lawful issue (*f*) (B).

It is now perfectly settled that the parents are competent to prove or disprove their marriage (*g*), or to establish the legitimacy or illegitimacy of a child, by proof that it was born after or before marriage. A mother has been allowed to prove a clandestine marriage, in the Fleet, to the father of the child, previous to its birth (*h*); and the Dowager Countess of Anglesea was admitted in the House of Lords to prove her marriage with the Earl of Anglesea previous to the birth of their son, Lord Valentia, where the question was as to the legitimacy of the latter (*i*). So the evidence of parents is admissible to bastardize their own issue (*k*), by proof that they have never been married. But such evidence is open to great observation (*l*). Competency.

(*a*) *Roe* d. *Thorn* v. *Lord*, 2 Bl. 1099. Note, the argument urged in favour of a strict deduction was, that if it were unnecessary, the estate might be carried, contrary to the rules of descent, to the *half-blood*, to the maternal instead of the paternal line, &c. It would surely be going a great length to admit a mere presumption in favour of so harsh a rule as that which excludes relations of the half-blood; to rebut a reasonable presumption, when once established by any means, that the claimant is the real heir; and the danger of preferring the maternal to the paternal line cannot arise where there is but one claimant, who, whether he claimed through the paternal or maternal line, would still be entitled in preference to a mere stranger. The Judges who held that strict deduction was necessary, founded their opinion on the doctrine relating to real actions, conceiving that the same deduction of descent which ought to be pleaded in real actions ought to be given in evidence in ejectment, in order to make out a title by descent. *Quære.*

(*b*) Per Lord Ellenborough, in *Doe* v. *Jesson*, 6 East, 80. *Rowe* v. *Hasland*, 1 W. Bl. 404. And see *Doe* v. *Deakin*,[1] 4 B. & A. 433; B. N. P. 233, 294–5. Cowp. 591.

(*c*) See tit. PRESUMPTION.

(*d*) 1 Jac. 1, c. 11, s. 2.

(*e*) 19 Car. 2, c. 6.

(*f*) *Doe* d. *Banning* v. *Griffin*, 15 East, 293.

(*g*) Cowp. 593.

(*h*) Per Lord Mansfield, Cowp. 593.

(*i*) Ap. 22d, 1771; and per Lord Mansfield, Cowp. 594.

(*k*) *R.* v. *Bramley*, 6 T. R. 330. *St. Peter's* v. *Swinford*, B. N. P. 112.

(*l*) Per Lord Kenyon, 6 T. R. 330.

(A) (See Post. tit. PRESUMPTION.)

(B) *Pancoast* v. *Addison*, 1 Har. & J. 356. See *Jackson* v. *Boneham*, 15 Johns. 226. *Ewing* v. *Savary*, 3 Bibb. 236. Hearsay evidence of finding the body and burial of one supposed to be dead, is inadmissible; though otherwise as to the fact of his death. But that one was missing at a particular time, with a report and general belief of his death, is, it seems, *prima facie* evidence of his death. *Jackson* v. *Ety*, 5 Cow. 314.)

[1] Eng. Com. Law Reps. vi. 476.

The wife is competent to prove acts of incontinency with others, because, as it is said, this is a matter peculiarly confined to her own knowledge; but it is fully settled that neither the wife nor the husband can prove the fact of non-access (*m*); a rule founded upon grounds of policy and of decency (*n*).

Declarations. Where the parties, if living, would have been competent witnesses to negative the marriage, their declarations to that effect are evidence after their decease (*o*).

The declaration of the father is, after his death, admissible to prove that the son was born before the marriage (*p*).

*846 *But as the evidence of parents would not be received in their lifetime to prove the bastardy of children born during marriage, by evidence of non-access, so neither are their declarations to that effect admissible after their death (*q*).

PENAL ACTION.

Particulars of proof. In an action of debt to recover a penalty under a statute, issue being joined on the usual plea of *nil debet*, it is necessary to prove (*r*),

1st. The affirmative of all the essential averments (*s*).

2dly. In *qui tam* actions, that the offence was committed within the county, &c.

3dly. That the action was commenced within time, &c.

Proof of averment. It has been seen, that where a person is charged with a criminal omission, the proof of the negative lies upon the party who makes the charge (*t*); where, however, the action is founded on the doing an act without a legal qualification, the existence of which, if it exist at all, is peculiar within the knowledge of the defendant, it seems to be incumbent on him, notwithstanding the rule, to prove his qualification (*u*).

Variance. Where a contract is averred, a material variance will be as fatal as in an action of *assumpsit*. Where the plaintiff declared for a penalty for fraud in the measuring of coals purchased from the defendant by *A.* and *B.*, and it appeared in evidence that the purchase was made by *A., B. and C.*, the variance was held to be fatal (*x*), although a separate delivery was made to *A.* and *B.* of their shares. The same was held where the plaintiff declared for a penalty for an illegal insurance of a particular lottery ticket for the sum of 42*l.*, and it turned out that this sum had been given for that and other tickets (*y*).

And the same proof must be given of a contract where the evidence of a contract is essential, as in an action on the contract. Thus, in an action

(*m*) *R.* v. *Reading*, B. N. P. 112. *R.* v. *Kea*, 11 East, 131. *Rex* v. *Rook*, 1 Wils. 340.

(*n*) Per Lord Mansfield, Cowp. 594; and per Lord Ellenborough, 11 East, 133.

(*o*) *R.* v. *Bramley*, 6 T. R. 330; B. N. P. 112. *May* v. *May*, Ibid.

(*p*) *Goodright* v. *Moss*, Cowp. 591. *May* v. *May*, B. N. P. 112; where, upon an issue out of Chancery, the preamble of an act of parliament, reciting that the plaintiff's father was not married, and to the truth of which he was proved to have been sworn, was given in evidence, yet, upon proof of a constant cohabitation, and his owning the mother upon all other occasions to be his wife, the plaintiff obtained a verdict.

(*q*) Cowp. 591.

(*r*) In an action for the penalty incurred by acting as a magistrate without being qualified, the defendant is not entitled to notice of action. *Wright* v. *Horton*,[1] Holt's C. 458; cor. Wood, B. York, 1816.

(*s*) See Vol. I. 418.

(*t*) *Supra*, Vol. I. 418, 421.

(*u*) *Supra*, tit. GAME.

(*x*) *Parish*, q. t., v. *Burwood*, 5 Esp. C. 33. *Everett* v. *Tindall*, 5 Esp. C. 169. See *R.* v. *Goddard*, Leach, 617. *Partridge* v. *Coates*,[2] R. & M. 153. *Fox* v. *Keeting*,[3] 2 A. & E. 670.

(*y*) *Philips*, q. t., v. *Mendez da Costa*, 1 Esp. C. 39. *Secus*, if the declaration does not aver a particular premium, but a particular premium is proved to have been given. Ibid.

[1] Eng. Com. Law Reps. iii. 156. [2] *Id.* x. 461. [3] *Id.* xxix. 173.

against a master of a vessel for hiring a deserter from another ship, if the prior hiring was by contract in writing, it must be produced and proved, and cannot be proved by the parol evidence of the deserter (*z*).

A declaration alleged that the defendant advertised a proposal for a promise to give, &c. to any one who would procure *A. B.* a place under Government: the advertisement was, in fact, for a proposal to receive a promise. It was held that the words "for a promise" were surplusage: the words "under Government" were sufficient, though the language of the statute is "office in the gift of the Crown" (*a*).

*In debt for using a trade (*b*) without having served an apprenticeship, *847
it was held that it need not be proved that the defendant used it for the Amount of penalties.
whole of the time laid in the declaration, provided that it was alleged that he forfeited 40*s.* for every month, (*c*), and proved that he used the trade for a month together.

Where several lottery tickets are insured at the same time, one penalty only can be recovered (*d*); but it is otherwise where several tickets are insured at different times, although on the same day (*e*). But the plaintiff cannot recover more penalties than are included in the affidavit to hold to bail (*f*).

If the jury find a *general* verdict for one penalty (*g*), it is for the plaintiff Penalty.
to apply it; but, after applying it to one count, which turns out to be defective, he cannot afterwards apply it to another, although the evidence would have warranted a verdict on the latter (*h*).

2dly. *Within the county.*—An offence against a penal statute must in Within the county, &c.
general be alleged and proved to have been committed within the proper

(*z*) *Martin* v. *Greenleaf*, 2 Esp. C. 729.

(*a*) *Clarke* v. *Harvey*,[1] 1 Starkie's C. 92.

(*b*) The averment of the trade was held to be material. Averment of the trade of a sawyer is not proved by evidence of setting to work in the trade of a mast and block-maker. *Spencer* v. *Mann*, 5 Esp. C. 110. But *semble*, a misdescription of the master's trade would not be material, Ib. See *Beach* v. *Turner*, 4 Burr. 2449.

(*c*) *Powell*, q. t., v. *Farmer*, Peake's C. 57. Under the statute, 5 Eliz. c. 4, s. 31; this branch of the statute was repealed by the statute 54 G. 3, c. 96.

(*d*) *Holland* v. *Duffin*, Peake's C. 58. So under the stat. 29 C. 2, s. 7, which enacts that no tradesman, artificer, workman, labourer or other person, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day, except works of necessity and charity, and except dressing of meat in families, or dressing and selling of meat at inns, cooks' shops or victualling-houses, for such as cannot otherwise be provided, &c. on pain of forfeiting 5*s.* &c.; it was held, that a baker who exercised his trade on a Sunday could not be convicted in more than one penalty in respect of the same Sunday, and that there could be no more than one offence on one and the same day. *Cripps* v. *Durden*, 2 Cowp. 640. So if an unqualified person kill several hares on the same day, he cannot, it is said, be convicted in so many different penalties, as the offence for which the statute gives the forfeiture is the keeping of dogs and engines, and not the killing the hare. *R.* v. *Matthews*, 10 Mod. 26. *Supra*, 500; and per Ld. Kenyon, in *Peshall* v. *Layton*, 2 T. R. 512; *Marriott* v. *Shaw*, Com. 274. Yet *qu.* whether every distinct instance of killing a hare be not a different using of a gun, &c. to destroy game? For the statute is in the disjunctive, *keep* or *use*. See *R.* v. *Gage*, 1 Str. 546. *R.* v. *King*, 1 Sess. C. 88. In the case of *Brooke* v. *Milliken*, 3 T. R. 509, it was held that several penalties might be incurred on the same day, on the 12 G 2, c. 36, for *distinct acts of sale* of books reprinted in another country, which were originally printed and published here. If a man first shoot a hare, and afterwards, though on the same day, shoot a pheasant, it seems that the acts of using are as distinct as the acts of sale were in *Brooke* v. *Milliken*.

(*e*) See *Brooke* v. *Milliken*, 3 T. R. 509; and the preceding note.

(*f*) *Phillips* v. *Mendez da Costa*, 1 Esp. C. 34.

(*g*) One penalty may be recovered against several under the game laws. *Hardyman* v. *Whitaker*, 2 East, 572. *Secus*, in proceeding against two proctors for practising without certificates. *Barnard* v. *Gostling*, 1 N. R. 245.

(*h*) *Holloway* v. *Bennett*, 3 T. R. 448. *Hardy* v. *Cathcart*,[2] 5 Taunt. 11. Penal information for *using* a private still, for which the party was liable to the penalty of 20*l.*, under an ancient statute; the Court quashed a conviction in the sum of 200*l.*, which could only arise by inference from recent statutes, which impose the greater penalty for having in custody, &c. *R.* v. *Bond*, 1 B. & A. 390.

[1]Eng. Com. Law Reps. ii. 310. [2]*Id.* i. 4.

county (*i*) (1). A variance in this respect is matter of defence upon the trial (*k*).

*848 Contract. *Where a contract was made for the purchase of coals, without stating the specific quantity, it was held that the offence of selling coals of a different description from those contracted for, was committed in the county where the coals were delivered, the contract having been made in a different county (*l*). But the not justly measuring such coals being a local omission contrary to a local Act, is completed at the place where the coals are kept for sale, and where the bushel is required to be kept for the purpose of measuring (*m*).

The offence of driving a distress out of the hundred is not complete till the cattle have entered the second hundred; and if the latter hundred be situated in a different county, the defendant will be liable to be nonsuited if the *venue* be not laid there (*n*).

Where a draft was given for usurious interest in the county *A.*, and the money was actually received on the draft in the county *B.*, it was held that the offence was committed in the latter county (*o*).

An action for non-residence, although the offence consist in an omission, must be brought in the county where the living is situate (*p*).

In an action of debt for using a trade without having served an apprenticeship, it was held that proof was requisite that the defendant exercised the trade for one entire month (*q*) within the same county (*r*).

Although the *venue* be changed into another county for the purpose of trial, the cause of action must still be proved to have accrued in the county where the *venue* is laid (*s*).

(*i*) By the stat. 31 Eliz. c. 5, s. 2, which enacts that the offence against any penal statute shall not be laid to be done in any other county than where it was in truth done. This statute extends to all actions by common informers upon a penal statute, whether made before or after that statute. (B. N. P. 194. Com. Dig. *Action*, N. 10. 2 T. R. 238; 2 B. & P. 381. *Barber* v. *Tilson*, 3 M. & S. 429). The statute, however, contains some exceptions as to informations by the Attorney-general in the Exchequer, champerty, &c.— By the stat. 21 Jac. I, c. 4, all informations, either by or on behalf of the King or any other, for any offence against any penal statute, shall be laid in the county where, &c. This statute, it has been held, does not apply to offences created by subsequent statutes, (3 M. & S. 438; B. N. P. 195; *Hickes's Case*, 1 Salk. 372, 3). But held to extend to an offence created by a statute which had expired before 21 J. 1, but continued by subsequent statutes, which give it effect from the time of first being passed. *Shipman* v. *Henbest*, 4 T. R. 109. And neither of these statutes extends to actions brought by the party grieved. Ibid. and B. N. P. 195. By the latter statute, s. 3, the informer shall make oath that the offence was committed in the county where the suit was commenced. The venue of an information for being a tanner and shoemaker, under the stat. 24 G. 2, c. 19, need not be within the county. *Attorney-general* v. *Farris*, 3 Ans. 871. *Sed qu.*

(*k*) 4 East, 385.

(*l*) *Butterfield* v. *Windle*, 4 East, 385, under the stat. 3 Geo. 2, c. 26. (*m*) Ibid.

(*n*) *Pope* v. *Davies*, 2 Camp. 266; and see *Platt* v. *Lokke*, Plow. 35. Sav. 58.

(*o*) *Scurry* v. *Freeman*, 2 B. & P. 381. And see *Wade*, q. t., v. *Wilson*, 1 East, 195; where it was held that if a premium be taken at the time of an usurious loan, receiving interest at the rate of 5*l.* per cent., the offence is complete as soon as any interest is received. If an usurious contract be entered into by a deed executed in London, appointing the lender to be the receiver of the borrower's rents in Middlesex, with a pretended salary, and the lender receive the rents in Middlesex, but settle for the balance with the borrower in London, the *venue*, in an action on the statute, is well laid in London (*Scott*, q. t., v. *Brent*, 2 T. R. 238); and per Ashurst, it might be laid either in London or Middlesex (Ibid. 240). But P. C. K. B. Hil. T. 1825, the *venue* must be laid in the county where the money is received, and not where the contract is made. As to the *venue* in cases of *conspiracy*, *game*, *libel*, &c. see these titles respectively; as to the *venue* in cases of indictments, see Starkie's Crim. Pleadings, Ch. I.

(*p*) In the K. B. MS.

(*q*) *R.* v. *Barnett*, 3 Camp. 344. *Pearson* v. *Gowran*,[1] 3 B. & C. 700.

(*r*) *Cunningham* v. *Watson*, 3 Camp. 249. This penal law is now repealed. *Supra*, 847, note (*b*).

(*s*) *Robinson* v. *Garthwaite*, 9 East, 296. See the stat. 38 Geo. 3, c. 2, s. 1.

(1) [An action upon the statute of New Jersey, for restraining certain persons from navigating the waters between that State and New York, was held to be transitory. *Gibbons* v. *Ogden*, 1 Halsted, 285. See *Gilbert* v. *Marcy*, Kirby, 401.]

[1]Eng. Com. Law Reps, x. 215.

Where part of the penalty sued for is given by the statute to the poor of the particular parish where the offence was committed, evidence is also requisite to prove that the offence was committed in that parish according to the allegation in the information or declaration (*t*). Parish.

*It is sufficient if the parish be described by its popular and well-known name, although that be not the name of its consecration (*u*); but where, in an action to recover penalties for non-residence, the parish was described to be *St. Ethelburg*, and it appeared, on the defendant's evidence, that the name was *St. Ethelburga*, the variance was held to be fatal (*x*). *849

Where the plaintiff had closed his case without proof of the local averment, he was held to be precluded from afterwards adducing such evidence (*y*).

3dly. *The commencement within time*, &c. (*z*).—The suing out a *latitat* was a commencement of the action (*a*). Commencement.

The production of the writ shows that a *qui tam* action was commenced in time, although there be no evidence to connect the writ with the action (*b*), provided the declaration appear to have been filed in time (*c*); but the record of an issue in the Common Pleas did not prove the time of filing the declaration (*d*).

(*t*) See *R.* v. *Lookup*, 4 Burr. 2018. *Evans* v. *Steevens*, 4 T. R. 226. *R.* v. *Priest*, 6 T. R. 538; the statute gave a part of the penalty to the overseers of the poor where the offence was committed, and in the conviction it was adjudged to be paid to the overseers of the *township* of Ullesthorpe; the fact having been alleged at Ullesthorpe; and the Court were of opinion that the conviction was irregular. In *R.* v. *Wyatt*, (2 Ld. Raym. 1478), in a similar case, where the offence was laid to have been committed *apud* Villam de Mottram Andrews, the Court, after conviction, said that they would intend that the parish was co-extensive with the vill, and that if the vill was extra-parochial, the informer would have the whole.

(*u*) *Williams* v. *Burgess*, 3 Taunt. 127. And see *Kirtland* v. *Pounsett*, 1 Taunt. 570. *Burbidge* v. *Jakes*, 1 B. & P. 225. In an action of debt on the stat. 3 Hen. 8, c. 11, against Dr. Leigh, for practising physic in the parish of St. George's in the East, within seven miles of the City of London, it appeared from the consecration deed, that the name of the parish was St. George's, in the county of Middlesex; but Lee, C. J. held it to be well enough, for it was more generally known by the former than by the latter description. And see *Wilson*, q. t., v. *Van Mildert*, 2 B. & P. 394, where it was held that three united parishes might be described in pleading as one rectory.

(*x*) *Wilson* v. *Gilbert*, 2 B. & P. 281.

(*y*) *Tovey* v. *Plomer*, Esp. on Pen. Stat. 142, cor. Ld. Ellenborough; but see below, 850, notes (*e*) and (*h*).

(*z*) By the stat. 31 Eliz. c. 5, s. 5, all actions, indictments, &c. brought for any forfeiture upon a penal statute, whereby the forfeiture is limited to the King only, shall be brought within two years, &c.; where the benefit is limited to the King and the informer (except where the action, &c. is brought on the Statute of Tillage), within *one* year; or on default, then by the King, within two years, &c. Upon the construction of this statute, and that of 7 Hen. 8, c. 3, where the penalty is given to a common informer alone, the action must be brought within one year (*Lookup* v. *Sir T. Frederick*, 4 Burr. 2018; B. N. P. 195, where the action was brought on the stat. 9 Ann. c. 14); and it extends to all actions upon penal statutes, whereby the forfeiture is limited to the King, or to the King and a common informer, whether made before or since the stat. 31 Eliz., 3 M. & S. 421, 434;[1] 5 Taunt. 754; 9 East, 296; but it does not extend to actions brought by the party grieved. 1 Lord Ray. 78; Haw. b. 2, c. 26, sec. 47; Cro. Eliz. 645; Carth. 232; 3 Leon. 237; Show. 354; Tidd's Practice, 13, 14, seventh edition; Willes, 443 (*a*). It has, however, been doubted whether the statute applies where the whole of the penalty is given to the informer. *Culliford* v. *Blandford*, 4 Mod. 129; affir. *Chance* v. *Adams*, Ld. Ray. 78; cont. 4 Com. Dig. 410. *Frederick* v. *Lookup*, 4 Burr. 2018; B. N. P. 195. If a statute give a moiety to the informer and a moiety to the King, though an information after the year be void as to the informer, it is good as to the King. Haw. b. 2, c. 26, s. 46; 3 Wils. 250; Moor, 58; Savill, 6. The stat. 31 Eliz. c. 5, extends to offences of omission as well as commission. 5 M. & S. 427;[2] 2 Chitty's Rep. 420; Chitty on the Statutes, 700. The limitations in the statute being incorporated in the stat. 12 Anne, apply to Scotland as well as England. *Surtees* v. *Allan*, 2 Dow. 254, and now see the late statute, *supra*, 656.

(*a*) *Hardyman* v. *Whittaker*, 2 East, 573. *Culliford* v. *Blandford*, Carth. 232, by two judges, Holt, C. J. *dissent.* For other observations and decisions, connected with this subject, vide *supra*, tit. JUSTICES.—HUNDRED; and *infra*, tit. TIME.

(*b*) *Hutchinson* v. *Piper*, 4 Taunt. 555. (*c*) 6 Taunt. 141; 3 Marsh. 497.

(*d*) In *Thistlewood* v. *Cracroft*,[3] 6 Taunt. 141, 1 Marsh. 497, the writ was returnable Easter 1813, but had not been returned; the issue was of Hilary 1815, and the plaintiff produced rules for times to declare from Mich. 1813 to Trin. 1814; and it was held that this was not sufficient evidence to show that the declaration had been filed in time.

[1] Eng. Com. Law Reps. i. 253. [2] *Id.* xviii. 384. [3] *Id.* i. 335.

*The writ may be produced in order to show that the action has been commenced within time, after the objection has been taken (*e*).

In an action for penalties for using a trade without having served an apprenticeship, it was held that no penalty could be recovered which was completely incurred a year before the action brought; for each month's employment is a distinct offence (*f*).

Under the Uniformity of Process Act, the writ is the commencement of the action, and the record shows the day on which it was issued (*g*). The plaintiff's counsel having neglected in the first instance to prove the commencement of the suit, Lord Kenyon held that it might be proved in any stage of the cause (*h*).

The evidence as to the *corpus delicti* is referred to under the appropriate heads (*i*).

Defence. The defendant may, under the general issue of *nil debet*, avail himself of any proviso, either in the principal statute, or any other which exempts him from the penalty, by evidence that he is, in point of fact, within the exemption (*k*). But the defendant cannot, under this issue, prove that the penalties have already been recovered by a stranger; for the fact ought to have been pleaded, in order to give the plaintiff an opportunity of replying that the recovery was fraudulent (*l*).

An offence against a penal statute cannot be punished after the repeal of the particular clause creating the offence, although the offence was committed previous to the repeal of the Act unless the repealing statute contain some special exemption (*m*).

Competency. *S51 An informer who is entitled to any part of the penalty is, it has been *seen, incompetent to give evidence (*n*); but in some instances such informers are made competent by the express provisions of particular statutes (*o*);

(*e*) *Maugham* v. *Walker*, Peake's C. 263. Where the plaintiff, after he had closed his case in a penal action, and after an objection had been taken to the insufficiency of the evidence, offered further evidence in order to remove the objection, Lord Ellenborough said that he would receive it, if the omission arose from inadvertence on the part of plaintiff's counsel, but not otherwise. *Alldred* v. *Halliwell*,[1] 1 Starkie's C. 117.

(*f*) *Evans* v. *Hunter*, 2 Camp. 293. (*g*) See tit. Justices; Hundred; Time.

(*h*) *Maugham* v. *Walker*, Peake's C. 163. But where the plaintiff had closed his case, having omitted to prove that the offence had been committed in the proper county, Lord Ellenborough excluded subsequent proof. *Tovey* v. *Palmer*, Esp. on Pen. Stat. 142; but *qu.*

(*i*) See Game, Usury, &c. A penalty is inflicted by stat. 3 Geo. 2, c. 26, s. 13, on coal dealers who shall neglect to fill the sacks sent out from a measure prescribed by the Act. Proof that the coals, on being remeasured at the place of delivery, were short of the proper quantity, and the testimony of one who saw the coals delivered out of the barge into the cart, and who continued with them until remeasured, that he saw no bushel used, is sufficient proof of a neglect within the statute. *Warren* v. *Windle*, 3 East, 205. And even without such testimony, the former evidence is presumptive proof, in support of an averment in an action on the statute, that the coals had not been *justly* measured within the statute. Ibid. Where, in an action for unshipping foreign glass without paying duty, the master of a homeward-bound vessel coming up the Thames was proved to have hired and sent off a boat and men, accompanied by one of his own crew, to bring away certain boxes of foreign and British glass lying on the sands on the Essex coast, to be landed at Woolwich, which they find and bring as far as Gravesend, where the whole is seized by the custom-house officers; held to be sufficient for a jury, of a being concerned in unshipping foreign glass without payment of duty, and in unshipping British glass shipped for exportation, subjecting the master of the vessel to the penalties for both those offences, although the whole was one transaction. *Attorney-general* v. *Towns*, 6 Price, 198.

(*k*) B. N. P. 225; 2 Roll. Ab. 683. *R.* v. *Hall*, 1 T. R. 320. It was formerly held otherwise, where the exemption was contained in another Act, or where it contained matter of law. Gilb. L. Ev. 11. [See *U. States* v. *Hayward*, 2 Gallison, 485.]

(*l*) *Bredon* v. *Harman*, 2 Str. 701; *supra*, Vol. I. tit. Judgment; and see the statute 4 H. 7, c. 20.

(*m*) *Miller's Case*, 1 Bl. 451. [See *Hollingsworth* v. *Virginia*, 3 Dallas, 378. *U. States* v. *Passmore*, 4 Dallas, 372.]

(*n*) *Supra*, Vol. I. tit. Witness.—Informer.

(*o*) See the stat. 32 Geo. 3, c. 56, s. 7, which prohibits counterfeit certificates of the characters of servants. And see the Hackney-coach Act, 33 Geo. 3, c. 75, s. 17. See the statute 1 Geo. 4, c. 56, as to malicious trespasses. And see also as to parishioners, *supra*, Vol. I. tit. Witness.—Inhabitant.

[1]Eng. Com. Law Reps. ii. 321.

and in some other instances also, informers have been held to be competent, by necessary inference from particular statutes, on the consideration that such statutes would otherwise be in a great measure nugatory (*p*).

(*p*) As in the case of the Bribery Act, 2 Geo. 2, c. 24. See *Heward* v. *Shipley*, 4 East, 182. *Bush* v. *Rawling*, Say, 289. *Mead* v. *Robinson*, Willes, 425. *Dover* v. *Maester*, 5 Esp. C. 92. So in a prosecution under the stat. 21 Geo. 3, c. 37, against exporting machinery (*R.* v. *Teasdale*, 3 Esp. C. 68). So under the stat. 23 Geo. 2, c. 13, s. 1, for seducing artificers to leave the kingdom, although the informer is entitled to half the penalty (*R.* v. *Johnson*, Willes, 425, n. (*c*). So on a prosecution for penalties under the stat. 9 Ann. c. 14, s. 5, the loser of money at play is competent to prove the fact. *R.* v. *Luckup*, Willes, 425 (*c*). Proof of exemption lies on defendant. *R.* v. *Neville*,[1] 1 B. & Ad. 489. See also *Sutton* v. *Bishop*, 4 Burr. 2284. *Sibly* v. *Cuming*, 4 Burr. 2469; B. N. P. 225. *R.* v. *Pemberton*, 1 Bl. 250; 1 M. & M. 42. The new rules do not apply to such penal actions as are within the 4th sect. of the stat. 21 J. 1, c. 4. See *Lord Spencer* v. *Swannel*, 3 M. & W. 154; and *semble*, that the st. 21 J. 1, c. 4, applies to actions on statutes subsequent as well as prior to that Act. As to the limitation of actions for penalties by parties aggrieved, see the 2 & 3 Will. 4, c. 71, s. 3, and *supra*.

[1]Eng. Com. Law Reps. xx. 433.

END OF VOL. II. PART I.